Re: Petition of Brana Publishing, Inc. to Limit or Quash Civil Investigative Demand; Petition of Art Source International, Inc. to Limit or Quash Civil Investigative Demand; and Petition of Brana Enterprises, Inc. to Limit or Quash Civil Investigative Demand, File No. 872-3209.

March 26, 1992

Dear Mr. Fox:

This is to advise you of the Federal Trade Commission's ruling on the Petitions to Limit or Quash the Civil Investigative Demands for Documentary Material (collectively "Petitions"), which you filed on behalf of your clients Art Source International, Inc. ("Art Source"), Brana Publishing, Inc. ("Brana Publishing"), and Brana Enterprises, Inc. ("Brana Enterprises") (collectively "Petitioners"), in the above-referenced matter. Because the petitions filed by Art Source, Brana Publishing, and Brana Enterprises raised the same issues, the Commission has responded with this single ruling covering all three petitions.[1]

The ruling set forth herein has been made by Commissioner Deborah Owen pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). Pursuant to Rule 2.7(f), within three days after service of this decision, Petitioners may file with the Secretary of the Commission a request for full Commission review. Whatever briefs or other material the Petitioners wish the Commission to consider in reviewing this decision must accompany any such request in order to be considered as timely filed. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

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[1] The oral presentation on the petitions filed by Brana Publishing and Art Source was held on February 25, 1992. At that time, counsel for Petitioners informed Commissioner Owen that he had also been retained to represent Brana Enterprises, which did not receive its C.I.D. until February 21, 1992. Counsel requested that the arguments he made at the oral presentation be treated as also made by Brana Enterprises. The arguments will be so treated.

Commissioner Owen has carefully reviewed the Petitions and accompanying exhibits. She has also considered the oral presentation on the Petitions conducted on February 25, 1992. The Petitions are denied in part, and granted in part, for the reasons stated below. Petitioners' obligations under the C.I.D.s are modified as set forth below.

I. Background

On October 24, 1991, the Federal Trade Commission approved a Resolution Directing Use of Compulsory Process, authorizing the use of compulsory process in an investigation to determine:

> whether unnamed persons, partnerships, or corporations, engaged in the sale, advertising, and marketing of fine art prints, may be engaged in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, including but not limited to, misrepresenting the origins, authorship, edition size, or value of fine art prints.

On January 28, as part of this investigation, civil investigative demands ("C.I.D.s") were issued to Art Source, Brana Enterprises, and Brana Publishing, firms engaged in the sale of fine art at charity and public auctions. The C.I.D.s were subsequently served on Petitioners.

Beginning on or about February 10, 1992, counsel for Petitioners and the staff of the Commission entered into negotiations concerning the C.I.D.s . Counsel for Petitioners expressed concerns over the scope, breadth, and alleged indefiniteness of the specifications in the C.I.D.s. He also expressed concerns over the protection of confidential business information contained in the documents. Counsel for Petitioners and the staff of the Commission were unable to resolve any of the issues that were raised. Counsel for Petitioners filed these Petitions.

II. Specific Objections

A. *Petitioners assert that the C.I.D.s seek information beyond the scope of the resolution authorizing compulsory process and as a result are unreasonable in terms of both relevance and burden.*

Petitioners note that the Federal Trade Commission is limited to seeking information reasonably relevant to the specific inquiry the Commission has authorized, "as set forth in the Commission's resolution." Pet. p. 5[2] (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977)(en banc), *cert. denied*, 431 U.S. 974 (1977). In this case, the Petitioners note that the Resolution limits the investigation to whether unnamed entities engaged in "the sale, advertising, and marketing of fine art prints" are in violation of Section 5 of the Federal Trade Commission Act. Resolution Directing Use of Compulsory Process (October 24, 1991)(emphasis added). However, the C.I.D.s seek the production of documents pertaining to the sale of artworks related to certain named artists, without regard to whether the artwork was a print. This, Petitioners assert, makes the C.I.D.s impermissible broad.

The Petitioners are incorrect in asserting that because the C.I.D.s seek information related to artworks other than fine art prints, they are impermissible broad. The starting point in analyzing the relevance of information called for by a specification to a Commission investigation is recognition that courts give "relevance" a broad interpretation in enforcing Commission compulsory process. As the United States District Court for the District of Columbia stated, "[b]ecause the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections." *Federal Trade Commission v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338 (D.D.C. Feb. 14, 1991), *appeal pending* No. 91-5174 (D.C. Cir. argued March 9, 1992). More particularly, relevance is

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[2] References to the Petitions are cited as "Pet. p." with the appropriate page number. References to the transcript of the oral presentation on the Petitions, held on February 25, 1992, are cited as "Tr. p." with the appropriate page number.

measured against the agency's general purpose in gathering the investigative materials as described by the underlying resolution authorizing compulsory process. *Federal Trade Commission v. Texaco Inc.*, 555 F. 2d 862, 874 (D.C. Cir. 1977)(en banc), *cert. denied*, 431 U.S. 974 (1977). As the Commission staff pursue this investigation into possible unfair or deceptive acts in the sale, advertising, or marketing of fine art prints, it may be necessary for the staff to gather some incidental information on the sale, advertising or marketing of other types of art for purpose of comparison. Such information can be relevant to this investigation, although one would expect that the focus of the material requested would be on art prints.

The staff has determined that, at this time, it does not need comparative information concerning certain types of artworks not related to fine art prints. During the oral presentation on the Petition, staff indicated that they were willing to limit the C.I.D.s to documents that relate to prints, if agreement were reached on an appropriate definition of the term "prints." Tr. p. 13. At that time, counsel for Petitioners and counsel for the Commission seemed reasonably close to reaching agreement on the breadth of artworks to be covered by the C.I.D.s Tr. pp. 13-14. However, despite the urging of Commissioner Owen that both sides continue to negotiate, no agreement on this point has been reached. The Commission therefore feels compelled to define the artworks to be covered by the specifications of the C.I.D.s.

Definition 4 of the C.I.D.s shall be limited to artworks incorporating, in whole or in relevant part, the process of intaglio (*e.g.*, etchings, engravings, dry points), aquatint, lithography, serigraphy, silkscreen, woodcut, poster printing, or photographic, photomechanical, or photochemical reproduction, or any combination of the above media, by, after, or attributed to one of the seven artists listed in the C.I.D.s, including any reproductions, facsimiles, or composites of images, by or purportedly by the above artists.

B. *Petitioners assert that the scope of the documents sought by the C.I.D.s is too broad and burdensome, including the request for backup tapes or disks for computer systems.*

The Petitions assert that because each of the C.I.D.s "seeks virtually every document which in any way bears upon the acquisition, sale and offering for sale, of all artwork attributed to the relevant artists created or received by the Petitioner during a six year period," and because a response would require a review of "literally hundreds of files," each C.I.D. is overbroad and burdensome. In reviewing such claims of burden, it is instructive to restate the general rules that govern their consideration. First, "the burden of showing that an agency subpoena is unreasonable remains with the respondent." *FTC v. Rockefeller*, 591 F. 2d 182, 190 (2d Cir. 1979), quoting *SEC v. Brigadoon Scotch Distributing Co.*, 480 F. 2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *accord FTC v. Texaco, Inc.*, 555 F. 2d. 862, 882 (D.C. Cir. 1977)(en banc). In Brigadoon, the Second Circuit added that "where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." 480 F.2d at 1056.

Second, as the court stated in Texaco, "[w]e emphasize that the question is whether the demand is unduly burdensome or unreasonably broad." It added:

> Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

555 F.2d at 882 (emphasis in original)(footnotes omitted).

Finally, in order to attempt to meet the burden of showing unreasonableness, Petitioners must present something more than unsupported conclusions and unsupported claims of burden. In Rockefeller, for example, respondents prepared and submitted estimates of compliance costs. 591 F. 2d at 190. From this, it should be clear that a challenge to agency compulsory process based upon a claim of burden must be supported by some reasonable, substantial estimate of the cost of compliance and its relationship to the respondent's ongoing business operations. Unsubstantiated, conclusory claims will not meet the test -- they will not even come close. Federal Trade Commission Letter Ruling Re: Petition of Megatrend

Telecommunications, Inc. to Limit and/or Quash CID, File No. 902 3281 (June 24, 1991).

1. Time for Compliance

The Petitioners allege that the original deadline to comply with each C.I.D., each of which expired on February 19, 1992, was simply not enough time to physically review the "literally hundreds of files." Pet. pp. 3-4. Counsel for Petitioners requested a sixty-day extension. Tr. p. 7. In addition, counsel for Petitioners argues that the time period covered by each C.I.D., from January 1, 1986 to the present, is unduly burdensome. As an alternative, counsel for Petitioners suggests that Petitioners should initially be required to produce only documents relating to a two-year period, with documents from earlier time periods on to be produced if it is later determined that they are needed. Tr. pp. 6-7.

However, the Petitions lack the specific detail needed to support a finding of undue burden concerning the time period covered by the C.I.D.s Counsel for the Commission states that the staff has reason to believe that the entire period from January 1, 1986 to the present will provide relevant information.[3] The Commission will not modify that period. Concerning the time period for compliance with the C.I.D.s, the Commission is persuaded that the original time period, approximately 20 days, was too short. Counsel for the Commission does not object to a short extension of time. The Commission will extend the date for compliance with the C.I.D.s to thirty days from the date of this letter.[4]

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[3] It would be inappropriate at this time for the Commission to reveal the basis on which the six-year time period was chosen.

[4] In addition to an extension of time, counsel for Petitioners asked that the Commission staff review the materials called for in the C.I.D.s in counsel's New York offices, rather than in the Petitioners' offices in California. Tr. pp. 8-9. The location of the document production is a matter best left to negotiation between the staff and counsel for the Petitioners, and the Commission will not order the staff to inspect and copy the documents in New York rather than in California.

2. Alleged Ambiguities

In the Petitions, Pet. p. 3, and the oral presentation, Tr. p. 9, counsel for Petitioners makes the allegation that terms used in the C.I.D.s were ambiguous, and thus make complete and accurate compliance with the C.I.D.s impossible. Petitioners allege that in this respect each C.I.D. violates Section 20(c)(3)(A) of the Federal Trade Commission Act. That Section provides that a C.I.D. for documentary material shall "describe each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified. . . ." 15 U.S.C. 57b-1(c)(3)(A).

The only specific term that Petitioners identified as ambiguous was the term "cooperating entities" in Specification 3. The Commission staff offered a clarification of that term to counsel for Petitioners in their original conversation concerning the C.I.D.s In the oral presentation, counsel for the Commission stated for the record that the Commission staff used that term to mean "organizations under whose auspices an auction is held or that benefit from an auction." Tr. pp. 13-14. The Commission adopts that definition.

The Petitioners did not identify any other terms that were allegedly ambiguous. Counsel for the Commission made clear his willingness to further clarify the term "cooperating entities," or other specifications unclear to Petitioners. The Commission does not see any need to define other terms in the C.I.D.s. The Commission determines that the C.I.D.s, as clarified by counsel for the Commission, meet the requirements of Section 20(c)(3)(A) of the Federal Trade Commission Act.

3. Computer Backup Tape or Disk(s)

A final point on burden raised by the Petitions is Specification 9 of each C.I.D., which requires Petitioners to produce "a copy of the most recent backup tape or disk(s) for Respondent's computer system." Petitioners point out that this specification has no direct tie whatsoever to the stated nature and scope of the investigation because the Commission staff is requesting the production of whatever happens to have been encoded on the most recent backup tape or

disk(s), whether or not it relates to the subject of the Commission's investigation. The Commission agrees that this specification is overly broad.

Definition 5 of each C.I.D. defines the term "documents" to include "computer data storage materials (including magnetic tapes or disks)." Therefore, each C.I.D. already calls for the production of specified relevant material on any computer backup tape not otherwise produced, which falls under Specifications 1 through 8 (as previously clarified by the staff and adopted herein), even if the documents are only available in the form of computer (machine) readable code on a magnetic tape, disk, or other computer storage device. In addition, Specification 9 calls for all information on the backup tape or disk that is not included in one of the other specifications. So long as the other information is relevant to the investigation, this request is permissible. However, Specification 9 does not include any limitations to restrict its scope to relevant information. Thus it does not meet the test set out in Invention Submission and Texaco. *See supra* pp. 2-3.

The Commission therefore modifies Specification 9, limiting it to all documents stored on the most recent backup tape or disk(s) that relate, reflect, or refer to the purchase of, sale of, or trade in, any relevant artwork included in Definition 4, the definition of relevant artwork, as that definition is modified above. For the purposes of this request, any data bases, data compilations, or spreadsheets included on the backup tape or disk(s) that contain any data entries that relate reflect, or refer to the purchase of, sale of, or trade in such artworks, shall be considered a single document, and the entire data base or data compilation shall be produced. By this modification, the Commission does not intend to limit the obligations of Petitioners to search any backup tape or disk(s) for information relevant to Specifications 1 through 8. It may be noted that Direction 7 of the C.I.D. requires that documents responsive to more than one specification need not be submitted more than once. Therefore, to the extent documents contained on the most recent backup tape or disk(s) are produced in response to one of the previous specifications, they need not be produced again.

C. *Petitioners assert that they should be given additional confidentiality protection.*

Petitioners raise a number of concerns about the confidentiality of the information contained in their documents. First, in addition to the confidentiality protection provided by the Federal Trade Commission Act and Rules, Petitioners request that they be given 10 days advance notice before any of their confidential information is disclosed to other law enforcement agencies. Section 21(b)(6) of the Federal Trade Commission Act already sets forth the manner in which the Commission may disclose confidential information to other Federal law enforcement agencies and to State law enforcement agencies. 15 U.S.C. 57b-2(b)(6). This includes obtaining from the requesting State law enforcement agency a certification that such information will be maintained in confidence.

The Commission's procedure for disclosing information to other law enforcement agencies does not permit disclosing to the owner of such information the fact that such information has been disclosed to another law enforcement agency if the other agency requests that the owner not be notified. Moreover, even if the owner of such information is notified, the notification is to occur at the time the information is provided to the other law enforcement agency. *See* Commission Rules of Practice 4.11(c). Furthermore, granting the Petitioners' request for ten days advance notice could jeopardize other law enforcement agencies' confidential investigations, a tack the Commission declines to take.

Second, the Petitioners express concern that their confidential information could be disclosed to competitors. It is unclear, from either the Petitions or the oral presentation, what relief the Petitioners are seeking here. The Commission Rules already provide protection regarding the disclosure of such information. Commission Rules of Practice 4.10 (c) provides that only the Commission may determine to make public nonpublic information, with certain exceptions not relevant here. Moreover, Commission Rules of Practice 4.10 (e), (f), and (g) explain in which situations the Commission may disclose confidential information, and in which situations the supplier of such confidential information is provided advance notice of the disclosure. Furthermore, Commission Rule 2.16 prescribes detailed custodial

requirements for material secured through compulsory process. The Petitions present no reason why the protection of these sections is not sufficient in the instant case. Therefore, the Commission declines to impose additional restrictions on the use of the Petitioners' confidential information.

Finally, the Petitioners express concern about the adverse impact caused by the Commission staff contacting their customers. Petitioners fear that if the Commission staff merely contacts one of Petitioners' customers, that will raise concerns in the mind of the client concerning the artwork that client purchased. Petitioners note that they have neither been charged with, nor convicted of, any crime. Tr. pp. 19-21. They wish to ameliorate the concerns of their clients and minimize any damage to their business from the investigation.

Petitioners suggest that the Commission staff be directed to begin any contact with one of Petitioners' clients with a statement that the Commission is conducting an "investigation of the art print industry, and [the staff] is seeking additional information relating to the industry. And that [the staff] understand[s] that [the customer] had some artwork that was purchased from a retailer and [the staff] want[s] to ask questions about it." Tr. p. 19. Petitioners seek to compel the Commission staff to give "adequate assurances" to such clients that the person from whom they bought artwork has not been the subject of an investigation, but in fact is cooperating with an investigation of the entire industry. Tr. p. 20. In sum, Petitioner requests that the Commission staff assure the Petitioners' clients that "the fact that [one of the Petitioners] has been asked for information should not be construed to mean that they are a target or that they did anything wrong, that is how the Commission conducts itself." Tr. p. 21.

The C.I.D.s in this case are intended to gather evidence to allow the Commission to determine whether certain parties have engaged in unfair acts or practices in the sale, advertising or marketing of fine art prints. The possible unfair acts or practices include misrepresenting the origins, authorship, edition size, or value of such prints. In previous investigations, the staff has developed evidence of the existence of large numbers of fraudulent art prints in the United States. It would be inappropriate for the Commission staff to reassure the clients of the Petitioners, or of any art dealer -- whether

or not that dealer is a target -- that there is nothing wrong with any particular artwork. Without examining the artwork, and perhaps without an expert opinion, the staff simply does not know if any particular artwork is genuine.

The Commission staff stated during the oral presentation that whenever such questions arise during interviews, the staff always states that there has been no finding of wrongdoing on the part of the company that they are investigating. The Commission assumes that to be staff's standard operating procedure. The Commission cannot go farther without unduly restricting the staff's investigation. The Commission will not consider doing so absent allegations of specific damage from the staff investigation, or allegations of staff misconduct. Even then, the legitimate interests of the Petitioners must be weighed against the Commission's obligations to conduct investigations. *See Invention Submission* at 65,353; Federal Trade Commission Letter Ruling Re: Petition of Invention Submission Corp. to Limit or Quash Civil Investigative Demands, File No. 882 3060, p. 15 (October 4, 1991). In this case, the Petitioners have not met the threshold burden of articulating specific allegations warranting Commission interference in the staff investigation. The Commission declines to restrict the staff's ability to contact clients of Petitioners.

III. Conclusion

For the foregoing reasons, the Petitions to Limit or Quash the Civil Investigative Demands for Documentary Material filed by Brana Publishing, Inc., Brana Enterprises, Inc., and Art Source International, Inc. are denied in part and granted in part. Petitioners are directed to comply with the Civil Investigative Demands by close of business on the April 27, 1992.

Pursuant to Rule 2.7(f), within three days after service of this ruling, Petitioners may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise directs.

Re: Hang-Ups Art Enterprises, Inc.'s Petition to Limit or Quash the Civil Investigative Demand, File No. 872-3209.

March 31, 1992

Dear Mr. Steiner:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Limit or Quash the Civil Investigative Demand for Documentary Material ("Petition"), which you filed on behalf of your client Hang-Ups Art Enterprises, Inc. ("Hang-Ups"or "Petitioner"), in the above referenced matter.

The ruling set forth herein has been made by Commissioner Deborah Owen pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). Pursuant to Rule 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. Whatever briefs or other material the Petitioner wishes the Commission to consider in reviewing this decision must accompany any such request in order to be considered as timely filed. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

Commissioner Owen has carefully reviewed the Petition and accompanying exhibits. She has also considered the oral presentation on the Petition conducted on February 25, 1992. The Petition is denied in part, and granted in part, for the reasons stated below. Petitioner's obligations under the C.I.D. are modified as set forth below.

I. Background

On October 24, 1991, the Federal Trade Commission approved a Resolution Directing Use of Compulsory Process, authorizing the use of compulsory process in an investigation to determine:

whether unnamed persons, partnerships, or corporations, engaged in the sale, advertising, and marketing of fine art prints, may be engaged in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade

Commission Act, 15 U.S.C. 45, as amended, including but not limited to, misrepresenting the origins, authorship, edition size, or value of fine art prints.

On January 28, 1992, as part of this investigation, a civil investigative demand was issued to Hang-Ups, a firm engaged in the sale of fine art at charity and public auctions. The C.I.D. was served on Petitioner on or about January 29, 1992. Pet. p. 2.[1] On February 4, 1992, Petitioner retained counsel to represent it in this matter. Pet. p. 23. The C.I.D. required Petitioner to make the specified documents available on February 19, 1992 by 5:00 p.m.

Beginning on February 5, 1992, counsel for Petitioner and the staff of the Commission entered into negotiations concerning the C.I.D. Counsel for Petitioner expressed concerns over the burden of the C.I.D., over what he considered a request to produce irrelevant information, and the possible damage to Petitioner's business if the Commission staff contacted Petitioner's clients. Counsel for Petitioner and the staff of the Commission were unable to resolve any of the issues that were raised. On February 18, 1992, counsel for Petitioner filed this Petition.

II. Specific Objections

A. *Petitioner asserts that the C.I.D. is vague and ambiguous and does not permit the responsive material to be fairly identified.*

Petitioner argues that the C.I.D. does not describe the documents requested with reasonable particularity. In particular, in the Petition, the Petitioner notes that the C.I.D. uses three terms, "cooperating entities," "respondent," and "transactions," that are so unclear, Petitioner asserts, that it cannot tell what is requested. Pet. p. 6. In addition, in the oral presentation, counsel for Petitioner noted additional terms that he alleged were ambiguous: "medium," Tr. p. 20, and "reproductions, facsimiles, and composites of images," Tr. p. 22.

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[1] References to the Petition are cited as "Pet. p." with the appropriate page number. References to the transcript of the oral presentation on the petition, held on February 25, 1992, are cited as "Tr. p." with the appropriate page number.

As a threshold matter, counsel for Petitioner failed to comply with Commission Rule of Practice Section 2.7(d)(2) with respect to these issues. Rule Section 2.7(d)(2) requires that "[e]ach petition [to limit or quash] shall be accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition . . . ." In the instant case, counsel for Petitioner made an effort, in apparent good faith, to resolve some of the issues raised in the Petition, but by his own admission, counsel for Petitioner never raised these issues with counsel for the Commission. Tr. p. 19.

The purpose of Rule Section 2.7(d)(2) is to insure that counsel for Petitioner makes an effort to resolve with counsel for the Commission questions that invariably arise in discovery, without the intervention of the Commission itself. In this case, the questions that arose -- how to define the terms in the C.I.D. -- are the type of questions that the attorneys involved should be able to resolve. During the oral cpresentation, counsel for the Commission readily agreed to define and narrow the contested terms, suggesting that the attorneys might have solved these issues.

Despite the failure of counsel for Petitioner to raise these issues prior to filing the Petition, the Commission must insure that the C.I.D. complies with Section 20(c)(3) of the Federal Trade Commission Act. That Section provides that a C.I.D. for documentary material shall "describe each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified . . . ." 15 U.S.C. 57b-1(c)(3).

While on its face the C.I.D. meets the requirements of Section 20(c)(3)(A), the Petition, and the oral presentation, raised some legitimate questions, particularly concerning "cooperating entity." However, during the oral presentation, Commission staff offered clarifications of some of these terms. The staff further indicated a willingness to clarify any other terms that were unclear to the Petitioner. In order to insure compliance with Section 20(c)(3)(A), as well as to facilitate the compliance of Hang-Ups, and the timely completion of this investigation, the Commission adopts and

incorporates, in this opinion and in the definitions of the C.I.D., the following clarifications offered by Commission staff.

The Petition identified three terms which allegedly made the C.I.D. ambiguous: "cooperating entities," "respondent," and "transactions." With respect to "cooperating entities," the Commission staff clarified that term to mean the "civic organizations and other groups that have sponsored the auctions in question and any other beneficiaries of those auctions," in which Petitioner offered relevant artworks for sale. Tr. p.32.

With respect to the second term, "respondent," Definition 2 of the C.I.D. defines it to include "other entities under common ownership or control." Petitioner stated that it does not know what that means. At the oral presentation, the staff clarified the definition, limiting the definition of "respondent" to include only entities with "substantial common ownership or control." Tr. p. 33. Lest there be any confusion, the Commission hereby modifies the definition to include, within the term "respondent," any company with 10% common ownership -- that is where 10% of the ownership is held by individuals or entities that hold at least 10% of the ownership of Hang-Ups.[2]

With respect to the third term, "transactions," the C.I.D. in Specification 1 calls for the production of all documents "relating to Respondent's transactions concerning the relevant artworks . . . ." The Petitioner expressed concern that the term "transactions" might require production of documents related to lease arrangements, transactions with attorneys, and the like Pet. p. 6.

Petitioner's complaint is puzzling. If Petitioner has documents that relate to transactions "concerning the relevant artworks," Hang-Ups is instructed to produce them. To the extent that the specification would require the production of privileged material, the C.I.D. instructions contain procedures for handling such documents

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[2] Direction 2 of the C.I.D. requires Petitioner to provide all the documents in its possession, custody, or control, that fall within the specifications of the C.I.D. The C.I.D. does not require Petitioner to produce documents in the possession, custody or control of companies under common ownership and control with Hang-Ups, unless the documents are also in the possession, custody and control of Hang-Ups.

in a way that protects the privilege.[3] Petitioner's argument with respect to lease arrangements is a red herring -- it is difficult to envision a lease "concerning relevant artworks." Moreover, it is hard to envision how staff could draw the line here more narrowly, without exempting documents essential to the investigation.

In addition to the three terms identified in the Petition, at the oral presentation, counsel for Petitioner alleged that the additional terms, "artworks in any medium," "reproductions," "facsimiles," and "composites of images" are ambiguous. Tr. pp. 20-22. With respect to the definition of "artworks in any medium," it was unclear whether counsel for Petitioner was arguing that the term was ambiguous, or clear, but overbroad, because it called for production of documents related to artworks that were not prints. Tr. pp. 20-21. In either event, the staff agreed to narrow the definition of relevant artworks. Tr. pp. 31-32. Accordingly, the Commission limits the term relevant artworks to artworks incorporating, in whole or in relevant part, the process of intaglio (*e.g.*, etchings, engravings, dry points), aquatint, lithography, serigraphy, silkscreen, woodcut, poster printing, or photographic, photomechanical, or photochemical reproduction, or any combination of the above media, by, after, or attributed to one of the seven artists listed in the C.I.D.s, including any reproductions, facsimiles, or composites of images, by or purportedly by the above artists. This should both narrow the definition and clarify it for Petitioner.

With respect to the other three terms, to facilitate compliance with the C.I.D., the Commission hereby defines the terms "reproductions" and "facsimiles" to mean: (1) any copy of an artwork which is an exact copy in all respects; (2) any copy or reproduction of an artwork which cannot be distinguished without close examination from the original; or (3) any artwork bearing a stamped, printed, or other signature imitating that of the artist. "Reproductions" and "facsimiles" include posters. The Commission hereby defines "composites of images" to mean artworks that incorporate images from one or

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[3] It should be noted that no objection was raised with respect to those procedures for handling allegedly privileged materials.

more works of an artist and combine them into a single image. The Commission defines "composites of images" to include "pastiches."[4]

It is expected that counsel for Petitioner and counsel for the Commission can resolve any other such questions without the intervention of the Commission.

B. *Petitioner asserts that the C.I.D. is overbroad, in terms of both its scope and breadth.*

Definition 4 of the C.I.D. states:

"Relevant artworks" means all artworks, in any medium, by, after, or attributed to the artists Marc Chagall, Salvador Dali, Joan Miro, Pablo Picasso, Alexander Calder, Victor Vasarely, and Philippe Noyer, including any reproductions, facsimiles, or composites of images by or purportedly by the above artists.

Petitioner argues that the staff, having defined what is relevant in the definitions of the C.I.D., cannot now require the production of information which is not relevant, *i.e.* does not relate to one of the seven named artists.[5] It must be first noted that Petitioner claims not that the staff have attempted to obtain irrelevant documents that do not contain information about one of the seven listed artists, but rather that the staff have attempted to obtain irrelevant information contained in documents that admittedly also contain relevant information.[6] The solution counsel for Petitioner proposes for documents "tainted with non-relevant material" is that the documents be withheld by Hang-Ups, or that the Petitioner be permitted to redact all non-relevant information from the documents that it produces to the Commission staff.

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[4] A pastiche is a "picture or other work of art that (often with fraudulent purpose) imitates the style of a particular artist by copying and recombining parts of his authentic works." *The Concise Oxford Dictionary of Art and Artists* 347 (1990).

[5] During the oral presentation, counsel for Petitioner may have also argued that the C.I.D. is overbroad because it called for information relating to all artworks, in any medium, by the named artists. Tr. p. 21. This objection is also dealt with above.

[6] A possible exception is Specification 8, which requests a backup tape or disk of Hang-Ups' computer system. Counsel for Petitioner may be arguing that this specification requests copies of irrelevant documents.

Petitioner's argument misses the point, both with respect to the utilization of redaction, and with respect to what information is relevant to the Commission's investigation. Redaction can be a useful way to segregate information into that which should be produced during discovery, and that which should be protected from disclosure during discovery. For example, parties might agree to redact information that is protected by a privilege against disclosure, or which is commercially sensitive and is unnecessary to the litigation. However, in this case, counsel for the Petitioner has made no claim of privilege. Counsel was unable to articulate any manner in which his client would be prejudiced if the Commission received documents complete with what Petition termed "irrelevant" information. Tr. p. 17. Thus, Petitioner should comply with the instructions in the C.I.D. to produce any document in its entirety, if it contains relevant information.

The starting point in analyzing the relevance of information called for by a specification in a Commission investigation is recognition that courts give "relevance" a broad interpretation in enforcing Commission compulsory process. As the United States District Court for the District of Columbia stated: "Because the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections." *Federal Trade Commission v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338 (D.D.C. Feb. 14, 1991), *appeal pending* No. 91-5174 (D.C. Cir. argued March 9, 1992). More particularly, relevance is measured against the agency's general purpose in gathering the investigative materials as described by the underlying resolution authorizing compulsory process. *Federal Trade Commission v. Texaco Inc.*, 555 F. 2d 862, 874 (D.C. Cir. 1977)(en banc), *cert. denied*, 431 U.S. 974 (1977).

The scope of the investigation is defined by the resolution authorizing the use of compulsory process. That resolution was not limited to the seven artists listed in Definition 4 of the C.I.D. Those seven listed artists merely establish the artists whose works are the

current focus of the investigation.[7] Information concerning the works of other artists may lead to the discovery of relevant evidence. Such information may allow comparisons between the transaction prices or methods of sale of artworks the staff believes are forged, and those the staff believe are genuine, which may help establish knowledge of the authenticity, or lack thereof, of the prints by the seven listed artists. In addition, such information may lead to the discovery of problems with the authenticity of additional prints. Finally, such information can provide a context to better understand the information that the documents contain regarding the seven listed artists. For these reasons, the Petitioner's argument that the C.I.D. is overbroad must be rejected as a basis to limit or quash the C.I.D.

In addition, the Petitioner has claimed that the time period covered by the C.I.D. is excessive. The C.I.D. covers a time period from 1986 through the present. Counsel for Petitioner suggested instead that Petitioner produce documents for the time period from January 1, 1989 to the present. Petitioner then suggested that older documents could be produced at a later date. Tr. pp. 11-12. Petitioner, however, offers only generalities about the burden of producing the additional documents.

The staff have indicated a sound basis for requesting documents going back to January 1, 1986.[8] There is thus no basis for limiting the staff to documents in the period suggested by Petitioner. The Commission staff and the Petitioner are free to work out any mutually agreeable schedule for the production of documents. If it is convenient for the Commission staff and the Petitioner to stage the production of documents by time period, that can be worked out between the staff and Petitioner. However, in this case, the Petitioner falls short of making the necessary showing for the Commission to order the Commission staff to limit production to the period suggested by Petitioner.

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[7] In this regard, the terminology "relevant artists" in Definition 4 may have been an unfortunate choice of words. Alternative language, such as a neutral term, "listed artists," or "Definition 4 artists," would have made it clear that neither he Commission, nor the staff, was limiting the investigation to information about the seven listed artists.

[8] It is unnecessary to repeat on the public record staff's basis for desiring documents as far back as 1986.

C. *Petitioner asserts that compliance with the C.I.D. would be unduly burdensome, disrupt normal business operations, and damage Hang-Ups' reputation.*

Petitioner operates an art auction business. According to the Petition, Hang-Ups has twelve employees, ten of whom work in the warehouse and would have no familiarity with Hang-Ups' business records, or how those records are maintained. Allegedly, only two of the three principals of Hang-Ups, the vice-president and the secretary/treasurer, are capable of identifying documents responsive to the C.I.D. According to the Petition, both of these individuals are scheduled to travel extensively over the next few months to conduct auctions, and cannot remain in Hang-Ups' office to produce the requested documents without disrupting their auction schedule, foregoing substantial sales revenue, and disrupting customer relations. The Petition concludes that compliance with the C.I.D. is therefore unduly burdensome.

The Petition also alleges that the breadth of the C.I.D requesting documents for the period from January 1, 1986 to the present, is unnecessary and unwarranted. The extended period for which Petitioner is required to produce documents allegedly exacerbates the disruption to Hang-Ups' business that complying with the C.I.D. purportedly will cause.

In reviewing such claims of burden, it is instructive to restate the general rules that govern their consideration. First, "the burden of showing that an agency subpoena is unreasonable remains with the respondent." *FTC v. Rockefeller*, 591 F. 2d 182, 190 (2d Cir. 1979), quoting *SEC v. Brigadoon Scotch Distributing Co.*, 480 F. 2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *accord FTC v. Texaco, Inc.*, 555 F. 2d. 862, 882 (D.C. Cir. 1977)(en banc). In Brigadoon, the Second Circuit added that "where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." 480 F. 2d at 1056.

Second, as the court stated in Texaco, "[w]e emphasize that the question is whether the demand is unduly burdensome or unreasonably broad." It added:

> Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

555 F.2d at 882 (emphasis in original)(footnotes omitted).

Finally, in order to attempt to meet the burden of showing unreasonableness, respondents must present something more than conclusory and unsupported claims of burden. In Rockefeller, for example, respondents prepared and submitted estimates of compliance costs. 591 F. 2d at 190. From this, it should be clear that a challenge to agency compulsory process based upon a claim of burden must be supported by some reasonable, substantial estimate of the cost of compliance and its relationship to the respondent's ongoing business operations. Unsubstantiated, conclusory claims will not meet the test -- they will not even come close. Federal Trade Commission Letter Ruling Re: Petition of Megatrend Telecommunications, Inc. to Limit and/or Quash CID, File No. 902 3281 (June 24, 1991).

While Petitioner attempts to place a specific cost on complying with the C.I.D., it falls short of the required threshold showing to quash the C.I.D. on this basis. The Petition explains the potential cost to Hang-Ups if the vice-president and the secretary/treasurer are forced to cease holding art auctions while they search for documents. However, the Petition admits that Hang-Ups has a clerical employee and a third principal. Much of the documentary material called for in the C.I.D. should be easily identified. For instance, if a catalog lists a work by one of the artists listed in Definition 4, it should be produced; if a purchase order covers an artwork by one of the artists listed in Definition 4, it should be produced. This type of document production does not appear to require an intimate knowledge of the art in question. Hang-Ups does not explain why the existing clerical employee and other principal cannot be given instructions by the vice-president and the secretary/treasurer and do much of the work identifying documents called for by the C.I.D.

It should be noted that the Commission staff has not objected to Petitioner's request for additional time to respond to the C.I.D. In addition, the staff offered to limit the initial burden by allowing

Hang-Ups to produce documents relating to sales of relevant artworks to clients whose last names began with the letters R through Z. Staff offered to give Hang-Ups an indefinite extension on production of such documents for clients whose last names began with the letters A through Q. Letter from Monica Tait, Esq. to David Steiner, Esq. (February 13, 1992).[9]

Petitioner falls short of the showing of burden necessary to quash the C.I.D. However, the Commission is persuaded by Petitioner's argument that the original time period in which to comply with the C.I.D., approximately 20 days, was too short. The Commission will modify the C.I.D. and extend the date for compliance with the C.I.D.s to thirty days from the date of this letter.

D. *Petitioners assert that the disclosure of Hang-Ups' charity customers, as well as private purchasers, would destroy Hang-Ups' ability to do business with these customers in the future.*

The Petitioner identifies this as perhaps its most critical concern. Petitioner alleges that the mere contacting of potential auction sponsors by the Commission staff, and identification of Hang-Ups as the target of the investigation, will likely cause the contacted party to refrain from doing business with Hang-Ups in the future. Petitioner identifies two instances when adverse publicity allegedly severely impacted the ability of an art auction firm to obtain customers. Petitioner argues that it is unfair to damage its business before it is even accused of any wrongdoing. The relief that Petitioner seeks is not a ban on the staff contacting its customers; indeed, the Petitioner recognizes that some customers must be contacted. Rather, the

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[9] Staff reserved the right to request the production of such documents on thirty days notice, if the staff decided that they needed the additional documents.

Petitioner seeks some limitation on the staff, to prevent the wholesale contacting of customers. Tr. p. 24.[10]

The Commission has faced this issue before. *See Invention Submission* at 65,353; Federal Trade Commission Letter Ruling Re: Petition of Invention Submission Corp. to Limit or Quash Civil Investigative Demands, File No. 882 3060 (October 4, 1991). In this case, the staff has disavowed any intention to contact all the customers, stating that they would contact only a small sampling of customers. In fact, the staff acknowledge that they only have the resources to contact a small sampling in any event. Tr. p. 37.

The staff previously offered to forego the immediate production of any documents relating to Petitioner's customers whose names began with the letters A through Q. Staff would only request those documents if, after examining the other documents produced by Hang-Ups, the staff determined the additional documents were necessary. Letter from Monica Tait, Esq. to David Steiner, Esq. (February 13, 1992). What the staff seeks is to retain the flexibility to determine for themselves, as the investigation progresses, how to construct a reasonable sample of clients. The Commission agrees that it is reasonable to allow the staff that flexibility. The Commission denies Hang-Ups' request to limit the C.I.D. in this way.

E. *Petitioner asserts that the request for Hang-Ups' backup tape or disks for their computer system is not warranted.*

Petitioner argues that 15 U.S.C. 44 is the statute controlling what constitutes documentary evidence that the Commission may seek in the C.I.D., and that the statute does not include computer tapes or disks. Therefore Petitioner argues that Specification 8 of the C.I.D.,

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[10] In the Petition at page 5, Petitioner also requested that the Commission staff be directed to tell those customers that it does contact, that there has been no specific accusation of wrongdoing made against Hang-Ups. In the oral presentation, Petitioner seems to have abandoned this request, stating that any such statement by staff would not affect the adverse impact on Hang-Ups' business. Tr. p. 13. Nevertheless, the Commission notes that Petitioner's concern is addressed by staff's policy to respond to the inquiries of interviewees that there has been no finding of wrongdoing on the part of the company about which they are asking questions.

which calls for the production of the most recent backup tape or disk for Hang-Ups' computer system, is inappropriate.

The statute under which the Commission issued the C.I.D. to Hang-Ups is Section 20 of the Federal Trade Commission Act, 15 U.S.C. 57b-1. Section 20(a)(5) defines "documentary material" to include "the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document." (Emphasis supplied.) There is no requirement in the statute that a document created by a computer must have been printed on paper before the Commission can compel its production. Although Petitioner cites no authority for its position, it seeks to impose this requirement on the Commission. The statutory language covers documents of the types listed, without regard to whether they exist only in computer (machine) readable code or on a piece of paper.

Definition 5 of the C.I.D. defines the term "documents" to include material stored in computers, or in computer storage devices, including magnetic tapes or disks. Therefore, the Commission understands the C.I.D. to already call for the production of all documents which fall under Specifications 1 through 7, even if the documents are only available in the form of computer (machine) readable code on a magnetic tape, disk, or other computer storage device. Specification 8 calls, in addition, for all information on the backup tape or disk that is not called for by one of the other specifications. So long as the other information is relevant to the investigation, this request would be permissible.

However, the Commission staff is requesting the production of whatever happens to have been encoded on the most recent backup tape or disk(s), without regard to whether it is in any way relevant to this investigation. The Commission concludes that this is overly broad.

The Commission therefore modifies Specification 8, limiting it to all documents stored on the most recent backup tape or disk(s) that relate, reflect, or refer to the purchase of, sale of, or trade in any relevant artwork included in Definition 4, the definition of relevant artwork, as that definition is modified above. For the purposes of this request, any data bases, data compilations, or spreadsheets included on the backup tape or disk(s) that contain any data entries that relate,

reflect, or refer to the purchase of, sale of, or trade in such artworks shall be considered a single document, and the entire data base or data compilation shall be produced. By this modification, the Commission does not intend to limit the obligations of Petitioner to search any backup tape or disk(s) for information relevant to Specifications 1 through 7. It may be noted that Direction 7 of the C.I.D. requires that documents responsive to more than one specification need not be submitted more than once. Therefore, to the extent documents contained on the most recent backup tape or disk(s) are produced in response to one of the previous specifications, they need not be produced again.

III. Conclusion

For the foregoing reasons, the Petition to Limit or Quash the Civil Investigative Demand for Documentary Material filed by Hang-Ups Art Enterprises, Inc. is granted in part and denied in part. Petitioners are directed to comply with the Civil Investigative Demand by close of business on April 30, 1992.

Pursuant to Rule 2.7(f), within three days after service of this ruling, Petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise directs.

Re: Petition of Japan Automobile Manufacturers Association, Inc. to Limit or Quash Subpoena Duces Tecum, File No. 901-0106.

April 20, 1992

Dear Mr. Tanaka:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Limit or Quash Subpoena Duces Tecum, which you filed on behalf of your client, the Japan Automobile Manufacturers Association, Inc. ("JAMA" or "Petitioner").

The ruling set forth herein has been made by Commissioner Deborah Owen pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). Pursuant to Rule 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. Whatever briefs or other material the Petitioner wishes the Commission to consider in reviewing this decision must accompany any such request in order to be considered as timely filed. The timely filing of such a request shall not stay the return date set forth in this ruling, unless the Commission otherwise specifies.

The Petition is granted in part and denied in part for the reasons stated below.

I. Background

This subpoena arises in the context of the Commission's investigation of certain business practices of Japanese automobile manufacturers operating in the United States to determine whether they are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended. JAMA is a trade association whose membership includes thirteen Japanese automobile manufacturers. JAMA is based in Japan and has a United States office in Washington, D.C.

On June 5, 1990, the Commission approved a resolution authorizing the use of compulsory process in this investigation. On February 11, 1992, the Commission issued to JAMA the subpoena

duces tecum at issue in this Petition. The subpoena contained nine specifications and set forth a March 3, 1992 return date.

Petitioner objected to producing certain documents under the subpoena. On several occasions, JAMA and the Commission's investigating staff discussed JAMA's concerns to limit or modify the subpoena. During the negotiations, staff extended the return date on the subpoena, pursuant to Commission Rule 2.7(c), until March 17, 1992. Staff denied JAMA's request to extend the deadline for filing a petition to quash or limit the subpoena, pursuant to Rule 2.7(d)(3). On March 2, 1992, JAMA filed the instant Petition.

JAMA advances several arguments in support of its Petition: (1) the subpoena is outside the scope of the Commission's authority; (2) the subpoena requires production of confidential documents, including responsive documents that are "politically sensitive;" (3) the subpoena seeks documents that are irrelevant to this investigation; (4) the subpoena is vague and indefinite; (5) the subpoena is unduly burdensome; and (6) JAMA is entitled to reimbursement of expenses incurred in complying with the subpoena. In connection with its burden argument, Petitioner also has requested a staggered production schedule to govern its compliance with the subpoena. Finally, Petitioner has requested that it be permitted to review any translations of foreign language documents obtained by the Commission or review the resume of any Commission-hired translator. JAMA has submitted a Memorandum of Law in Support of the Petition in which it elaborated upon the arguments raised in the Petition.

Commissioner Owen has carefully reviewed the Petition, accompanying exhibits, and supporting Memorandum. She has also considered the oral presentation on the Petition conducted on March 18, 1992. Petitioner's objections to the subpoena are discussed below.

II. Petitioner's Objections

A. *Petitioner alleges that the subpoena is outside the scope of the Commission's authority and that the subpoena was not issued for a lawful purpose.*

Petitioner contends that the subpoena "was issued for purposes other than the proper ones under the Commission's authority," and that "the way in which [the subpoena] is being enforced is not pursuant to a lawful purpose." JAMA Pet. at 2, Mem. at 11. In support of these allegations, Petitioner argues that the Commission's delay in issuing the subpoena, "more than twenty months" after the first round of subpoenas, somehow suggests that the Commission issued the subpoena for purposes that are not authorized by law. Petitioner further states that staff's refusal to make "any meaningful concessions" suggests that the Commission's action is not pursuant to a proper investigation, but "to show that the Commission's activities in this area are active, tough, and nonnegotiable. . . ." JAMA Pet. at 2.

This investigation and the attendant subpoena are plainly within the Commission's statutory authority. The FTC Act expressly provides that the Commission may "prosecute any inquiry necessary to its duties in any part of the United States" and has the power to "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions * * * Federal credit unions * * * and common carriers * * *." 15 U.S.C. 43, 46(a). Sections 6 and 9 of the FTC Act, 15 U.S.C. 46, 49, enumerate the Commission's specific investigative powers, including its authority to issue various forms of compulsory process. In particular, Section 9 authorizes the Commission to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." JAMA raises no contention that it is somehow exempt from investigation or beyond the Commission's subpoena power.

Petitioner's contention that the subpoena was issued for some improper purpose is both unsupported and untrue. The resolution authorizing the use of compulsory process in this matter clearly announces an investigation of certain business practices of Japanese automobile manufacturers operating in the United States (and of other unnamed parties) in order to determine whether any such person or persons may be engaged in, or may have engaged in, unfair methods

of competition in violation of Section 5. Seeking relevant records from the trade association that represents these manufacturers is hardly an unusual or questionable action. The subpoena is designed to elicit information that pertains to the lawful purposes of this investigation as cited in the resolution and authorized by law. The fact that the subpoena was issued later, rather than earlier, in the course of a complex investigation is irrelevant.

Petitioner's related argument, that the staff's alleged unwillingness to negotiate somehow demonstrates an improper motive, is similarly without foundation. Petitioner's allegations as to the staff's unwillingness to negotiate the impact of the subpoena are belied by various modifications made by the staff during the course of its discussions with Petitioner's counsel and voluntarily proposed to the Commission at the hearing.[1] Hence, Petitioner's objection to the subpoena on grounds that it is outside the Commission's authority or was issued for an improper purpose is denied.

B. *Petitioner alleges that confidential and "politically sensitive" documents need not be produced.*

Petitioner argues that it should not be required to produce certain responsive documents that contain confidential information. *See* JAMA Mem. at 24-25 (stating that Specification 7 seeks confidential documents analyzing sales, marketing, pricing, promotion or production of automobiles). Petitioner also argues that it should be permitted to produce redacted versions of "politically sensitive" documents for fear that such documents would be turned over to persons other than Commission personnel, producing embarrassment. Hearing Tr. at 18-19. JAMA objects to the production of "politically sensitive" documents for two reasons. First, it states that Commission access to its sources of information without adequate safeguards would be detrimental to its business operations. Second, it maintains that producing such "sensitive" documents without redacting the identities and corporate affiliations of JAMA's sources of information may subject such individuals to potential retaliation.

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[1] *See, e.g.*, note 8, *infra* (discussing staff's suggested modifications).

Petitioner proposed to redact the identities of individuals and produce redacted copies to Commission staff. In addition, JAMA proposed to permit one Commission representative to review the original, unredacted documents in JAMA's offices.

1. Confidential information

The confidential nature of certain information does not place it beyond the reach of the Commission's compulsory processes. As the United States District Court for the District of Columbia has stated:

> Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and [the subpoena] must be complied with.

FTC v. Invention Submission Corp., 1991-1 Trade Reg. Rep. (CCH) ¶ 69,338 at 65,353 (D.D.C. Feb. 14, 1991), *appeal pending*, No. 91-5174 (D.C. Cir. argued March 9, 1992) (footnote omitted).[2]

In addition, extensive statutory safeguards protect confidential information once supplied. Section 21 of the FTC Act mandates that information obtained by compulsory process during the course of a Commission investigation must be kept confidential.[3] 15 U.S.C.

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[2] There is abundant case law upholding the Commission's authority to obtain confidential documents. *See, e.g., FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 908 (5th Cir. 1979); *FTC v. Lonning*, 539 F.2d 202, 206, 209-210 (D.C. Cir. 1976); *FTC v. Tuttle*, 244 F.2d 605, 616 (2d Cir.), *cert. denied*, 354 U.S. 925 (1957); *TK-7 Corp. v. FTC*, 738 F. Supp. 446, 447 (W.D. Okla. 1990); *FTC v. Karr*, 1978-1 Trade Cas. (CCH) ¶ 61,932 (D.D.C. 1978).

[3] Prior to enactment of Section 21 of the FTC Act, the confidentiality of information obtained by compulsory process during the course of a Commission investigation (with the exception of trade secrets and customer identity, which were governed by Section 6(f) of the FTC Act) was governed by the terms of the Freedom of Information Act, 5 U.S.C. 552. The authority granted agencies under subsection (b) of that Act to withhold information is discretionary. The effect of Section 21(b) of the FTC Act was to replace discretion to withhold with a mandatory requirement to withhold.

Section 21 was enacted in 1980 as Section 14 of the Federal Trade Commission Improvements Act of 1980. Senator Wendell H. Ford, the Senate Manager of the legis-

57b-2(b); *See also* 15 U.S.C. 46(f); 16 CFR 4.10. Section 21(b)(6) sets forth the manner in which the Commission may disclose confidential information received pursuant to process to other federal law enforcement agencies and to state law enforcement agencies. 15 U.S.C. 57b-2(b)(6). In particular, the Commission must secure from the requesting law enforcement agency a certification that such information will be maintained in confidence. *Id.* In addition, Section 21(b)(3)(C) provides for the disclosure of documents or testimony obtained by the Commission's compulsory process to congressional committees or subcommittees upon request. In such instances, however, the Commission immediately must notify the owner or provider of the requested information about the congressional access request, if the requested information is designated as confidential by the owner or provider of the information.[4]

These statutory safeguards for confidential information, obtained by compulsory process during the course of a Commission investigation, were enacted, in part, to confirm and facilitate the Commission's ability to obtain confidential information in the course of its investigations and to safeguard that information once obtained.

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lation, provided some background leading to enactment of this provision, stating that:

the problem of obtaining information at the Commission does exist. Businesses frequently take the Federal Trade Commission to court to quash subpoenas, because of the fear that the FTC will release their confidential information to competitors. . . . The FTC Conference Report emphasizes that this provision was adopted due to the special circumstances surrounding the difficulty of receipt of information by the FTC.

126 Cong. Rec. 11914 (1980), reprinted in 7 Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes, 5911 (1983).

[4] During the hearing, Petitioner's counsel conceded that Congress has the authority to subpoena JAMA's documents on its own initiative, and that the Commission is not a necessary conduit for congressional access to such documents. Hearing Tr. at 33. Congress has inherent constitutional authority to investigate, and individual committees and subcommittees are delegated authority by the full House of Representatives and Senate to subpoena witnesses, testimony, and documents. *See McGrain v. Daugherty*, 273 U.S. 135, 174-75 (1927); *See also* Standing Rules of the Senate, 102nd Congress, Second Session, Rule 26(1) (Revised to March 18, 1992) [S. Doc. 102-17]; Rules of the House of Representatives, 102nd Congress, Rule XI, cl. 2(m)(1) (adopted Jan. 3, 1991) [H. Doc. 101-256].

The Commission finds that the subpoena issued to JAMA meets the test enunciated by the U.S. District Court in Invention Submission. Accordingly, Petitioner's objection to the production of confidential information is denied. Responsive confidential information is properly requested and must be produced.

2. "Politically sensitive" documents

Petitioner states that the primary basis for its objections to the subpoena is that it requires the production of "politically sensitive" documents. JAMA objects to the production of these documents because it believes such documents are "marginally responsive to the subpoena," and because of the "sensitive" nature of these documents. JAMA Mem. at 9. Petitioner has offered to redact the identities and corporate affiliations of individuals mentioned in these documents and to permit a single designated Commission staff representative to review the nonredacted original documents in JAMA's offices. However, Petitioner has failed to offer any legal precedent to support this proposal.

The Commission can compel the production of complete and unexpurgated responsive documents. *See FTC v. United States Borax & Chem. Co.*, 1978-1 Trade Reg. Rep. (CCH) ¶ 61,939 (D.D.C. Feb. 17, 1978); *See also SEC v.Vacuum Can Co.*, 157 F.2d 530, 531 (7th Cir. 1946); *In re Indusco, Inc.*, 15 F.R.D. 7, 10 (S.D.N.Y.1953). Requiring the production of complete, nonredacted documents facilitates the Commission's understanding of such documents. Relevant information often may be useful only if it is presented in the same context in which it was originally created. Further, to sustain the subpoena, a court need only find that the requested documents are relevant to a lawfully authorized inquiry. *See Indusco*, 15 F.R.D. at 10. Accordingly, the Commission has the authority to subpoena any of these "politically sensitive" documents that are relevant to the investigation, and as previously discussed, adequate procedures are provided to protect such information.

Staff recently made a proposal to Petitioner in an attempt to limit its obligations to produce "politically sensitive" documents that might not be relevant to this investigation. Petitioner agreed to staff's proposal that two staff attorneys be afforded an opportunity to

examine these "politically sensitive" documents for relevancy in the offices of either Petitioner or its counsel. On April 10, 1992, two Commission staff members examined "politically sensitive" documents that were made available for their review in the offices of Petitioner's counsel. From that examination, the staff was able to determine that some "politically sensitive" documents are relevant and would further this investigation. Accordingly, Petitioner is hereby required to produce all relevant documents, regardless of their "political sensitivity."

C. *Petitioner asserts that some other specifications are also irrelevant.*

The courts give relevance a broad interpretation in enforcing Commission compulsory process. As the United States District Court for the District of Columbia recently stated:

> Because the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections.

FTC v. Invention Submission Corp., at 65, 351. More particularly, relevance is measured against the agency's general purpose in gathering investigative materials, as described by the underlying resolution authorizing compulsory process. *FTC v. Texaco Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977).

JAMA has raised five objections on relevance grounds. First, JAMA opposes specifications seeking information relating to the manufacture of automobiles, as opposed to automobile parts procurement. Second, it objects to the production of documents dating back to January 1, 1988. Third, JAMA challenges Specification 4, which seeks minutes and other documents that describe JAMA meetings. Fourth, it argues that Specification 6 requires the production of documents relating to competition among auto manufacturers in the United States, including documents discussing agreements, coordination efforts, meetings, communications or conversations among such manufacturers. Fifth, JAMA challenges Specification 9, which seeks documents relating to future

plans or efforts to substitute auto parts manufactured in the United States for other parts.

1. Documents relating to the manufacture of automobiles

In its papers, Petitioner challenges Specifications 1(e), 2, 3(c), 6(c) and 7, because they require production of information relating to the manufacture of automobiles. JAMA argues that this investigation focuses only on the procurement of parts by manufacturers manufacturing automobiles in the United States, and that documents pertaining to automobile manufacturing are therefore irrelevant.

During its oral presentation, Petitioner conceded that the Commission's resolution describes this investigation to include the restriction of competition in the United States auto parts industry or the automobile industry.[5] Given this admission, and the clear language of the resolution, its objection to production of plainly relevant information on automobile manufacturing is denied.

2. Documents dating back to January 1, 1988

In its papers, JAMA challenged the relevancy of 1988-89 documents, stating that such documents would be "stale and of historical value only." JAMA Mem. at 12. During its oral presentation, however, Petitioner conceded both the relevancy of 1988-89 documents that discussed auto parts procurement and that the Commission's resolution encompasses the possible restriction of competition in both the United States auto parts industry and the automobile industry. Hearing Tr. at 6-8. At the hearing, JAMA

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[5] At the hearing, Commissioner Owen asked whether it was Petitioner's position that the subpoena is not within the scope of the Commission's resolution authorizing compulsory process, or instead that the specifications are covered by the resolution but are not within the focus of the Commission's investigation. Petitioner's counsel responded that JAMA took the latter position. He further stated that the Commission clearly has the authority under the resolution to seek documents specified in the subpoena. Petitioner's counsel, however, suggested that both the title of this investigation -- "Foreign Auto Parts Investigation" -- and the congressional hearings that preceded it indicate that automobile parts procurement practices are the real focus. Hearing Tr. at 6-8.

agreed to produce 1988-89 documents that discuss auto parts procurement, but continued its objection to production of 1988-89 documents that discuss automobile manufacturing. Petitioner did not pose a wholesale challenge to the relevancy of 1990-91 documents sought under the subpoena (although it has objected to production of certain documents on other grounds).

Administrative agencies vested with investigatory power have broad discretion to require the disclosure of information concerning matters within their jurisdiction. *Phillips Petroleum Co. v. Lujan*, 951 F.2d 257, 260 (10th Cir. 1991) (upholding agency's right to request and obtain documents more than six years old). Further, a district court must enforce an administrative subpoena unless the evidence sought is plainly incompetent or irrelevant to any legal purpose of the agency. *Id.*, *citing Endicott Johnson v. Perkins*, 317 U.S. 501, 509 (1943).

Petitioner's documents dating back to January 1988 are relevant to this investigation because Japanese-owned automobile and parts manufacturers have been operating in the United States since before 1988.[6] In addition, when Chairman Steiger testified on behalf of the Commission before the Committee on the Judiciary of the United States House of Representatives on May 3, 1990, she publicly announced this investigation. JAMA documents prepared in 1988-89 are therefore particularly important since documents created after this investigation became public may be colored by knowledge of its existence.

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[6] The four-year time period covered by the subpoena is not contemporaneous with the entire tenure of Japanese car manufacturing in the United States. Honda began manufacturing cars in the United States in 1982, Nissan in 1985, and Mazda in 1987. *See* United States Department of Commerce Study on Foreign Direct Investment in the United States, August 1991, at 19, 55. Japanese automobile parts companies began making substantial investments in parts manufacturing facilities in this country in the mid-1980s. *See* Department of Commerce Study on Japanese Direct Investment in United States Manufacturing, August 1991, at 19. JAMA began conducting its business in Washington, D.C. in mid-1976 and notes in its Petition and supporting papers that it has played an important role in encouraging Japanese-owned automobile and parts manufacturers to open facilities in this country since 1980. *See* JAMA Certificate and Application for Certificate of Authority, filed with District of Columbia Department of Consumer & Regulatory Affairs, Business Regulation Administration, Corporations Division (Jan. 23, 1992), at 3.

Counsel for Petitioner admitted during its oral presentation that 1988-89 documents could contain information about a violation of Section 5 during that time period.[7] Such documents are clearly relevant, given the activities of Japanese-owned automobile and parts manufacturers in this country during that period. For the foregoing reasons, Petitioner's objection to producing 1988-89 documents discussing automobile manufacturing is denied.

3. Documents pertaining to all JAMA meetings

Petitioner objected to Specification 4 on relevancy grounds. That Specification seeks documents pertaining to all JAMA meetings. Subsequent to the filing of JAMA's Petition and pursuant to Rule 2.7(c), staff modified Specification 4 and limited its scope to the following documents:

All minutes and other documents recording or describing meetings of JAMA and any JAMA chapter, subdivision, office and affiliate that relate to the manufacturing of automobiles in the United States or the procurement of parts by manufacturers manufacturing automobiles in the United States.

See Letter from Michael D. McNeely to H. William Tanaka (March 9, 1992) (emphasis added). The Commission now must determine whether the documents sought under this Specification are relevant and whether the modification imposes any undue burden on Petitioner.

As noted earlier, Petitioner has conceded that the Commission's resolution authorizing the use of compulsory process in this investigation encompasses both the automotive industry and the auto

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[7] COMMISSIONER OWEN: Well, now, is it your position that the documents pertaining to this 1988 to 1990 period would not be probative of any wrongdoing that may have taken place during that period?
MR. TANAKA: Well, if it is first of all still information which may be of some historical value.
COMMISSIONER OWEN: Well, it might be historical value about a violation of Section 5, might it not?
MR. TANAKA: Conceivably, yes.
COMMISSIONER OWEN: Hypothetically speaking.
Hearing Transcript at 20.

parts industry. We find that, as modified by the staff, Specification 4 lies within the bounds of relevance, and this further limitation imposes no undue burden on Petitioner. We therefore adopt staff's modification to this Specification as set forth in staff's March 9, 1992 letter to Petitioner's counsel.

4. Specification 6

JAMA objected to Specification 6 on grounds that it requires production of documents relating to virtually every aspect of its activities, irrespective of their relevance to this investigation. JAMA Mem. at 24. This specification seeks documents relating to competition among automobile manufacturers in the United States, including documents discussing agreements, coordination efforts, meetings, communications, or conversations among such manufacturers.

Petitioner fails to offer, and we cannot determine, any basis for finding such documents to be outside the scope of this investigation. As noted earlier, courts give relevance a broad interpretation in enforcing the Commission's compulsory process. This investigation is to determine, *inter alia*, whether certain persons or entities are restricting competition in the United States auto parts or automotive industry. The Commission's process resolution enumerates certain anticompetitive practices that may have been the means used in restricting competition. These practices include equity exchanges, interlocking directorates, intra-group financial commitments, joint research and development efforts, membership in exclusive management councils or clubs with certain auto parts manufacturers, and predatory or discriminatory pricing or refusals to deal with certain groups or suppliers. We are persuaded that documents that discuss competition among auto manufacturers that manufacture in the United States would likely bear upon whether certain persons or entities have engaged in any of the foregoing anticompetitive practices. Likewise, documents that discuss or relate to agreements, meetings, communications or conversations between or among manufacturers, concerning the manufacture, sale, or distribution of automobiles or parts procurement, would likely bear upon whether

Petitioner or its members have engaged in these practices in restraint of trade.

We find that documents described in Specification 6 are properly within the scope of this investigation and are relevant to whether manufacturers may be restricting competition involving either the auto parts or the automotive industry. Accordingly, Petitioner's objection to Specification 6 on relevancy grounds is denied.

5. Documents that discuss future plans or efforts

Petitioner objects to Specification 9, which seeks documents relating to present or future plans or efforts to substitute auto parts manufactured in the United States for other parts. JAMA contends that future plans or efforts are irrelevant to the conduct at issue, which is alleged to have occurred between 1988 and the present. JAMA Mem. at 24.

We find that documents relating to future plans or efforts are relevant to the Commission's investigation. Future business plans of Petitioner and its members may bear upon how they conduct themselves now. Such documents also could assist in interpreting other documents that describe current or recent business practices. In addition, such documents are likely to shed light on past parts procurement practices. Accordingly, Petitioner's objection to the production of documents relating to future plans or efforts to substitute auto parts manufactured in the United States for others is denied.

D. *Petitioner alleges that the subpoena is vague and indefinite.*

Petitioner argues that the subpoena fails to describe material sought with sufficient particularity or definiteness. However, although JAMA asserts that certain definitions and specifications within the subpoena are vague and indefinite, it fails to identify them. We are given no specific language from the subpoena that is purportedly ambiguous or unclear, and Petitioner must provide more than rhetorical flourishes in order to prevail. Accordingly, Petitioner's conclusory and unsupported objection on grounds of vagueness or indefiniteness is denied.

1322

E. *Petitioner argues that the subpoena is unduly burdensome.*

Petitioner objects to the subpoena on burdensomeness grounds for several reasons, each of which is discussed separately in the following sections. Before turning to the merits of Petitioner's arguments, it is instructive to restate the general rules that govern claims of burden.

Our analysis is guided by several standards. First, "the burden of showing that an agency subpoena is unreasonable remains with the respondent." *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979), *quoting SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *accord FTC v. Texaco, Inc.*, 555 F.2d at 882. In Brigadoon, the Second Circuit added that "where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." 480 F.2d at 1056.

Second, as the court stated in Texaco, "[w]e emphasize that the question is whether the demand is unduly burdensome or unreasonably broad." It added:

> Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

555 F.2d at 882 (emphasis in original) (footnotes omitted).

Finally, in order to meet the burden of showing unreasonableness, respondents must present something more than conclusory and unsupported claims of burden. In Rockefeller, for example, respondents prepared and submitted estimates of compliance costs. 591 F.2d at 190. From this, it should be clear that a challenge to agency compulsory process based upon a claim of burdensomeness must be supported by some reasonable, substantiated estimate of the cost of compliance and its relationship to the respondent's ongoing business operations. Unsubstantiated, conclusory claims will not meet the test -- they will not even come close. This requirement is consistent with the Commission's previous rulings on petitions to limit or quash subpoenas or civil investigative demands. *See generally* Commission

ruling on Petition of Brana Publishing, Inc. to Limit or Quash CID, letter to Lawrence I. Fox, Esquire (March 26, 1992), File No. 872-3209; Commission ruling on Petition of Winnebago Industries, Inc. to Quash or Limit CIDs, letter to Christopher Smith, Esquire (July 26, 1991), File No. 902-3240; Commission ruling on Petition of Megatrend Telecommunications, Inc. to Limit and/or Quash CID, letter to Daniel Shepro, Esquire (June 24, 1991), File No. 902-3281.

1. Effect on normal business operations

Petitioner asserts that compliance with this "unduly burdensome and unreasonably broad" subpoena threatens to unduly disrupt or seriously hinder its normal operations. JAMA Mem. at 19-20. In its oral presentation, Petitioner stated that it suffers from personnel changes every several years, and as a result, its files have not been kept in a systematized fashion that would facilitate the search for responsive documents. However, although JAMA stated in its papers that it has only four employees in its Washington, D.C. office, it emphasized in its oral presentation that manpower would not be a problem because any number of paralegals from its law firm could be enlisted to conduct the document search. JAMA indicated that approximately ninety boxes of documents are responsive to the subpoena. Hearing Tr. at 26.

Petitioner's unsupported assertions are insufficient to warrant a limitation on production of lawfully demanded documents on burdensomeness grounds. In the absence of any specificity in this regard, and given the lack of manpower constraints, Petitioner has not demonstrated that production of the relevant information could amount to the type of burden that would "unduly disrupt or seriously hinder normal operations of a business," as the standard was described in *Texaco*, 555 F.2d at 882. Moreover, Petitioner has failed to offer evidence to substantiate its claim that its normal business operations would be unduly disrupted or seriously hindered. Accordingly, its objection on such grounds is denied.

1322

2. Time for compliance

The reasonableness of the return date is measured under the general rules for evaluating burdensomeness described above. Petitioner offers some substantive information on which to determine the reasonableness of the time allowed for response to the subpoena. Although JAMA did not specifically object to the time for compliance in its Petition, the supporting memorandum states, *inter alia*:

> A return date of March 3, 1992 is patently unreasonable. Considering the extremely broad scope of the Commission's subpoena, requiring JAMA to respond in less than three weeks is clearly unreasonable. The subpoena seeks virtually every document in JAMA's custody or control. Thousands of documents, many in Japanese, will have to be reviewed. Thus, it is not physically possible for JAMA to comply by the return date.
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> * * *
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> After JAMA counsel explained the unduly burdensome nature of compliance with the subpoena in such a short period of time, Commission staff extended the deadline for compliance with the subpoena until March 17 and denied the scope and other issues raised by JAMA counsel. Under the circumstances, an extension of time until only March 17 is not meaningful.

JAMA Mem. at 14.

Petitioner also has noted that Instruction 5 imposes an additional burden on it in meeting the Commission deadline because some of its documents are in Japanese. JAMA states that an attorney and an interpreter must review each Japanese document to identify privileged material. JAMA agrees to produce all responsive Japanese documents without translation, but with all privileged material redacted. JAMA Mem. at 16.

The Commission is persuaded that the original time period, approximately 21 days, was too short, given the exceptional circumstances of this case, including the nature of Petitioner's business, the nature of the document request, and the hurdles presented in identifying privileged communications among JAMA's foreign language documents. The Commission will extend the date for compliance with the subpoena to May 20, 1992.

3. Schedule of privileged documents

Petitioner objects to Instruction 5 of the subpoena, which requires it to state, in writing, individually for each document withheld under a claim of privilege:

> its type, title, subject matter, and date; the names, addresses, positions, and organizations of each author and recipient; and the specific grounds for claiming that the document is privileged as well as facts sufficient to support such a claim.

JAMA asserts that this requirement imposes an unreasonable and unfair burden, "tantamount to an arbitrary and unlawful denial of a reasonable opportunity to assert the privilege." JAMA Mem. at 15.

Providing the information required under Instruction 5 is a predicate to asserting a claim of privilege here. Commission Rule 2.8A requires any person withholding material responsive to an investigational subpoena, if so directed in the subpoena, to submit the information called for in Instruction 5. Federal courts impose similar requirements for litigants withholding documents based on a claim of privilege. *See, e.g., Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1199 (1985); *Eureka Financial Corp. v. Hartford Accident and Indemnity Co.*, 19 Fed. R. Serv. 3d 1448 (E.D. Cal. March 27, 1991). The court in Eureka Financial explained that:

> [t]he purpose of the specific objection requirement is to provide the party seeking discovery with a basis for determining what documents the party asserting the privilege has withheld. Otherwise, how could this opposing party ever know whether the documents withheld under a blanket privilege objection were withheld correctly, incorrectly, or maliciously? [The objecting party] would have the court believe that an opposing party must simply trust the good faith and diligence of the party asserting the privilege.

19 Fed. R. Serv. 3d at 1454.

For the foregoing reasons, and in light of the additional time for compliance granted to Petitioner, *supra,* Petitioner's objection on grounds that Instruction 5 imposes undue burden is denied.

4. Documents available from public sources

Petitioner argued both in its papers and in its oral presentation that a significant quantity of its responsive documents is publicly available (*e.g.*, newspaper and magazine articles, proposed legislation, books, etc.). According to Petitioner, an estimated thirty to forty percent of the roughly ninety boxes of responsive documents encompass publicly available documents. When the Commission issued the subpoena now in dispute, it was unaware that JAMA's files contained such a large proportion of publicly available documents. In an effort to limit any unnecessary burden that might have been imposed on JAMA as a result of the subpoena, staff has excluded certain categories of publicly available documents from the scope of production. We emphasize that the foregoing exclusions of certain publicly available documents from the scope of production have no effect upon any such documents that contain handwritten notations, including interlineations or marginalia. Responsive documents containing any handwritten notations or other alterations must be produced. Petitioner has agreed to these exclusions from production.[8] We find that such exclusions of various categories of publicly

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[8] While negotiating this agreement, Petitioner furnished staff with a list of publicly available print materials that it wished to exclude from the scope of this production. Staff reviewed the list and eliminated those publicly available sources of general circulation to which it has access and reduced the scope of publicly available sources within the scope of the subpoena.

Staff further limited the scope of production by agreeing that Petitioner is not required to produce the following categories of publicly available documents contained in Petitioner's files: (1) congressional correspondence with federal and state agencies; (2) drafts of federal or state legislation; (3) announcements of federal or state legislation; (4) federal or state regulations on automobile emissions or fuel economy; (5) text of congressional hearings; (6) text of press conferences held by U.S. Representatives or Senators; (7) statements made on the floor of the Senate or House of Representatives; (8) reference materials prepared by Senators, Representatives or their staffs; (9) news releases issued by federal agencies; (10) books; (11) studies and legal briefs prepared by federal and state agencies relating to automobile emissions; and (12) annual and quarterly reports of General Motors, Ford or Chrysler.

Following the hearing, staff further sought to minimize Petitioner's compliance burden and extended an offer that JAMA need not produce documents that relate solely to trade balances between the United States and Japan. Petitioner agreed that such documents would be excluded from production.

available documents sufficiently limit the scope of production of publicly available documents. Petitioner is required to produce all responsive documents contained in its files that are available from public sources and not otherwise expressly excluded from production pursuant to its agreement with staff.

5. Documents previously produced to staff by JAMA or other sources

Petitioner, citing undue burden, makes two arguments that the subpoena is duplicative. First, it contends that the subpoena requires production of documents that JAMA has already provided to staff voluntarily. Second, Petitioner claims the subpoena is duplicative because it seeks documents already obtained by staff from other sources during this investigation.

No list of the documents JAMA previously submitted to staff was ever created. Such documents have since been integrated with other materials obtained throughout this investigation. In an effort to identify documents previously submitted, staff has reviewed correspondence from Petitioner's counsel that accompanied two voluntary submissions of documents in April and June, 1990. Based on this correspondence, staff reviewed its files and identified approximately twenty-eight documents previously submitted by JAMA. Staff has agreed that Petitioner need not provide these documents again. To the extent that staff identifies additional documents previously submitted by JAMA prior to the final return date set forth below, Petitioner is not required to resubmit such documents.

To the extent that Petitioner can identify documents that staff has previously obtained from other sources during this investigation, such documents must be submitted, unless staff may choose not to require their production. We must allow staff some discretion in this regard, since confidentiality restrictions may prevent staff from acknowledging its previous access to such documents and their source. Furthermore, certain documents, although already given to staff by other sources, must be produced because their existence in JAMA's files may be of independent significance.

F. *Petitioner requests reimbursement for compliance costs.*

Petitioner seeks reimbursement for all "search, retrieval, compilation, and duplication costs incurred in complying with the subpoena." JAMA Mem. at 26.

Pursuant to the subpoena duces tecum, Petitioner must relinquish its responsive documents to the Commission. Section 9 of the FTC Act sets forth the Commission's authority to require by subpoena the production of documentary evidence relating to any matter under investigation. It has been the Commission's practice to accept from a subpoena addressee either original documents or photocopies thereof.

Recipients of subpoenas are expected to bear the cost of compliance, which is considered to be part of the public duty of providing evidence. *See SEC v. OKC Corp.*, 474 F. Supp. 1031, 1037-37 (N.D. Tex. 1979). The Commission has stated, "[a] subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable." *In re ITT Corp.*, 97 FTC 202, 203 (1981). In an interlocutory order in the ITT matter, the Commission ruled that, to determine whether the costs of compliance are "reasonable," the ALJ should "compare the costs of compliance in relation to the size and resources of the subpoenaed party." *Id.*, *citing SEC v. OKC Corp.* Other courts have denied requests for reimbursement because imposing reproduction costs on the Commission would derogate its power to issue administrative subpoenas. *FTC v. Texaco*, 555 F.2d at 883; *See also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir.), *cert. denied*, 419 U.S. 815 (1986).

The Commission finds that no reimbursement for either search or copying costs is warranted in this case. The Commission's Operating Manual states that no reimbursement will be provided for search costs incurred by a subpoena addressee. Furthermore, no reimbursement will be provided for copying costs except in exceptional circumstances. *See* FTC Operating Manual Chapter 3.3.6.5. Petitioner has failed to raise any facts or arguments to suggest that there are exceptional circumstances that would require such

reimbursement for copying. Petitioner has cited no other authority that would require reimbursement for search costs or copying costs on these facts. Moreover, Petitioner's burden has been reduced to some extent by the limitations on the subpoena as outlined herein. For the foregoing reasons, Petitioner's request for reimbursement for search and copying costs is denied.[9]

G. *Petitioner requests a staggered production schedule.*

Petitioner has proposed a staggered production, whereby the initial stage of production would be restricted to production of "a small random sampling of documents." JAMA Mem. at 25. We find this unacceptable because it would permit production of a few documents selected at Petitioner's discretion. Furthermore, it is unnecessary in light of staff's modifications and the Commission's extension of time for compliance.

H. *Petitioner requests that it be permitted to review either the Commission translations of Japanese documents or the resume of any Commission-hired translator.*

Petitioner has stated that it is prepared to produce all Japanese language documents, without translation, but that any privileged excerpts would be redacted. JAMA Mem. at 16. The subpoena, by its terms, does not require Petitioner to obtain translations for its foreign language documents. Petitioner has expressed concern that Japanese language documents are particularly susceptible to mistranslation, and as an additional safeguard, Petitioner requests that it be permitted to review the Commission-translated documents for accuracy. Hearing Tr. at 21-22. Petitioner also has proposed that it be permitted to supply the Commission with a list of prospective

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[9] Subsequent to its Petition, JAMA has stated that it will make all responsive documents available for staff's inspection and copying subject to the disposition of its Petition. *See* Letter from H. William Tanaka to Michael D. McNeely (March 20, 1992). We note that Commission staff has offered, but is not required, to allow Petitioner to make responsive documents available for duplication by staff.

translators or to review the resume of any Commission-hired translator. *See* JAMA Mem. at 16-17; *See also* Rule 2.7(d)(2) Statement at 3, accompanying JAMA Petition.

Nothing precludes Petitioner from submitting a list of translators it would recommend; however, neither the Commission nor its staff would be obligated to retain any of the "JAMA-approved" translators. Moreover, nothing precludes Petitioner from obtaining for the Commission its own translations of any documents that it believes are susceptible to mistranslation. Petitioner offers no legal authority or Commission precedent to support its proposals that it be permitted to review either the translated documents or the resume of any Commission-hired translator. We find that such outside involvement in a Commission investigation would be inappropriate and hereby deny Petitioner's proposals. This ruling in no way forecloses any subsequent opportunity Petitioner might have to raise any objections relating to any alleged mistranslation of its documents.

III. Conclusion

For the foregoing reasons, the Petition to Limit or Quash Subpoena Duces Tecum filed by Japan Automobile Manufacturers Association, Inc. is denied in part and granted in part. Pursuant to Rule 2.7(e), JAMA is directed to comply with the subpoena issued to it by 5:00 p.m. on May 20, 1992.

Pursuant to Rule 2.7(f), within three days after service of this ruling, Petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise directs.

Re: Hang-Ups Art Enterprises, Inc.'s Petition to Limit or Quash the Civil Investigative Demand, File No. 872-3209.

April 29, 1992

Dear Mr. Steiner:

The Commission has considered (a) the Petition to Limit or Quash the Civil Investigative Demand that you filed on behalf of Hang-Ups Art Enterprises, Inc. ("Petition"), including the affidavits of Max Klein and David Paul Steiner that were filed with it; (b) the March 31, 1992 letter ruling granting in part, and denying in part, the petition; (c) the transcript of the oral presentation on the petition, held February 25, 1992; (d) your request for Commission review filed April 6, 1992; and (e) the Civil Investigative Demand at issue.

The Commission has determined that your request for full Commission review does not raise any new issues regarding the Petition, and that the Petition was properly denied in part and granted in part for the reasons stated in the March 31, 1992 ruling.

The Commission also denies your request for a stay of the April 30 return date for the documents. Accordingly, the full Commission concurs with and hereby adopts the March 31, 1992 letter ruling in this matter. Hang-Ups Art Enterprises, Inc. is directed to comply with the Civil Investigative Demand by April 30, 1992.

Re: Petition of Center Art Galleries-Hawaii, Inc. to Limit or Quash the Civil Investigative Demand, File No. 872-3209.

June 22, 1992

Dear Mr. Bain:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Limit or Quash the Civil Investigative Demand for Documentary Material ("Petition"), which you filed on behalf of your client Center Art Galleries-Hawaii, Inc. ("Center Art" or "Petitioner"), in the above-referenced matter.

The ruling set forth herein has been made by Commissioner Deborah Owen pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). Pursuant to Rule 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. Whatever briefs or other material the Petitioner wishes the Commission to consider in reviewing this decision must accompany any such request in order to be considered as timely filed. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

Commissioner Owen has carefully reviewed the Petition and accompanying exhibits. She has also considered the oral presentation on the Petition conducted on April 8, 1992. The Petition is denied in part, and granted in part, for the reasons stated below. Petitioner's obligations under the Civil Investigative Demand ("CID") are modified as set forth below.

I. Background

On October 24, 1991, the Federal Trade Commission approved a Resolution Directing Use of Compulsory Process, authorizing the use of compulsory process in an investigation to determine:

whether unnamed persons, partnerships, or corporations, engaged in the sale, advertising, and marketing of fine art prints, may be engaged in unfair or deceptive

acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, including but not limited to, misrepresenting the origins, authorship, edition size, or value of fine art prints.

On January 28, 1992, as part of this investigation, a CID was issued to Center Art, a firm engaged in the sale of fine art at charity and public auctions. On March 3, 1992, Center Art was served a copy of the CID by the United States Marshal's service. By letter dated March 9, 1992, the Bureau of Consumer Protection staff extended Center Art's time to produce documents and file a motion to quash. Pet. p. 2.[1]

Counsel for Petitioner and the staff of the Commission entered into negotiations concerning the CID. Initially, counsel for Petitioner and the staff were unable to resolve the issues raised by Petitioner. On March 30, 1992, counsel for Petitioner filed this Petition. Counsel for Petitioner and the staff of the Commission continued negotiations up to and during the eve of the oral presentation on April 8, 1992. Counsel for Petitioner and the staff were able to resolve many of the issues that were raised.[2] However, several issues remained.

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[1] References to the Petition are cited as "Pet. p." with the appropriate page number. References to the transcript of the oral presentation on the Petition, held on April 8, 1992, are cited as "Tr. p." with the appropriate page number.

[2] Counsel for Petitioner and the Commission staff resolved a number of objections to the definitions in the CID, by referring to the Letter Ruling on the Petition of Brana Publishing, Inc. to Limit or Quash Civil Investigative Demand; Petition of Art Source International, Inc. to Limit or Quash Civil Investigative Demand; and Petition of Brana Enterprises Inc. to Limit or Quash Civil Investigative Demand, File No. 872-3209, issued March 26, 1992 ("Brana Letter Ruling"). Counsel for Petitioner agreed to accept (1) the definition of "artwork," Tr. p. 5; (2) the definition of "cooperating entities," Tr. p. 22; and the limitation on the breadth of the requirement to produce back up computer tapes, Tr. p. 5-6, contained in the Brana Letter Ruling. The Commission adopts the same rulings on these three issues in this Petition as contained in the Brana Letter Ruling.

Counsel for Petitioner withdrew the objection to the use of the term sales scripts, Tr. p. 23.

II. Specific Objections

A. Petitioner asserts that the scope of the documents sought by the CID is unduly broad and burdensome.

Petitioner first asserts that the structure of the CID, given the manner in which Center Art maintains its files, would require the review of virtually all documents maintained by Center Art. In addition, Petitioner originally asserted that the specifications are insufficiently detailed to permit Petitioner to identify the specific documents required under the CID. The issue of the definiteness of the specifications was resolved by agreement between the staff and counsel for Petitioner.

The agreement on the meaning of terms did not fully dispose of the issue of burden. However, counsel for Petitioner offered to provide a subset of the requested documents on a staggered basis to reduce the burden on Petitioner, while, Petitioner asserted, providing Commission staff with the information they required. Counsel for Petitioner's offer addresses both this burden objection, and the reasonableness of the time period of the CID, and will be discussed immediately below.

B. Petitioner asserts that the CID does not prescribe a return date which will provide a reasonable period of time to assemble the documents.

Petitioner asserts that because of the volume of documents in the possession of Petitioner, the time period specified in the CID is unreasonably short. Unlike most other petitions to quash subpoenas and CIDs that have come before the Commission, in this case, Petitioner has at least attempted to catalogue the type and volume of documents allegedly in its possession. Petitioner estimates that it possesses over 6,500,000 documents that would have to be reviewed to identify the documents requested by the CID. Pet. pp. 8-10. Furthermore, while the CID requires the production of documents that contain information on artworks by certain artists, Petitioner's documents contain information by artwork title, without identifying the artist in the document. Tr. p. 28. According to Petitioner, this

requires that someone knowledgeable about the artworks and artists review the documents. Center Art argues that it has only one employee and a part-time helper qualified to undertake that search. Tr. p. 28.

In addition, Center Art has a group of documents that, the United States District Court for the District of Hawaii has ruled, were illegally seized in 1987 by law enforcement officers, acting under the leadership of postal inspectors from the United States Postal Service, during an unrelated investigation of Center Art. *In re Motion for Return of Property Pursuant to Rule 41, Federal Rules of Criminal Procedure,* 681 F.Supp. 677 (D.Haw.1988), *aff'd, Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989) (hereinafter "Motion for Return"). These documents were returned to Center Art pursuant to the Court's order. However, according to Petitioner, the documents were returned without apparent organization, and were never re-integrated into Center Art's filing system, Tr. p. 10; moreover, according to Petitioner, the boxes are stored in what may be described as a "makeshift" manner. Tr. p. 14. In addition to arguing that these documents should not be produced during the pendency of litigation between Center Art and the postal authorities, discussed below, Petitioner alleges that the condition of these documents is such as to require an enormous amount of time to produce pursuant to the CID.

Leaving aside the documents that were seized by the postal authorities, Petitioner has proposed staggered production of some of the documents requested by the CID. First, Petitioner offers to produce certain files within two weeks of an agreement with the staff. These documents include: (1) documents denoted as artists files; (2) employee tax forms to the extent necessary to identify employees;[3] and (3) receiving logs post-dating the document seizure in 1987. Tr. p. 46-7.[4] With respect to other documents that are maintained in the general chronological files of the company, the Petitioner has offered

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[3] Petitioner agreed to annotate the forms to the extent of their ability with the positions held by the employees. Tr. p. 7.

[4] The Commission understands that the Petitioner has already produced at least some of the documents that were offered within the two-week period.

to produce documents from its files for two-month periods of each year covered by the CID beginning with the last half of 1987. Tr. p. 12. Petitioner has offered to produce those documents within 60 days. Tr. p. 9.

The Commission staff agree to accept the Petitioner's proposal if they have a right to require the production of additional documents responsive to the CID from the files of Center Art, at a later date, upon sixty days notice to the Petitioner. The Commission agrees with the Petitioner and the staff on the proposed staggered production schedule for documents created after the postal authority seizure and modifies the CID accordingly.

To the extent that they have not already been produced, Petitioner shall produce within two weeks of the date of this letter (1) artists files, (2) employee tax forms sufficient to identify employees annotated to the extent possible with the employee's position, and (3) receiving logs post-dating the document seizure in 1987. Within sixty days of the date of this letter, the Petitioner shall produce all other documents responsive to the CIDs for two months of each year since and including 1987; however, the months of 1987 shall be after the document search. This schedule amounts to twelve months worth of documents chosen from the period 1987 to the present. The staff and Petitioner have already agreed upon November and December of 1987 and January and February of subsequent years.

Petitioner shall be obligated to produce additional documents from its general chronological files if, after receiving the first round of documents, Commission staff request additional production. Petitioner shall be given 60 days notice before it is required to produce additional documents, and is obligated to produce such additional documents as the staff request on the same staggered production schedule, producing documents for any twelve months that post-date the 1987 document seizure, chosen by the staff, every 60 days. The Commission understands that this schedule resolves the objections to the CID by Center Art, except for the documents seized in the earlier postal investigation.

C. Petitioner asserts that certain documents that were illegally seized by postal authorities should not be produced pending resolution of the appeal of the litigation between postal authorities and Petitioner.

On April 15, 1987, postal inspectors led a team of thirty law enforcement officers in a search of six separate Center Art locations. During the search, virtually all of the business records of Center Art were seized. As already noted, the United States District Court for the District of Hawaii found the search warrants overbroad and ordered all of the documents, except those relating to prints attributed to Salvador Dali, suppressed. Motion for Return, at 688. In a subsequent ruling, the United States Court of Appeals for the Ninth Circuit upheld the District Court suppression order. 875 F.2d 747.

The 1987 search of Center Art was part of an investigation that led to subsequent convictions that are now on appeal to the Ninth Circuit.[5] Because of the ongoing appeal, Petitioner argues that the CID should be quashed to the extent it calls for documents that were seized and subsequently ordered returned to Center Art (hereinafter "suppressed documents"). Because the illegal seizure covered virtually all of the business records of Center Art, Petitioner argues that it should produce no documents that pre-date the seizure.

Petitioner does not contend that because the documents were illegally seized, the Commission can never obtain the documents in a civil investigation. Tr. p. 21. Rather Petitioner argues that because of the possibility that the suppressed documents, or information contained in the documents, may reach the postal authorities or government prosecutors prior to a Ninth Circuit decision on the pending appeal, Petitioner should not have to produce such documents until after that decision. Tr. pp. 18-19, 21-22.

In addition, Petitioner alleges that the condition of the documents precludes any complete or systematic search of the files that were seized and later returned. Tr. p. 22. Pursuant to the court ruling that the documents were illegally seized, the documents were returned to

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[5] *United States v. Wiseman, Center Art Galleries-Hawaii, Inc., and Mett*, Nos. 90-10612, 90-10616, and 90-10617 (9th Cir.). The Commission understands that the appeal briefs have been filed, and oral argument is scheduled for July 20, 1992.

Center Art. However, the documents were never re-integrated into Center Art's filing system. According to Petitioner, the documents are simply kept in boxes. Tr. p. 28. Additional documents from Center Art have been added to the boxes, and Petitioner now estimates there are 6.5 million documents in the boxes.[6] Pet. p. 10. Counsel for Petitioner sampled a few boxes and found that the information on the labels on the boxes may or may not reflect the contents of the box. Tr. p. 10.

Addressing the issue of the burden first, the staff have offered a procedure for the staff to examine a sample of the documents. As an alternative to producing all documents from 1986 and 1987 that are called for in the CID, the staff suggested a two-part procedure, in which Center Art would first produce a list of the information on the labels on the boxes in storage, recognizing that the labels may or may not be accurate. In the second part of the procedure, the staff propose to identify twenty to thirty boxes, and that the production from 1986 and early 1987 be limited to whatever relevant documents from those years are found in the chosen boxes.

At the oral presentation on the Petition, counsel for Petitioner estimated that it would take 15 to 20 days to simply inventory the labels on the boxes, and an additional 60 days to actually produce the documents from the boxes chosen by the staff, beyond the time required to produce the documents from the post-seizure period, 1987 to the present. Counsel for Petitioner made it clear that he was not agreeing to such a schedule because Petitioner still sought a ruling on quashing the CID with respect to the illegally seized documents. However, in the event of an adverse ruling on that issue, such a schedule would not impose an undue burden on Center Art. Tr. p. 35.

The Commission denies Petitioner's request to quash the CID with respect to the suppressed documents. Several considerations justify this ruling. First, Petitioner has not shown that those documents bear on any issue in the pending criminal appeal. Second, Petitioner has shown no conceivable mechanism by which those

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[6] Petitioner claims to have 315 boxes. Tr. p. 10. Experience with the production of large volumes of documents suggests that Petitioner's estimate probably errs on the high side. However, Petitioner's representations are sufficient to convince the Commission that Petitioner possesses a large number of documents.

documents could somehow be used in a criminal case in which the trial is already over; in which, therefore, the record was closed long ago; and in which the appeal will be argued in only a few weeks. Third, any request for access by federal law enforcement authorities would have to be considered and ruled on by the Commission's General Counsel, under a grant of authority that establishes strict guidelines for release of agency records to coordinating agencies. *See* 15 U.S.C. 46(f), 57b-2(b)(6); 16 CFR 4.11(c). Petitioner establishes no basis for assuming that the General Counsel or the Commission's staff would participate, either intentionally or inadvertently, in any improper release of information. Neither does Petitioner establish any basis for the implicit assumption that government prosecutors or other federal law enforcement officials would improperly or illegally seek access to FTC records in knowing or negligent violation of an applicable federal court order, assuming that such an order existed. Absent such a showing, no limitation of the CID, nor any additional restriction on the staff's use of the information, is appropriate.

Based on the information presented, the Commission modifies the CID with respect to the suppressed documents in the following manner. Within 70 days from the date of this letter,[7] the Petitioner shall produce to the Commission staff a list of the boxes of documents held in storage, including in the list, whatever descriptive information is on the outside of the boxes. The staff shall then identify to Center Art no more than 30 of the boxes, and within 60 days of the date staff informs Center Art of their selection, Center Art shall produce all documents contained in those boxes that are responsive to the CID.

Petitioner shall be obligated to produce additional documents from these storage boxes if, after receiving the first round of documents, Commission staff request additional production. Petitioner shall be given 60 days notice before it is required to produce additional documents and is obligated to produce such additional documents as the staff request on the same staggered

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[7] This date is 10 days after the date for production of the documents from the general chronological files discussed in Part II above.

production schedule, producing documents from up to thirty boxes, chosen by the staff, every 60 days.

IV. Conclusion

For the foregoing reasons, the Petition to Limit or Quash the Civil Investigative Demand for Documentary Material filed by Center Art Galleries-Hawaii, Inc. is granted in part and denied in part. Petitioner is directed to comply with the Civil Investigative Demand according to the staggered schedule set forth above.

Pursuant to Rule 2.7(f), within three days after service of this ruling, Petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise directs.

Re: Request of Center Art Galleries-Hawaii, Inc. for Review of Ruling by Full Commission on the Petition to Limit and/or Quash CID, File No. 872-3209.

July 30, 1992

Dear Mr. Bain:

The Commission has considered: (a) the Petition on behalf of Center Art Galleries-Hawaii, Inc. ("Petitioner" or "Center Art") to Limit and/or Quash Civil Investigative Demand; (b) the transcript of the hearing thereon; (c) the CID specifications at issue; (d) the June 22, 1992 letter ruling by Commissioner Owen granting in part, and denying in part, the Petition; and (e) your request for full Commission review of that ruling, including the documentary attachments ("Request for Commission Review").

In requesting full Commission review, Center Art focuses its appeal on the ruling that Petitioner must produce some of the documents that were ruled to have been illegally seized during a criminal investigation of Center Art. Request for Commission Review at 4.[1] In its Request, for the first time, Center Art specifically asks the Commission to delay any production requirement with respect to the suppressed documents pending the outcome of a possible retrial that might result from the pending appeal of its criminal conviction.[2] Presenting new material in its Request for Commission Review, Center Art further argues that certain alleged past misconduct by federal criminal investigators or prosecutors demonstrates that suppressed documents, once in the Commission's possession, will be obtained unlawfully by such prosecutors, even in violation of a court order. The Commission denies Petitioner's Request to delay production and, in all other respects, adopts Commissioner Owen's letter ruling.

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[1] *See In re Motion for Return of Property Pursuant to Rule 41, Federal Rules of Criminal Procedure,* 681 F. Supp. 677 (D. Haw. 1988), *aff'd, Center Art Galleries-Hawaii. Inc. v. United States,* 875 F.2d 747 (9th Cir. 1989) [hereinafter "*In re Motion for Return of Property*"].

[2] *United States v. Wiseman, Center Art Galleries-Hawaii, and Mett,* Nos. 90-10612, 90-10616, and 90-10617 (9th Cir.).

The Commission finds that these arguments do not differ substantively from Petitioner's previous argument that the seized documents should not be produced pending resolution of the criminal appeal. As stated in the letter ruling on Center Art's Petition, requests for access by federal law enforcement authorities must be considered and ruled upon by the Commission's General Counsel, and in certain instances, the Commission, under a grant of authority that establishes strict guidelines for release of agency records to coordinating agencies.[3] The Commission finds that the appropriate remedy for any improper conduct by government prosecutors hypothesized by Petitioner is not to impede the Commission's independent investigation of Petitioner; but rather for Petitioner to apply to the court with jurisdiction over the criminal case for appropriate relief and, thereafter, to seek sanctions for any violation of that court's order that might have occurred. Accordingly, the Commission denies Petitioner's request to delay production.

In all other respects, the Commission has determined that the Request for Commission Review raises no new issues.[4] The Commission therefore concurs with, and hereby adopts, that ruling.

Under Rule 2.7(f), the timely filing of a request for full Commission review shall not stay the return date specified in the ruling, unless otherwise specified by the Commission. The Commission notes that Petitioner may implicitly seek a stay of the dates for compliance with the CID specified in the ruling.[5] The Commission denies that request. The return dates remain as specified in Commissioner Owen's letter ruling.

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[3] *See* 15 U.S.C. 46(f), 57b-2(b)(6); 16 CFR 4.11(c).

[4] Center Art further contends that the letter ruling "is based upon incorrect facts," referring to the statement that the district court "ordered all of the documents, except those relating to prints attributed to Salvador Dali, suppressed." Request for Commission Review at 6. Center Art correctly notes that the district court ordered all seized evidence returned, except the Dali prints and other works of arts. *In re Motion for Return of Property*, 681 F. Supp. 617, 687-88. We find that this incidental misstatement of fact concerning the district court's ruling has no bearing on the ultimate conclusions stated in the letter ruling.

[5] *See* Request for Commission Review at 6, 12 (requesting that the CID "be held in abeyance pending outcome of [Center Art's] criminal appeal").