

Order

IN THE MATTER OF

BASIC RESEARCH, L.L.C.**ORDER**

This matter comes before the Commission on the certification by Chief Administrative Law Judge Stephen J. McGuire (“ALJ”) of three procedural motions relating to Respondents’ allegation that Complaint Counsel’s disregard of the Commission’s rules regarding electronic filings resulted in the posting and disclosure of Respondents’ confidential documents on the Commission’s public Web site. The Commission treats this allegation as a serious matter, and recognizes the public interest in ensuring that all reasonable measures be taken to safeguard confidential information from improper disclosure. Accordingly, as explained below, the Commission, after reviewing Respondents’ arguments and Complaint Counsel’s responses, has determined to dispose of the certified motions by: (1) imposing certain procedural restrictions on Complaint Counsel for the remainder of this proceeding to help prevent any recurrence of the posting of information designated confidential by Respondents or by any other submitter, but otherwise denying Respondents’ motion for an order to show cause why Complaint Counsel should not be held in contempt, including Respondents’ request for dismissal and monetary relief; (2) granting in part and denying in part Respondents’ motion seeking access to certain internal agency electronic files by providing Respondents’ with aggregate FTC Web server data; and (3) denying Respondents’ motion for additional discovery.

I. Background**A. The Documents and Motions at Issue**

The documents at issue consist of five exhibits contained in Complaint Counsel's Motion for Partial Summary Decision, filed January 31, 2005, and one exhibit contained in Complaint

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Counsel's Motion to Compel, filed December 6, 2004.¹

Respondents allege that these exhibits were subject to the ALJ's protective order issued August 11, 2004, and should not have been posted to the Web site. Nonetheless, as explained further below, the exhibits accompanying Complaint Counsel's January 31 motion were posted to the FTC's public Web site on February 15, 2005, and, when Complaint Counsel discovered this situation, the documents were removed from the Web site at Complaint Counsel's request on February 17, 2005. At the same time, the allegedly confidential exhibit contained in Complaint Counsel's December 6 motion, which had been previously posted, was also removed from the Web site.

After learning of these postings, Respondents filed an emergency motion, dated February 18, 2005, seeking production of the Commission's web server logs and any other relevant electronic files to determine who may have accessed these exhibits while they were publicly posted. *See Respondents' Emergency Motion Requiring the Commission to Provide Respondents With Electronic Files Showing Who Accessed Respondents' Confidential Information While It Was on the Commission's Website—Expedited Briefing Requested* (Feb. 18,

¹ The five exhibits, or portions thereof, attached to Complaint Counsel's January 31 motion and at issue here are: Exhibit 11 (i.e., Exhibit A to Respondent's Response to Complaint Counsel's First Set of Interrogatories, containing product ingredients and ratios); Exhibit 15 (i.e., Exhibit A to Supplemental Answers and Answers to Complaint Counsel's First Set of Interrogatories, containing net gross revenue and advertising expenditures); Exhibit 36 (customer e-mail); Exhibit 42 (combined balance sheet and notes); and Exhibit 45 (advertising dissemination schedule). Also at issue is Exhibit R (gross sales figures) to Complaint Counsel's December 6, 2004, Motion to Compel.

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2005) (“Electronic Files Motion”).² By subsequent motion, Respondents further sought an order to show cause why Complaint Counsel should not be held in contempt of the ALJ’s protective order. *See* Respondents’ Motion for Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt (March 8, 2005) (“Contempt Motion”). Finally, Respondents moved for leave to take additional discovery regarding Complaint Counsel’s alleged violation of the protective order. *See* Respondents’ Motion for Leave to Take Discovery Regarding Complaint Counsel’s Violation of the Protective Order (March 8, 2005) (“Discovery Motion”).³

² Complaint Counsel filed a partial response to the Electronic Files Motion, requesting additional time for a supplemental response. *See* Complaint Counsel’s Partial Response to Respondents’ Emergency Motion (Feb. 18, 2005). By order dated February 22, 2005, ALJ McGuire granted Respondents’ request in its Electronic Files Motion for expedited briefing and ordered Complaint Counsel to file its supplemental response by February 25, 2005. *See* Complaint Counsel’s Supplemental Response to Respondents’ Emergency Motion (Feb. 25, 2005) (“Electronic Files Supplemental Response”); *see also* Reply to Complaint Counsel’s Partial & Supplementary Responses to Respondent’s Emergency Motion (Mar. 4, 2005); Order for Respondents to Show Cause (Mar. 9, 2005) (requiring respondents to show cause what information posted to the Web site was, in fact, confidential); Respondents’ Response to Order to Show Cause (Mar. 16, 2005).

³ *See also* Complaint Counsel’s Consolidated Opposition to Respondents’ Motion For Order to Show Cause Why Complaint Counsel Should Not Be Held in Contempt and Respondents’ Motion for Leave to Take Discovery (Mar. 21, 2005) (“Consolidated Opposition”).

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B. Respondent's Arguments and Complaint Counsel's Responses

Respondents assert that the exhibits in question contain, *inter alia*, business records and other confidential information, and, in one instance, a consumer's e-mail address and other personal information. Respondents assert that these exhibits containing this information were designated "confidential" pursuant to the ALJ's protective order, as noted earlier, and that Complaint Counsel violated the protective order by using e-mail for filings containing confidential material, in violation of Commission Rule 4.2(c)(3), 16 C.F.R. § 4.2(c)(3) (prohibiting the use of e-mail to transmit nonpublic filings to the Office of the Secretary). Respondents assert that Complaint Counsel's use of e-mail to transmit such confidential materials to other FTC document processing staff led to their erroneous posting on the FTC Web site by such staff, and constituted contempt of the protective order. Respondents assert that the posting of the materials caused them irreparable harm, and that the only appropriate remedy is dismissal of the complaint and monetary relief, including attorney costs. *See* Contempt Motion at 5-6, 23-35. Further, Respondents argue that production of certain electronic files is necessary to show who may have accessed the documents in question while they were posted on the Commission's Web site. *See* Electronic Files Motion at 2-3. Finally, Respondents seek additional discovery, including depositions of Complaint Counsel and other FTC staff, as well as documentary material relating to Complaint Counsel's alleged violation of the protective order. *See* Discovery Motion at 9-13.

Complaint Counsel have acknowledged that they used e-mail to transmit both the public and non-public versions of their January 31 motion and exhibits to the Commission's document processing staff. Complaint Counsel argue, however, that Respondents were fully aware of Complaint Counsel's ongoing use of e-mail to transmit electronic copies of non-public filings, that Respondents had failed to raise any objections to this practice, and that, in any event, the posting of the non-public version of the exhibits at issue resulted from an error once they

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were received by document processing staff, and not because the exhibits had been transmitted by e-mail. *See* Electronic Files Supplemental Response, Att. B, ¶¶ 14, 22.

Complaint Counsel assert that they have not acted in bad faith, and that when they discovered that the non-public version of the exhibits were publicly posted, they took immediate steps to have them removed from the public FTC Web site and to preserve the related electronic files. *See* Consolidated Opposition at 21-66. Further, Complaint Counsel argue that Respondents have failed to demonstrate, as a threshold matter, that the exhibits meet relevant standards for *in camera* treatment; that the Respondents had failed to designate certain exhibits properly in order for them to be subject to the protective order; and that no harm has been demonstrated from the posting of any of the exhibits on the FTC's Web site. *Id.* at 4-5; Electronic Files Supplemental Response at 4-6. Complaint Counsel argue that Respondents are not entitled either to dismissal of the complaint on the merits or monetary sanctions, that their Motion for discovery of electronic files cannot be granted without violating the Commission's privacy policy, and that their request for additional discovery should also be denied. *See* Electronic Files Supplemental Response at 3-4; Consolidated Opposition at 66-71.

C. The ALJ's Certifying Order

On April 6, 2005, after reviewing the Respondents' arguments and Complaint Counsel's responses, Judge McGuire issued an order certifying the Respondents' three motions to the Commission (*i.e.*, Electronic Files Motion, Contempt Motion, and Discovery Motion). *See* Order Certifying Motions to Commission and Staying Proceedings ("Certifying Order"). In his order, Judge McGuire concluded that Complaint Counsel violated Rule 4.2(c)(3) by e-mailing nonpublic filings, that all but one of the exhibits that were e-mailed appeared to contain information that is entitled to *in camera* treatment under the Commission's rules and precedent, and that the exhibits disclosed on the FTC's Web site were subject to the protective order applicable in this proceeding. Certifying Order at 7-10.

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Judge McGuire nevertheless determined that the three motions must ultimately be certified to the Commission because: “(1) the motions raise allegations, *inter alia*, requiring determination of matters beyond the merits of the violation of law charged in the Complaint; (2) the challenged conduct appears to involve components of the Commission and/or employees other than Complaint Counsel; and (3) the requested relief exceeds the authority delegated to the Administrative Law Judge.” Order at 2; *see also id.* at 10.

Accordingly, the Respondents’ three motions now are presented to the Commission for resolution. As described below, this Order: denies the Contempt Motion but grants appropriate alternative relief; grants in part and denies in part the Electronic Files Motion; and denies the Discovery Motion.

II. Discussion

The Commission addresses the Contempt Motion first, because the other two motions, which relate to discovery, turn upon the disposition of the Contempt Motion.

A. Contempt Motion

Respondents’ Contempt Motion seeks dismissal of the Commission’s complaint, asserting that such a remedy is appropriate when it is shown that a party has acted willfully or in bad faith in violating an order of an ALJ. We reject this request. While intent is a relevant factor on the issue of dismissal, it is not determinative. The Commission must also consider the strong public policy favoring disposition of cases on their merits, the potential availability of less drastic alternatives, and, most important, whether the Respondents have suffered any actual prejudice in the litigation itself as a result of the alleged violations. *See Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002) (factors relevant to whether dismissal is warranted under Fed. R. Civ. P. 41); *Bowling v. Hasbro, Inc.*, No. 04-1364, 2005 U.S. App. LEXIS 5867 (Fed. Cir. Apr. 11, 2005).

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Here, we observe that the Commission's complaint is brought in the public interest, that dismissal would not be the only available or feasible remedy, and that Respondents have failed to allege or demonstrate how the posting of the documents on the FTC Web site has prejudiced the Respondents with respect to the merits of the proceeding. Accordingly, even assuming *arguendo* that Respondents could demonstrate that Complaint Counsel's actions constituted an intentional or willful violation of the ALJ's protective order, the extraordinary remedy of dismissal is not justified. *See, e.g., Coleman v. American Red Cross*, 23 F.3d 1091, 1095-96 (6th Cir. 1994) (although attorney intentionally violated a protective order, it was an abuse of discretion to dismiss the case on that ground unless moving party could show how it had been prejudiced in the litigation).

While Respondents note that Commission Rule 3.38 authorizes the striking of a pleading, motion or other submission as a sanction for violations of an ALJ discovery order, nothing in that Rule compels dismissal of the complaint here. These discovery sanctions are designed as potential compensation for an improper denial of access to testimony, documents, or other evidence resulting from a party's failure to comply with discovery. *See* 16 C.F.R. § 3.38(c). Although the protective order was undoubtedly issued in connection with discovery, the posting of the exhibits on the FTC's Web site has not deprived or interfered with the Respondents' access to any relevant testimony, document, or other necessary evidence. Likewise, Respondents' allegation of serious competitive business harm from the alleged improper disclosure, even if proven to be true, would not constitute prejudice to any substantive claims or defenses that might be a factor in this litigation.

Nonetheless, the Commission believes that there is a sufficient basis in the existing record of this proceeding to conclude that Complaint Counsel violated the terms of Commission Rule 4.2(c)(3), *supra*, which prohibits the filing of confidential exhibits by e-mail. Specifically, affidavits submitted by Complaint Counsel concede that e-mail was used to transmit an unredacted (non-public) version of their January 31 motion to FTC document

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processing staff.⁴ To the extent that Complaint Counsel's violation of this Rule contributed, in whole or part, to confusion by document processing staff about the nonpublic status of the exhibits at issue and resulted in their posting on the FTC Web site, the Commission believes that Complaint Counsel's Rule violation is enough to warrant remedies, irrespective of Complaint Counsel's alleged intent or any showing of actual harm by Respondents.⁵

The Commission has determined that an appropriate remedy, rather than dismissal, is to require that, for the remainder of the present proceeding, all future public filings by Complaint Counsel under Rule 4.2(c)(3) be reviewed and certified by the Associate

⁴ Complaint Counsel's admission obviates the need to determine whether Complaint Counsel's acts or omissions constituted contempt of the protective order, which would require the Commission to resolve numerous underlying factual and legal issues (*e.g.*, Complaint Counsel's alleged intent, the intervening responsibility or role, if any, of Commission staff other than Complaint Counsel in the posting of the documents on the Web site, and whether the documents at issue were properly subject to the protective order in this proceeding). Indeed, threshold issues might be raised about the possible overdesignation of confidential materials under the protective order; we note that Judge McGuire determined that at least one of the exhibits at issue would not satisfy the standards for *in camera* treatment. In any event, resolving such issues would require a show cause hearing to make additional factual or legal findings that ultimately are not necessary for the Commission to fashion appropriate relief.

⁵ The Chairman has already directed the Executive Director, in consultation with the Office of General Counsel, to examine whether any further action would be warranted, such as taking any additional safeguards or making other changes to the Commission's policies, procedures and practices for the handling of information designated confidential, in light of the violation in this proceeding.

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Director for the Division of Enforcement, Bureau of Consumer Protection, to ensure that such public filings have been properly redacted, and that they contain no unredacted material that would violate the Rule. This remedy is intended to help avoid any future violations of the protective order and the Rule.

The Commission is cognizant that a remedy designed to prevent a future violation does not necessarily address a past violation. In that regard, Respondents' Contempt Motion asks the Commission for monetary relief to redress it for the time and expense it has incurred in pursuing this matter. The Commission, however, has no authority to grant such relief in the context of this proceeding.⁶

Accordingly, for the reasons stated above, the Commission grants the relief described above, but otherwise denies Respondents' motion for an order to show cause why Complaint Counsel should not be held in contempt, including Respondents' request for dismissal or monetary relief.

B. Electronic Files Motion

In addition to sanctions and monetary relief, Respondents have asked for the production of Web server log information that Respondents allege would reveal who may have accessed the exhibits at issue from the Commission's Web site. The Commission has determined to grant this motion in part by granting Respondents access to aggregate Web log data that reveal the Web domains from which requests to the exhibits in question were received. Disclosure of this information provides Respondents with information regarding the extent of the disclosures and may allow the Respondents to contact these domains to determine to what extent the domain operators

⁶ Absent statutory authority, the Commission may not award attorney costs or other expenses allegedly incurred by Respondents as a result of Complaint Counsel's actions. *See, e.g.*, 67 Comp. Gen. 574, 576 (1988).

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themselves, or users of these domains, may have retrieved, stored, used, shared, or disclosed exhibits from the FTC's servers.⁷

The Commission, however, denies Respondents' Electronic Files Motion to the extent that it seeks specific Internet Protocol (IP) addresses or other information that would personally identify any specific individual. The Commission acknowledges that such personally identifiable information might better serve Respondents' stated purpose to identify and contact specific individuals who may have accessed the exhibits at issue. Nonetheless, the disclosure of such personally identifiable information would violate the Privacy Act of 1974, 5 U.S.C. § 552a, to the extent, if any, that disclosure would constitute the improper establishment, retrieval, and disclosure from an agency system of records pertaining to an individual by name or other personal identifier (*e.g.*, a number or electronic address). The Act prohibits the retrieval and disclosure or use of such information without the individual's consent unless authorized by the Act. Retrieval and disclosure of such information under the present circumstances to the Respondents would neither be consensual nor for a purpose authorized by the Act.

Moreover, such disclosure would violate the FTC's Web privacy policy, which unequivocally states that Web server log information is used strictly as "aggregate" data and is not used to "track or record" information about individuals. The Commission believes that it would not serve the public interest for the Commission to compound Complaint Counsel's violation of Rule 4.2(c)(3) and make a disclosure of Web log information that could violate the privacy rights of other individuals who have been assured a certain degree of anonymity when visiting the FTC's Web site. In disclosing aggregate data, the Commission is

⁷ The Commission is unable to grant the Respondents' related request for any relevant "security logs," because the exhibits at issue were posted on public FTC servers (*i.e.*, no password or other security clearance must be submitted in order to access those servers).

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making available as much information as possible to the Respondents while remaining consistent with applicable privacy laws and policy. As already discussed, disclosure of aggregate data would allow Respondents to contact the operators of the Web domains from which requests for the exhibits originated, and determine if those domains might assist in identifying, retrieving, or destroying any copies of the exhibits that may have been retained by users of those domains or by the domain operators themselves, without requiring that the Commission potentially violate privacy law and policy by disclosing personally identifying information (*e.g.*, IP addresses) to the Respondents.

C. Discovery Motion

In addition to seeking Web log information, the Respondents, through a separate Discovery Motion, also have sought additional internal FTC documents that they believe would shed light on the circumstances surrounding the posting of the exhibits at issue, including depositions of Complaint Counsel and other agency support staff, any relevant personnel or training files, and any other information concerning the agency's privacy policies and practices.

Discovery in Commission adjudicatory proceedings under Part 3 of the Commission's Rules is limited to matters that are relevant to the allegations of the Commission's complaint, to the relief proposed therein, or to the Respondents' defenses, none of which is at issue in this Discovery Motion. *See* 16 C.F.R. § 3.31. To the extent Respondents argue that such discovery is necessary regarding issues of Complaint Counsel's credibility and culpability for the posting of the exhibits, such discovery is unnecessary, given the relief granted by the Commission to address Complaint Counsel's violation of Rule 4.2(c)(3). Therefore, the Commission denies the Discovery Motion.

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III. Conclusion

Accordingly, for the reasons stated above, the Commission:

- (1) Orders Complaint Counsel for the remainder of this proceeding to obtain prior review and certification by the Associate Director of the Division of Enforcement, Bureau of Consumer Protection, or in the rare event that he or she is unavailable, the Bureau's Deputy Director, of any future public filings by Complaint Counsel to ensure the proper use and redaction of materials subject to the ALJ's protective order and protect against any violation of that order or applicable rule, but otherwise denies the Respondents' Contempt Motion, including the request for dismissal and monetary relief;
- (2) Grants the Respondents' Electronic Files Motion in part, by ordering that the General Counsel release to the Respondents aggregate Web log data responsive to the Motion, and denies the Motion in part, to the extent it seeks access to specific IP addresses or any other personally identifiable information;
- (3) Denies the Respondents' Discovery Motion; and
- (4) Orders that the stay of this proceeding is hereby lifted, that the proceeding shall not be further stayed, except pursuant to the conditions and requirements set forth in Part 3 of the Commission's Rules, and that the proceeding shall remain subject to the time limits prescribed by Rule 3.51, 16 C.F.R. § 3.51, for the issuance of the Initial Decision, with an additional allowance of time, if needed, equivalent to the number of business days that have elapsed between the date of the Certifying Order and the date of this Order.

Response to Petition

**Re: Petition to Quash Filed by United FreshStart
(hereinafter “Petitioner” or “UFS”), File No. 042 3195**

March 24, 2005

Dear Mr. Clabaugh:

This letter advises you of the disposition of the UFS Petition to Quash the Civil Investigative Demand (“CID”) for written interrogatories, documentary materials, and oral testimony issued in conjunction with an investigation of UFS’s conduct by the Federal Trade Commission (hereinafter “FTC” or “Commission”). The Petition to Quash is denied for the reasons hereinafter stated. The new dates for Petitioner to comply with the CID are April 8, 2005, with respect to interrogatory answers and the production of documents, and April 15, 2005, with respect to oral testimony.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

I. Background and Summary

The CID was issued on December 21, 2004 – production of interrogatory answers and documents was required by January 20, 2005 and the investigational hearing was scheduled for February 11, 2005. On January 19, 2005, counsel for UFS spoke to Staff as technically required by Commission Rule § 2.7(d)(2), 16 C.F.R. § 2.7(d)(2), to discuss compliance issues related to the CID. In particular, you, on behalf of UFS, advised Staff that UFS would only comply with the CID if it were “granted immunity from

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail.

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prosecution.” Statement of Counsel for UFS at 1. Staff indicated that the FTC had neither the authority to prosecute criminal claims nor the power to grant immunity from prosecution. Later that same day, UFS’s Petition to Quash was timely filed.

II. Petitioner Has Failed to Substantiate Any Basis for Relief.

The factual basis for this Petition is provided by unsupported assertions of counsel. The Petition is not accompanied by any affidavits or other materials under oath.² In substance, UFS claims that it is entitled to relief from the commandment of the CID on four separate grounds: (1) the resolution authorizing the investigation only covers bankruptcy and financial counseling services, not foreclosure avoidance services and, thus, all the information sought is beyond the scope of the investigation authorized by the Commission; (2) the information sought is overly broad and not sufficiently related to the subject of the investigation to survive scrutiny under the Fourth Amendment; (3) UFS cannot be compelled to respond to the CID in violation of its rights against self-incrimination under the Fifth Amendment; and (4) tax returns and related information are statutorily privileged pursuant to 26 U.S.C. § 6103.

A. UFS has provided no factual basis for its claim under the Fifth Amendment.

Even conceding that an individual may sometimes be protected from the compelled provision of incriminating testimony and materials by reason of the Fifth Amendment, UFS has demonstrated no factual support for its claim that such protection is available to it or even that its claim of such privilege here has been properly invoked. In the first place, the privilege against

² The “Statement of Counsel for United FreshStart” was neither certified nor did it contain any factual representations supporting any claim for relief set forth in UFS’s Petition to Quash.

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compelled incriminating testimony does not extend to corporations or other collective entities. *See, e.g., Braswell v. United States*, 487 U.S. 99 (1988); and *Bellis v. United States*, 417 U.S. 85, 88-90 (1974). UFS has provided no facts suggesting either that it is a sole proprietorship or that the circumstances of the production of the materials requested would constitute compelled testimony of an inculpatory nature by an individual. *See United States v. Hubbell*, 530 U.S. 27, 34-39 (2000). Second, the privilege against compelled testimony cannot be asserted in a wholesale fashion. “A person may not make a ‘blanket assertion’ of the [Fifth Amendment] privilege.” *United States v. Aeilts*, 855 F. Supp. 1114, 1116 (C.D. CA 1994) (citing *United States v. Brown*, 918 F.2d 82, 84 (9th Cir. 1990)). The Commission’s Rules and general investigatory practice require privilege claims to be asserted in a more detailed manner to keep blanket claims of privilege from being used to sweep in unprivileged materials. *See, e.g.,* 16 C.F.R. §§ 2.7, 2.8A, and 2.9. The privilege must be asserted on a document-by-document basis, *Aeilts, supra*, and a “question-by-question basis.”³ *United States v. Bodewell*, 66 F.3d

³ Because the privilege must be asserted by the witness at the time each question is propounded and in response to each such question where it can be asserted, there is no reason to excuse the attendance of UFS from the investigational hearing commanded by the CID. Further, as the Sixth Circuit pointed out in *United States v. Mayes, et al*, 512 F.2d 637, 649 (6th Cir. 1975):

The Fifth Amendment privilege against self-incrimination is a privilege personal to the witness. *United States v. Goldfarb*, 328 F.2d 280 (6th Cir. 1964). . . . While the witness is entitled to the advice of counsel before determining whether he should invoke the privilege, *United States v. Compton*, 365 F.2d 1 (6th Cir. 1966), and while it is within the discretion of the trial judge to permit counsel for the witness to invoke the privilege on his behalf, 8 Wigmore, *supra*, § 2270, the nature of

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1000, 1002 (9th Cir. 1995); and *Brown*, 918 F.2d at 84 (“A person must have the chance to present himself for questioning, and as to each question elect to raise or not to raise the defense.”) (internal quotation marks omitted). Third, UFS must establish a factual basis for the Commission to believe that its compelled responses to the CID would subject it to “substantial and real, and not merely trifling or imaginary[] hazards of incrimination.” *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (quoting earlier Supreme Court cases – internal quotation marks omitted). Fourth, since the contents of UFS’s documents were in all likelihood voluntarily prepared by UFS in the ordinary course of its business and not by reason of government commandment in furtherance of a criminal investigation, the contents of such documents are not likely to be entitled to any privilege. *United States v. Fisher*, 425 U.S. 391, 410 (1976). This is especially true with respect to so-called “required records” which must be produced even if the privilege against compelled testimony might otherwise apply. *Shapiro v. United States*, 335 U.S. 1, 17 (1948). Finally, no burden falls upon Staff to resolve any ambiguity regarding UFS’s assertion of a claim of privilege until such time as UFS has established “a prima facie claim of privilege.” See *United States v. Yurasovich*, 580 F.2d 1212, 1221 (3rd Cir. 1978). In the present circumstances, the Commission cannot assume that UFS is entitled to claim the privilege any more than it can assume that UFS will assert the privilege in the proper manner on each occasion where it might be entitled to do so. Accordingly, UFS’s Petition to Quash must be denied on its claim arising under the Fifth Amendment.

the privilege is such that in the final analysis the controlling decision is that of the witness himself. . . . There may be a constitutional privilege against testifying and at the same time be a powerful incentive to get on the stand and tell the truth. The alternatives for the witness are seldom easy.

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B. UFS's business falls within the scope of the resolution authorizing the use of compulsory process.

According to the Petition, "Petitioner provides services to help homeowners avoid foreclosure proceedings against their homes. It does not provide bankruptcy counseling or *typical* financial services of any type." Petition at 2 (emphasis supplied). The Commission's resolution of March 5, 1984, which authorized Staff's use of this CID, is directed toward investigation of "the bankruptcy and financial counseling services industry." The Commission does not understand UFS to deny that it provides financial counseling services, only that its services might not be "typical." An intent to limit Staff to only those investigations of the financial counseling industry involving "typical" services cannot be found in our resolution. The present investigation of UFS is precisely the type of investigation intended by the resolution of March 5, 1984. Furthermore, the materials sought by the CID are precisely the sort of materials that are relevant to such an inquiry. There is, therefore, no basis for the Commission to grant this Petition to Quash on the grounds that information sought by the CID is not reasonably related to the nature and scope of the investigation authorized by the resolution.

C. Nothing contained in the Fourth Amendment supports UFS's claim for relief from the CID.

Petitioner next claims that the CID is "overbroad, unnecessarily burdensome and oppressive" and violates its Fourth Amendment right to be free from unreasonable searches and seizures. Petition at 1. The Petitioner has "the burden of showing that an agency subpoena is unreasonable . . . and, 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." *Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (1973), *cert. denied*, 415 U.S. 915 (1974). This is especially so in light of the breadth of inquiry this Commission is permitted to conduct. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[I]t is sufficient if

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the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.”). UFS did not provide any factual or legal support for its Petition to Quash on this ground and it must, therefore, be denied.

Petitioner’s claim of overbreadth is simply without merit. The materials sought are relevant to the inquiry being undertaken.⁴ It would be somewhat anomalous for this Commission to grant UFS’s overbreadth claim when Petitioner did not even avail itself of the opportunity to narrow the scope of its production when it conferred with Staff in advance of filing its Petition to Quash. See *United States v. Bailey*, 228 F.3d 341, 349 (4th Cir. 2000) (“But before a court will conclude that a subpoena is ‘arbitrarily excessive,’ it may expect the person served ‘to have made reasonable efforts . . . to obtain reasonable conditions’ from the government.”).⁵ Indeed, asking Staff for immunity from prosecution is hardly comparable to seeking relief from the scope of required production. Rather than seeking relief from production, such a request merely seeks to escape one potential, alleged consequence of such production.

⁴ UFS claims that 14 of the Interrogatories and 10 of the document specifications “are not reasonably related to the nature and scope of the investigation. . . .” Petition at 3. UFS provides no explanation of the basis for this claim. The Commission has reviewed each of the specifications cited by UFS and expressly finds that each is reasonably related to the nature and scope of the investigation. Accordingly, these claims do not provide UFS with any additional ground for relief.

⁵ Quoting *Morton Salt*, 338 U.S. at 653 (“Before the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions.”).

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Allegations of burden must likewise be supported with specificity. As the Commission stated in *National Claims Service, Inc., Response to Petition to Limit Civil Investigative Demands*, 125 F.T.C. 1325, 1328-29 (1998):

In short, Petitioner's burden allegation must be rejected as completely unsubstantiated. At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (e.g., the person-hours and cost of meeting the particular specifications at issue). Petitioner has failed to do any of these things.

Likewise here, UFS has failed to provide "a single affidavit or shred of documentary evidence supporting the existence of this alleged burden." *Id.* at 1328. See *United States v. Stuart*, 489 U.S. 353, 360 (1989) (holding that the investigated party bears the burden of proving that the subpoena is unduly burdensome). Having failed to do any of these things with any reasonable degree of specificity, UFS is, therefore, entitled to no relief on this ground.

Invocation of the Fourth Amendment adds virtually nothing to the analysis of UFS's claim for relief. The test applied by a court to the enforcement of an administrative agency's investigative subpoena is "limited to determining 'if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.'" *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (DC Cir. 1979) (quoting *Morton Salt*, 338 U.S. at 652). This does not appear to be materially different from the Supreme Court's standard of review under the Fourth Amendment as set forth in *Donovan v. Lone Star, Inc.*, 464 U.S. 408, 415 (1984):

We [have] . . . described the constitutional requirements for administrative subpoenas . . . as follows:

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“It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.”

See v. City of Seattle, supra, 387 U.S., at 544, 87 S.Ct., at 1740 (footnote omitted). *See also United States v. Morton Salt Co.*, 338 U.S. 632, 652-653, 70 S.Ct. 357, 368-369, 94 L.Ed. 401 (1950).

Id. This CID is limited in scope to the subjects set forth in the Resolution attached to the CID, the materials sought have been found to be relevant to that purpose, and Petitioner makes no complaint that the materials sought are not described with sufficient particularity. The Constitution requires nothing more. Accordingly, the Petition to Quash must be denied on Fourth Amendment grounds.

D. Nothing contained in 26 U.S.C. § 6103 provides UFS with a ground for relief.

Petitioner objects to the provision of certain information on the ground that tax returns and related information are “confidential pursuant to the provisions of Title 26 U.S. Code Section 6103.” Petition at 1. UFS’s reliance on this provision of law is without merit. The prohibition of that statute runs against officers and agents of the United States with respect to copies of such materials in the hands of the government. If the Commission was seeking the information from the IRS, Petitioner’s claim might have some merit. However, as explained by the Second Circuit Court of Appeals:

The disclosure of tax returns which is forbidden by both federal and state law to protect the integrity of the tax reporting and collecting system is an unauthorized disclosure of the filed returns, directed primarily against

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employees of government in the taxing departments.
Disclosure by the taxpayer himself of his copies of returns is not an unauthorized disclosure, even though it be made by reason of legal compulsion.

United States ex rel. Carthan v. Sheriff, City of New York, 330 F.2d 100, 101 (2nd Cir. 1964). UFS's Petition to Quash must, therefore, be denied on this ground.

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** UFS's Petition to Quash should be, and it hereby is, **DENIED**. Pursuant to 16 C.F.R. § 2.7(e), the new dates for Petitioner to comply with the subject CID are: April 8, 2005, with respect to interrogatory answers and document production; and April 15, 2005, with respect to oral testimony.

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Re: Request to the Full Federal Trade Commission to Review the Ruling Denying the Petition to Quash Filed by United FreshStart (hereinafter “Petitioner” or “UFS”), File No. 042 3195

April 6, 2005

Dear Mr. Clabaugh:

This letter advises you of the Commission’s disposition of UFS’s Request to the Full Federal Trade Commission to Review the Ruling Denying the Petition to Quash the Civil Investigative Demand¹ (“CID”) issued in conjunction with an investigation of UFS by the Federal Trade Commission (hereinafter “FTC” or “Commission”). The Request to Review is denied for the reasons stated below. Pursuant to the provisions of 16 C.F.R. § 2.7(f), the dates for Petitioner to comply with the CID remain April 8, 2005, with respect to interrogatory answers and the production of documents, and April 15, 2005, with respect to oral testimony.

The Commission issued a CID to UFS on December 21, 2004 with return dates of January 20, 2005 and February 11, 2005. On January 19, 2005, counsel for UFS timely filed the Petition to Quash. On March 24, 2005, Commissioner Harbour, acting as the Commission’s delegate, *see* 16 C.F.R. § 2.7(d)(2), directed the issuance of the decision denying UFS’s Petition to Quash because UFS had not shown any facts which entitled UFS to relief from the commandment of the CID. On March 31, 2005, UFS filed its Request to Review.

UFS requested relief from the CID on the grounds that: (1) the resolution authorizing the investigation only covers bankruptcy and financial counseling services, not foreclosure avoidance services and, thus, all the information sought is beyond the scope

¹ The phrase “Request to Review” shall be used to refer to UFS’s request for Commission review of the prior decision of Commissioner Harbour which denied UFS’s Petition to Quash Civil Investigative Demand (hereinafter “Petition to Quash”).

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of the investigation authorized by the Commission; (2) the information sought is overly broad and not sufficiently related to the subject of the investigation to survive scrutiny under the Fourth Amendment; (3) UFS cannot be compelled to respond to the CID in violation of its rights against self-incrimination under the Fifth Amendment; and (4) tax returns and related information are statutorily privileged pursuant to 26 U.S.C. § 6103. The factual basis for the Petition to Quash was provided by unsupported assertions of counsel. The Petition to Quash was not accompanied by any affidavits or other materials under oath.² The Request to Review does not supply any additional facts or legal arguments.

The Commission has reviewed the record created by UFS in support of its Petition to Quash and its Request to Review. That record does not support any of the claims for relief advanced by UFS. Accordingly, UFS has not carried its burden of proof establishing its entitlement to relief from the CID. *See Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (1973), *cert. denied*, 415 U.S. 915 (1974) (holding that the petitioner has “the burden of showing that an agency subpoena is unreasonable . . . and, 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.”).

For the reasons set forth in the Commission’s ruling of March 24, 2005 denying UFS’s Petition to Quash, **IT IS ORDERED THAT** such ruling should be, and it hereby is, **AFFIRMED**. Pursuant to 16 C.F.R. § 2.7(f), the dates for Petitioner to comply with the subject CID remain: April 8, 2005, with respect to interrogatory answers and document production; and April 15, 2005, with respect to oral testimony.

² The “Statement of Counsel for United FreshStart” accompanying UFS’s Petition to Quash was neither certified nor did it contain any factual representations in support of any claim for relief set forth in the Petition to Quash.