

Interlocutory Orders, Etc.

IN THE MATTER OF

**INOVA HEALTH SYSTEM FOUNDATION
AND
PRINCE WILLIAM HEALTH SYSTEM, INC.**

Docket No. 9326 – Order, June 17, 2008

ORDER DISMISSING COMPLAINT

On May 8, 2008, the Federal Trade Commission issued the Administrative Complaint in this matter, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), having reason to believe that Respondents Inova Health System Foundation (“Inova”) and Prince William Health System, Inc. (“PWHS”) had entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint Counsel and the Respondents have now filed a Joint Motion to Dismiss Complaint, on the grounds that the Respondents have abandoned the transaction and have withdrawn their Hart-Scott-Rodino Notification and Report Forms.¹ By Order dated June 13, 2008, Commissioner J. Thomas Rosch, serving by designation as the Administrative Law Judge in this matter, has certified the Joint Motion to the Commission.

The Commission has determined to dismiss the Administrative Complaint without prejudice, consistent with both Commission precedent and the current posture of this case. In *Equitable*,² for example, the Commission dismissed the administrative complaint without prejudice after the Respondents publicly announced that they had mutually terminated the acquisition agreement at issue in

¹ *Joint Motion to Dismiss Complaint* (June 11, 2008) (“Joint Motion”), available at <http://www.ftc.gov/os/adjpro/d9326/080611jointmodismisscmplt.pdf>.

² *In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company*, Docket No. 9322, Order Dismissing Complaint (January 31, 2008) (Public Version), at 2, available at <http://www.ftc.gov/os/adjpro/d9322/080204complaint.pdf>.

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the matter, and one of the Respondents filed a notice of that termination with the U.S. Securities and Exchange Commission. Similarly, in *Swedish Match*,³ the Commission dismissed the administrative complaint without prejudice after the parties determined to abandon the transaction at issue and Swedish Match AB withdrew the applicable Hart-Scott-Rodino Notification and Report Form. The Commission noted:

The withdrawal of the Notification and Report Form – and the parties’ abandonment of the February 10, 2000 Asset Purchase Agreement – ensure that the most important elements of the relief set out in the administrative complaint’s Notice of Contemplated Relief have been accomplished without the need for further litigation in this case. Therefore, the public interest warrants dismissal of the administrative complaint. The Commission has determined to do so, however, without prejudice, because it is not reaching a decision on the merits.⁴

For similar reasons, the Commission dismissed the administrative complaint in *H.J. Heinz*⁵ after the Respondents abandoned the transaction at issue.

In this matter, as in the foregoing cases, the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation. In particular, the

³ *In the Matter of Swedish Match North America Inc., and National Tobacco Company, L.P.*, Docket No. 9296 (*Swedish Match*), Order Dismissing Complaint (January 4, 2001), available at <http://www.ftc.gov/os/2001/01/swedishdismisscmp.htm>.

⁴ *Id.*, citing *R.J. Reynolds Tobacco Company*, Docket No. 9285, Order Dismissing Complaint (January 26, 1999), at 4.

⁵ *In the Matter of H.J. Heinz Company, Milnot Holding Corporation, and Madison Dearborn Capital Partners, L.P.*, Docket No. 9295 (*H.J. Heinz*), Order Dismissing Complaint (December 4, 2001), available at <http://www.ftc.gov/os/2001/12/heinzorder.pdf>.

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Respondents have publicly announced that they have abandoned the proposed merger at issue. Moreover, the Respondents have withdrawn the Hart-Scott-Rodino Notification and Report Forms they filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED that the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission, Commissioner Rosch not participating.

RESPONSES TO PETITIONS TO QUASH OR
LIMIT COMPULSORY PROCESS

**SOLVAY PHARMACEUTICALS, INC.,
BESINS HEALTHCARE, INC.,
WATSON PHARMACEUTICALS, INC.,
WATSON PHARMA, INC.,
PAR PHARMACEUTICAL COMPANIES, INC.,
AND
PADDOCK LABORATORIES, INC.**

FTC File No. 071 0060 – Decision, March 14, 2008

RESPONSE TO PAR PHARMACEUTICAL COMPANIES, INC.’S AND
PADDOCK LABORATORIES, INC.’S PETITION TO QUASH OR LIMIT
SUBPOENAS DATED FEBRUARY 13, 2008

Dear Mr. Gidley:

The challenged subpoenas were issued in the Commission’s investigation to determine whether there is reason to believe that patent settlements between a manufacturer of branded pharmaceuticals and Petitioners (Par Pharmaceutical Co., Inc. and Paddock Laboratories, Inc.) violate § 5 of the Federal Trade Commission Act. 15 U.S.C. § 45. This letter advises you of the Commission’s disposition of the Petition to Quash or Limit Subpoenas Dated February 13, 2008 (“Petition to Quash”) issued to Messrs. Paul Campanelli, Ed Maloney, and Scott Tarriff for oral testimony at investigational hearings to be conducted in accordance with the provisions of Commission Rules 2.8 and 2.9, 16 C.F.R. §§ 2.8, 2.9, on various dates, compliance with which is stayed pending disposition of this motion. 16 C.F.R. § 2.7(d)(4). Commissioner Pamela Jones Harbour, acting as the Commission’s delegate, in her sole discretion, has referred this Petition to the full Commission for determination. *See Id.*

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The Petition to Quash does not challenge the Commission's right to take these investigational hearings or argue that the hearings themselves constitute some undue burden; rather, it argues that video recording of investigational hearings is prohibited by the Commission's Rules, and would deprive Petitioners of due process of law. The Petition to Quash is denied for the reasons stated herein. Unless modified in accordance with 16 C.F.R. § 2.7(c), Messrs. Campanelli, Maloney, and Tarriff must comply with the Subpoenas *Ad Testificandum* on the following dates: Campanelli, March 28, 2008; Maloney, April 4, 2008; and Tarriff, April 10, 2008.

I. Background and Summary

The Federal Trade Commission issued subpoenas *ad testificandum* on February 13, 2008, to Messrs. Campanelli, Maloney, and Tarriff for oral testimony at investigational hearings. Petitioners' counsel accepted service of process on their behalf. In relevant part, each subpoena provides that: "The investigational hearing of [person directed to appear] will be recorded by sound-and-visual means in addition to stenographic means." Exhibits A, B, and C to Petition to Quash. Petitioners timely filed the Petition to Quash on February 20, 2008.¹

II. Investigative Authority of the Federal Trade Commission.

The investigational powers of the Commission are derived from Sections 6, 9, 10 and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, 57b-1, and are exercised in accordance with the procedures set out in Part 2A of the Commission's Rules. 16

¹ In ruling on the Petition to Quash, the Commission expressly does not reach the issue of whether Petitioners have standing to file the Petition to Quash subpoenas served on Messrs. Campanelli, Maloney, and Tarriff – who are either current or former employees of Petitioners – without joining them as parties to this Petition to Quash. While the Commission has reason to believe that counsel for Petitioners also represent Messrs. Campanelli, Malone, and Tarriff, no representation to that effect appears in the Petition to Quash. The Commission assumes that the individuals subpoenaed are aware of the instant Petition to Quash and have elected not to raise any objections particular to themselves regarding compliance with the subpoenas.

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C.F.R. §§ 2.1-2.16. Congress vested the Federal Trade Commission with broad independent authority to enact rules and regulations to carry out its mission. The Commission has properly implemented those rules of practice for non-adjudicative Part 2 proceedings, including investigational hearings, through proper rule making procedures. *See id.* The Commission's Rules do not forbid videotaping investigational hearings. The Petition to Quash, however, claims that the *absence* of express reference to videotaping in the Rules bars the Commission from videotaping investigational hearings.

Congress intended the Commission to “have ample power of subpoena” which it “expressly made broad enough to permit a full exercise of that power in connection with any kind of investigation which may be undertaken.” H.R. Rep. No. 63-533, pt. 1, at 7 (1914). The courts have confirmed the “[C]ongressional purpose to endow the Commission with broad powers of investigation. . . .” *Fed. Trade Comm’n v. Browning*, 435 F.2d 96, 99 (D.C. Cir. 1970). This is the context in which the Commission must interpret whether the Commission's Rules allow videotaping of investigational hearings.

III. The Rules Permit Videotaping of Investigational Hearings.

Investigational hearings are conducted pursuant to Commission Rules 2.8 and 2.9. Rule 2.8(b) reads in part that investigational hearings “shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.” 16 C.F.R. § 2.8(b). Petitioners interpret this language as foreclosing all other means of recording investigational hearings.² In doing so,

² Petitioners' reliance on an analogy to the 1993 amendments to the Federal Rules of Civil Procedure allowing videotaped depositions, Petition to Quash at 5, to argue that a negative implication is appropriate here is unpersuasive. The important feature of the 1993 amendment was not that it referred to videotaping, but that it allowed the noticing party to decide to videotape without prior leave of court. Fed. R. Civ. P. 30(b)(2) and (3) advisory committee notes (1993). Further, the Federal Rules of Civil Procedure provide no authority regarding the Commission's own Part 2 – Nonadjudicative Procedures.

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Petitioners read the Rule narrowly and ask the Commission to find a negative implication in the Rule's reference to stenographic recording and transcription.³

The Commission finds that the requirement that such hearings be "stenographically reported" and transcribed establishes a *minimum* standard of recordation, and, further, that this minimum standard does not foreclose any, much less all, other means of recording. Were we to accept Petitioners' narrow reading of the rule, it would forbid court reporters from using stenotype machines or other modern recording systems such as steno masks, audiotapes, and digital back-up systems to enhance the accuracy of transcription. It would also seem to prohibit both Commission staff and counsel for the witness from taking longhand notes during the course of investigational hearings.⁴ The Commission sees no merit in denying either itself or the witness the protections afforded by an accurate record, and therefore does not draw any negative or preclusive inference from the Rule's stenographic reporting requirement. Instead, we find that the FTC Act and our Rules permit video recording of investigational hearings.

³ Although not stated by Petitioners, they in effect ask the Commission to invoke the old Latin maxim of construction *expressio unius est exclusio alterius* in their favor. Reed Dickerson refers to this maxim as, "Several Latin maxims masquerade as rules of interpretation while doing nothing more than describing results reached by other means. . . . Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context." REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234-35 (1975). Likewise, Richard Posner observed that the Supreme Court's usage of this maxim "confirms that judicial use of canons of construction is opportunistic." RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 282 (1985). The Commission's rules concern themselves with insuring the fairness and reliability of its investigations; accordingly, we decline the opportunity to use this maxim to construe Rule 2.8 in a manner that would preclude using technology to enhance the accuracy of the records of investigational hearings without enhancing fairness in anyway.

⁴ The Petition to Quash, page 4, relies on a narrow definition of stenography: "1: the art or process of writing in shorthand[] 2: shorthand esp. written from dictation or oral discourse[] 3: the making of shorthand notes and subsequent transcription of them – stenographic. . . *adj* – stenographically. . . *adv*' . . ." (citation omitted).

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Rule 2.8(b), 16 C.F.R. § 2.8(b) states that “[i]nvestigational hearings shall be conducted. . . for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation.”⁵ Witness testimony includes both verbal and nonverbal evidence, sometimes referred to as the witness’s demeanor, or demeanor evidence. Petitioners’ interpretation of Rule 2.8(b) would require the Commission to hold that the Rule was intended to yield records of investigational hearings devoid of witness demeanor evidence. Videotaping captures the witness’s nonverbal testimony which, at a minimum, relates to a subject which is always relevant in an investigation: the credibility of each witness.⁶

Finally, the Petition to Quash relies on various cases at pages 5 and 6 for the general proposition that the Commission cannot violate its own rules, especially when doing so would be prejudicial to others. However, the Petitioners concede that the rules do not explicitly forbid the use of videotaping. Moreover, Petitioners have not identified how supplementing the stenographic record of these

⁵ “Data” is neither a narrow nor technical term. It includes “factual information. . . used as a basis for reasoning, discussion, or calculation” . . . as well as “information output by a sensing device or organ that includes both useful and irrelevant or redundant information and must be processed to be meaningful.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 293 (10th ed. 2002).

⁶ In appropriate cases, 16 C.F.R. § 2.9(b)(6) provides additional authority for videotaping investigational hearings. The person conducting the hearing is vested with broad discretion to “take all necessary action to regulate the course of the hearing” in order to “avoid delay” and to “prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct. . . .” *Id.* “Conduct that a stenographic transcript could not adequately convey – such as aggressive examination, abusive treatment of opposing counsel or the witness, and witness coaching – may be preserved in full detail on video. Therefore, the video deposition is a powerful means of curbing discovery abuse.” Michael J. Henke and Craig D. Margolis, *The Taking and Use of Video Depositions: An Update*, 17 REV. LITIG. 1, 20 (1998). Videotaping provides the person conducting the hearing with an important tool to protect the integrity of the investigation and the subjects being investigated. Videotaping a hearing, especially one not directly supervised by an independent adjudicative officer, can be a “necessary action to regulate the course of the hearing” within the meaning of Rule 2.9(b)(6).

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hearings with videotape could unfairly prejudice the witnesses. Accordingly, the cases cited by Petitioners are inapposite and the Commission finds that Petitioners have not provided sufficient law or facts to warrant granting this Petition to Quash.⁷

IV. Videotaping These Investigational Hearings Will Not Infringe Any of Petitioners' Due Process Rights.

Petitioners do not claim that the Commission's procedures for these investigational hearings, other than videotaping, deprive them or Messrs. Campanelli, Maloney, and Tarriff of any due process rights. Rather, Petitioners argue that "videotaping an investigational hearing would erode the constitutional distinction between an investigational hearing and an adjudicative hearing. . ." because it "would over-dignify the former and imperil the sanctity of the latter." Petition to Quash at 9. Petitioners further argue that "there is no genuine reason to seek to [videotape] other than to attempt to invade a subsequent adjudicative proceeding with the videotaped testimony from the investigational hearing." *Id.* at 10.

Petitioners also do not identify which attribute of videotaping makes that recording medium more capable of turning investigational hearings into adjudicative hearings than the attributes of any other recording medium – be it stenography, audio tape recording, or trial testimony regarding the investigational hearing. Thus, Petitioners have advanced no cognizable claim that videotaping, by itself, could ever abridge their due process rights, in these or any other hearings.

Finally, Petitioners assert that testimony taken during an investigational hearing can never be admissible in evidence at the time of trial. Petition to Quash at 9-10. Petitioners have not shown how differences between stenographic recording and video

⁷ See *Fed. Trade Comm'n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) ("The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to the purpose.").

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recording would ever determine whether that testimony should be received in evidence at trial. Petitioners also have not demonstrated, and we reject any implication, that it would *always* be impermissible as a matter of due process to offer testimony from our investigational hearings into evidence at the time of trial. Indeed, Petitioners themselves cite a case which is contrary to that proposition.⁸ The means used to memorialize investigational hearing testimony does not control whether or when that testimony can be used at trial. Whether particular testimony from an investigational hearing will be admissible at the time of trial depends on facts particular to the evidence being offered, the circumstances prevailing at the time of the offer, and the purpose for which it is offered.

Because the Commission cannot anticipate every fact that might arise at the time of trial bearing on the admissibility of any given testimony that might be taken during these investigational hearings, it would be premature and speculative for the Commission to rule on

⁸ *Universal Church of Jesus Christ, Inc. v. Comm’r of Internal Revenue*, 55 T.C.M. (CCH) 144 (1988), cited by Petition to Quash at 12, is such a case. In that matter a witness was confronted with his prior contradictory testimony from an investigational hearing conducted by the FTC during a subsequent IRS adjudicative proceeding testing the validity of a claimed tax exemption. See also *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 4; *FTC v. Foster*, No. Civ. 07-352, 2007 WL 1793441, at *9, *38 (D.N.M. May 29, 2007); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 117 n.4, 141, 152 (D.D.C. 2004). Indeed, the Supreme Court has even allowed illegally seized evidence which could not be used as evidence in the prosecutor’s case-in-chief in a criminal trial to be used to impeach a defendant’s testimony. *Walder v. United States*, 347 U.S. 62, 65 (1954) (“It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government’s possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.”). Petitioners’ reliance on *Hanna v. Larche*, 363 U.S. 420 (1960), is unavailing. Petition to Quash at 1, 7-9. Nothing in that case questions the reliability of the Commission’s investigational hearings or limits the subsequent use of testimony from such hearings in adjudicative proceedings under appropriate circumstances.

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such issues at this time. There will be time enough for the trial judge to review any due process implications arising from such evidence. Accordingly, we find that this Petition to Quash does not raise any due process issues we can resolve at this time regarding subsequent uses of testimony from these investigational hearings, regardless of how they might be recorded.

V. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED** that the Petition to Quash be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), Messrs. Campanelli, Maloney, and Tarriff must appear and testify on the following dates: Mr. Campanelli, March 28, 2008; Mr. Maloney, April 4, 2008; and Mr. Tarriff, April 10, 2008.

By direction of the Commission.

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WEST ASSET MANAGEMENT, INC.*FTC File No. 072 3006 – Decision April 18, 2008*RESPONSE TO WEST ASSET MANAGEMENT, INC.’S PETITION TO
LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Berg:

This letter advises you of the disposition of the Petition to Limit Civil Investigative Demand (“Petition”) served on West Asset Management, Inc. (“Petitioner” or “WAM”) in conjunction with an investigation of WAM’s conduct by the Federal Trade Commission (“FTC” or “Commission”). The Petition is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the Civil Investigative Demand (“CID”) is May 8, 2008.

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

Discussions between Petitioner and Commission Staff concerning the need for WAM’s business records began months before this CID was served on WAM on August 14, 2007. Petition at 1, 9. Frequent discussions with WAM regarding the scope of the CID, record storage and retention practices, confidential and sensitive information in business records relating to consumers and WAM’s clients, data sampling possibilities, and the burden of producing information responsive to various specifications of the

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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CID continued until the Petition was timely filed on November 5, 2007. Petition at 10-13. It should be noted that WAM claims to have provided some material responsive to the CID; however, Staff and WAM have divergent opinions on the extent to which these materials substantially comply with the CID as a whole.²

The CID was issued as part of the Commission's investigation to determine whether WAM, a debt collection firm, may have violated either the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* or the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* WAM has requested that the CID be limited "because: (1) the requests are unduly burdensome and can be reasonably limited without adversely impacting the FTC's investigation; and (2) the requests require the disclosure of confidential and personally identifiable consumer and client information³ that is not relevant in any manner to the FTC's investigation." Petition at 2. WAM seeks to withhold production of confidential and sensitive information on the grounds of relevance;⁴ however, the relevance of information

² Compare Petition at 11 n.2 ("This conference call is but one example of the extraordinary efforts WAM made to assist the FTC.") with Petition at 13 n.3 ("In this letter [Petition, Exhibit S, Letter from Bradley Elbein to Andrew Berg dated Oct. 26, 2007], Mr. Elbein stated his belief that WAM had not retained audio recordings pursuant to its obligations under the CID. . . .") and Petition, Exhibit O (Letter from Robin Rock to Andrew Berg dated Oct. 19, 2007) at 2 ("Although no qualification or objection was raised in response to Document Request No. 21, it now appears that WAM made a significantly less than complete production of its business records.").

³ Except where context might otherwise require, this opinion will use the phrase "confidential information" to refer collectively to the types of information WAM seeks to withhold from its responses to the CID, including confidential business information, client identity information, personally identifiable consumer information, and protected health information.

⁴ The Petition's actual claim is not that information identifying potential witnesses would be irrelevant to this investigation; rather, it is that WAM should be permitted to redact such identifying information because a mere theoretical risk of disclosure should outweigh the Commission's need for witness information. Petition at 27-28. With respect to client identity information, WAM proposes to insert a unique identifier into the records being produced, and the identifying information would be produced, if necessary, in response to a subsequent request from the Commission. *Id.* WAM notes that Staff had previously agreed to this procedure, *id.* at 27, but fails to note that "WAM has made it patently obvious that

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regarding the identity and location of consumers and clients, each of whom may, in turn, have information regarding WAM's business practices, is beyond legitimate question.⁵

WAM notes that the Regional Director for the Commission's Southeast Region offered to modify the CIDs in several respects on October 26, 2007.⁶ Petition at 2-3. WAM, however, claims those proposed modifications "make no meaningful difference." *Id.* at 3. Accordingly, the Commission will review and, for the reasons set out below, enforce the CID as issued.⁷

WAM's arguments against enforcement of the CID intertwine the issues of burden and the handling of confidential information.

redacting its clients' identities is time consuming and costly, and negatively impacts its ability to comply with the CID. Therefore, although we have thoroughly considered WAM's suggestion that it replace client information with another identifier, we cannot accommodate this request without significantly undermining our investigation. We, therefore, decline to acquiesce to this request." Petition, Exhibit A at 3, Letter from Dama Brown to Andrew Berg dated Oct. 26, 2007.

⁵ This is especially so in this case where we do not know whether WAM is primarily engaging in debt collection for its own account or as the agent of its client, including, for example, a client who may have directed, audited, or ratified practices of WAM for which the Commission might seek legal redress from both WAM and its client. As a result, such redaction could mask the identity of witnesses, as well as that of potential respondents or defendants in an enforcement action, clearly information which is relevant in a Commission investigation.

⁶ WAM indicates this was the first and only time the Regional Director offered to modify the CID to address its burden concerns. *But see* Petition, Exhibit E (Letter from Brad Elbein to Andrew Berg dated August 31, 2007). Even if the claim were literally correct, it still fails to note that the Commission Staff offered several concessions to accommodate WAM's burden concerns during the investigation prior to issuance of the CID. Petition, Exhibit D (Letter from Robin Rock to Andrew Berg, dated March 23, 2007).

⁷ Commission Staff and WAM each have an incentive to insure that WAM's burden of responding to the CID is no greater than necessary. The Commission's Rules are sufficiently flexible to permit reasonable adjustments in the scope, scale, and timing of WAM's responses to the CID. *See, e.g.*, 16 C.F.R. § 2.7(c). This Letter Ruling will deal with the thorny issues regarding confidential information. Thereafter, well-motivated counsel for both sides can and should apply themselves to the task of insuring that WAM's burden is no greater than necessary.

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But, these issues actually are not inseparable. For instance, if the burden of production for a particular class of records lies almost exclusively in the time and costs necessary to redact particular information within those records, it would be illogical to attempt resolution of the burden issue before addressing the information confidentiality issues.

Before turning to those issues, however, it is necessary to emphasize the fact that the party who moves to limit the enforcement of a CID bears the burden of demonstrating that a particular CID specification is unreasonable – the Commission does *not* need to demonstrate that a specification is reasonable. “[T]he burden of showing that an agency subpoena is unreasonable remains with the respondent, . . . 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. (Citations omitted).” *Fed. Trade Comm’n v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979), quoting *Sec. and Exchange Comm’n v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). Petitioner repeatedly and inappropriately structures its arguments for relief by contending that the Commission failed to show that a specification is necessary or reasonable. *See, e.g.*, Petition at 27 (“The FTC has not shown that the disclosure of creditor identifying information. . . is needed for its investigation.”). Thus, the Petitioner inappropriately attempts to shift the burden regarding the reasonableness of the CID’s specifications from WAM to the Commission.

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II. WAM Is Not Entitled to Withhold Confidential Information.⁸

WAM has not asserted a legally cognizable claim of privilege as to any portion of its records. It instead relies on statutory confidentiality provisions of federal law, e.g., the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 (Aug. 21, 1996) *as amended by* Pub. L. 105-33 (Aug. 5, 1997) *and* Pub. L. 105-34 (Aug. 5, 1997) (“HIPAA”), and on the confidentiality and data security provisions of contracts with its clients. As a general matter, confidentiality or privacy concerns do not provide a ground for exclusion, in the absence of a claim of privilege, unless “compliance threatens to unduly disrupt or seriously hinder normal business operations.” *Fed. Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 882 (DC Cir. 1976). The DC Circuit in *Invention Submission Corp.* did not lighten or change this standard just because disclosing the identity of potential witnesses to the FTC might place the respondent under a “cloud of suspicion and speculation.” If the mere creation of a cloud of suspicion were sufficient to stay enforcement, then every CID in every investigation would be suspect. *Fed. Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (DC Cir. 1992). WAM has not shown that disclosure of confidential

⁸ WAM has made no showing that the confidentiality provisions of 15 U.S.C. § 57b-2 are inadequate to protect WAM’s legitimate interests in avoiding public disclosure of confidential information. Contrary to WAM’s assertion that the “FTC offers no guarantee the information will be kept confidential,” Petition at 25, the FTC is not required to do so. It is, rather, WAM’s burden to show that production of confidential information to the Commission is highly likely to result in the public disclosure of that information. *Exxon Corp. v. Fed. Trade Comm’n*, 589 F.2d 582, 589 n.14 (DC Cir. 1978) (“[J]udicial intervention to prevent potential injury from prospective governmental misconduct is only justified when such misconduct is imminent, not merely hypothetical”). WAM correctly notes that two FTC laptops with confidential information were once stolen. See Petition at 26. It is, however, entirely inappropriate to extrapolate from that a high likelihood that WAM’s confidential information is or will ever be publicly disclosed to anybody. Petitioner offers no basis to support even *speculation* that the Commission’s privacy and data security procedures, either before or after the laptop thefts, are or would be inadequate to protect WAM’s legitimate data privacy and protection needs.

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information to the FTC threatens to unduly disrupt or hinder its business operations.

A. HIPAA Does Not Support WAM's Right to Withhold Confidential Information.

Regulations adopted by the Department of Health and Human Services govern when otherwise protected health information may be disclosed to law enforcement officials. Those regulations do not support WAM's confidentiality claims in this matter. In pertinent part, 45 C.F.R. § 164.512(f) permits a covered entity⁹ to disclose protected health information¹⁰ to a law enforcement official under certain circumstances. In this particular case, the protected health information sought by the CID is relevant and material to a legitimate law enforcement inquiry under the FDCPA, the requests are specific and limited in scope to the extent practicable in light of the circumstances, and de-identified information would not permit the FTC to identify potential witnesses within the meaning of 45 C.F.R. § 164.512(f)(1)(ii)(C)(1 - 3).¹¹ HIPAA provides no basis for WAM to withhold protected health information from its responses to the CID.

⁹ WAM effectively claims to be a covered entity by reason of client contract provisions making its operations subject to HIPAA when it provides collection services to medical services providers. Petition at 23-24.

¹⁰ The Commission assumes without deciding that all of the confidential information WAM seeks to withhold by reason of the data security provisions of HIPAA is protected health information within the meaning of HIPAA.

¹¹ A police officer *without a subpoena* can obtain more protected health information under 45 C.F.R. § 164.512(f)(2)(i)(A - H) than WAM's interpretation would have provided to the FTC with a CID under 45 C.F.R. § 164.512(f)(1). Rule 164.512(f)(2) permits an officer without subpoena to obtain name and address, date and place of birth, social security number, ABO blood type and rh factor, type of injury, date and time of treatment, and date and time of death (if applicable), as well as distinguishing physical characteristics, in order to identify or locate a suspect, fugitive, material witness, or missing person.

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B. WAM's Client Contracts Do Not Support Withholding Confidential Information.

WAM cites no legal authority for the proposition that a person can shield its business records from all law enforcement scrutiny simply by signing a contract with a business partner which so provides. This is not surprising. It makes no sense for parties to a private contract to be able to trump the Commission's Congressionally-mandated investigative authority through such a simple business expedient. Thus, unless WAM can show that disclosing the identity of its clients would as a practical matter destroy its business, *Invention Submission Corp.* precludes any relief here for WAM.¹²

WAM's Petition at page 25 makes an unsubstantiated claim that disclosure of consumer information, or seeking client authorizations to disclose confidential information, to the FTC would cause it significant commercial harm. The nature of this harm appears to be that disclosure to its clients of "the pendency of the FTC's investigation would unduly punish WAM and cause significant business harm. . . ." Petition at 28. WAM's argument ignores the fact that the Commission Rules expressly provide that "[a]ll petitions to limit or quash investigational subpoenas or civil investigative demands and the responses thereto" are part of the public records of the Commission, except for certain information that is exempt from disclosure in certain circumstances. 16 C.F.R. §§ 2.7(g), 4.9(b)(4)(i)(2008). Thus, while the Rules may permit confidential treatment of certain information contained within a given petition – provided that such information satisfies the criteria

¹² 965 F.2d at 1090. The District Court in that case expressly rejected a CID respondent's claim that the terms of private contracts could exempt it from compliance with compulsory process issued by the FTC. *Fed. Trade Comm'n v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991) ("Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought[;] . . . any other state of affairs would undermine the Commission's mandate to investigate unfair business practices. . . simply by protecting all information under confidentiality agreements.").

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prescribed by Commission Rule 4.10(a), 16 C.F.R. § 4.10(a) – the Rules do not authorize the filing of “*In re John Doe*” petitions, and thereby prevent public disclosure of the existence of a petition or the identity of the petitioner.

Petitioner provided three redacted exemplars of client contracts as Exhibits V, X, and Y to the Petition. A review of the provisions of WAM’s client contracts, however, does not support WAM’s argument that its provision of confidential information to the FTC in response to the CID would violate such contracts. The express provisions of Paragraph II.C. of Exhibit Y require WAM to promptly notify its clients whenever it is served with a CID for confidential information. The contract also requires WAM to permit its clients to participate in any challenge to “the legal validity of such subpoena or other legal process.” Petition, Exhibit Y, ¶ II.C.¹³ This provision obligated WAM to provide prompt notice to its clients of the pendency of the CID after its service on WAM. Given that, it would be inappropriate for the Commission to take cognizance of a harm to WAM (continued client ignorance of the pendency of this investigation) that can only occur through a breach of WAM’s contractual obligations to its clients.¹⁴

¹³ WAM’s reliance on language quoted out of context from Paragraph II.E. of Exhibit Y is not helpful to its argument. Petition at 27. The first sentence of Paragraph II.E. quoted by WAM, indeed requires prior written approval from the client before WAM can disclose “the business relationship between” client and WAM. The remaining provisions of the paragraph, however, clearly show that the intent of this paragraph is to preclude WAM from using the fact of its relationship with the client to promote or sell WAM’s collection services to others. WAM cites no authority which would compel, or even permit, the Commission to allow a general prohibition of advertising to void the specific contract provisions defining the obligations of the parties regarding receipt of compulsory process for confidential information. WAM’s construction of Exhibit Y, therefore, is unreasonable.

¹⁴ The other two contract exemplars fare no better when read properly. Exhibit V, for instance, prohibits any uses of “Protected Health Information. . . other than as permitted by HIPAA.” Petition, Exhibit V ¶ 14 at 9. HIPAA permits disclosure of confidential information to the FTC in this matter. Point II.A., *supra*. The Force Majeure provision in Exhibit X provides, “In the event that either party is unable to perform any of its obligations under this Agreement. . . because of. . . action or decrees of governmental bodies. . . the party who has been so effected shall

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Petitioner has not shown that the Commission should excuse it from providing confidential information in its CID responses either as a matter of fact, law, or discretion.

III. WAM Has Not Shown That Compliance with the CID Is Unreasonably Burdensome.

Allegations of burden must be supported with specificity.¹⁵ *In re National Claims Service, Inc., Petition to Limit Civil Investigative Demand*, 125 F.T.C. 1325, 1328-29, 1998 FTC LEXIS 192, *8 (1998). *National Claims* teaches that “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).” *Id.* WAM’s Petition fails to meet this burden.

WAM supports its Petition with a Declaration by Nancy Van Hoven which was included as an attachment to the Petition. WAM claims that it would take over two hundred days and cost more than \$300,000.00 to comply with CID Requests 23-27.¹⁶ Petition at 16,

immediately give written notice to the other party and shall do everything possible to resume performance.” Petition, Exhibit X ¶ 22 at 7. The CID is clearly an action or decree of a governmental body within the meaning of this paragraph. Further, reading this provision in that manner is consistent with other provisions of paragraph 3 of Exhibit X. Those provisions, for instance, require WAM to conduct its business in accordance with the provisions of FDCPA, which is enforceable by the FTC. *Id.* ¶ 3 at 1.

¹⁵ WAM has challenged the burdensomeness of CID Requests 23-27, and the inclusion of confidential information in Interrogatories 8, 22, and 26, and in Document Requests 21- 27. Petition at 13-14.

¹⁶ These statements of time and cost estimates are not factually supported. Even if each time and cost estimate were both accurate and verifiable, it still is not clear how much time it would take WAM to comply with the CID. For instance, to say a particular task takes 80 person/hours; does that mean it will be accomplished by ten people in one day or by one person in 10 days? If a project has five discrete steps or stages, each of which has a separately stated duration, will the accomplishment of those steps or stages be sequential or parallel, and will the time

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Decl. of Van Hoven ¶¶ 10-32, and Exhibit T. A substantial portion of those costs, however, appears to be costs associated with data reformatting and data deletion that do not appear to be necessary. For instance, it is not clear why electronic records of telephone conversations required under Document Request 25 have to be converted from “Voice Track” to “WAV” files in order to make them accessible to the Commission. Petition at 16. Paragraph 24 of the Van Hoven Declaration includes a conclusory statement to that effect, but it is unsupported by any fact. The Commission is not told whether this data conversion is required for any reason other than to permit the unnecessary redaction of confidential (but not privileged) information. There is no evidence in the record that WAM would incur substantial costs by producing the unredacted data to the FTC that is requested by the CID.

Even assuming that there were some merit to the cost estimates in the Van Hoven Declaration, these costs would only be the beginning of the analysis. In considering a petition to limit a CID the Commission must look at burden to the Petitioner in the context of the size and scope of the investigation and of the Petitioner in order to determine whether responding to the CID is likely to “pose a threat to the normal operation of [WAM’s business] considering [its] size.” *Fed. Trade Comm’n v. Rockefeller*, 591 F.2d 182, 190 (DC Cir. 1979).¹⁷ Here, given the scope and scale of WAM’s business, compliance with the CID will not likely pose such a threat to WAM. WAM is a wholly-owned subsidiary of West Corp. (a closely-held, multibillion dollar company) which generates nearly \$300 million in gross revenue per year, and the magnitude of its collection business is quite large both in number of collection efforts and dollar magnitude.¹⁸ As a result, the Commission finds that, even assuming

periods follow seriatim or overlap? Thus, the Petition’s claim that it will take in excess of 200 days for WAM to comply with the CID is largely unsupported.

¹⁷ See also *Federal Trade Comm. v. Standard American, Inc.*, 306 F.2d 231, 235 (3rd Cir. 1962) (finding petitioner had not provided sufficient evidence that compliance would lead to the “virtual destruction” of a business).

¹⁸ *West Reports Increase in Revenue for Collection Unit*, INSIDE ARM, Oct. 18, 2007, available at <http://www.insidearm.com/go/arm-news/west-reports-increase-in-revenue-for-collection-unit>.

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the accuracy of the Van Hoven Declaration, the record does not support a finding that WAM's burden of complying with the CID is likely to pose a sufficient threat to WAM's business operations to warrant limiting the CID.

V. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED** that WAM's Petition be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), Petitioner must comply with the CID by May 8, 2008.

By direction of the Commission.

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WELLNESS SUPPORT NETWORK, INC.*FTC File No. 072 3179 – Decision, April 24, 2008***RESPONSE TO WELLNESS SUPPORT NETWORK’S REQUEST FOR
FULL COMMISSION REVIEW OF DENIAL OF PETITION TO QUASH
CID**

Dear Mr. Fuerst:

This letter advises you of the Commission’s disposition of Wellness Support Network’s (“WSN”) Request for Full Commission Review of Denial of Petition to Quash CID (“Request for Review”) issued in conjunction with an investigation of WSN by the Federal Trade Commission (hereinafter “FTC” or “Commission”). The Request for Review is dismissed for the reasons stated below.

I. Background and Summary

On July 27, 2007, the Commission issued a CID to WSN in connection with the Commission’s investigation into advertising claims made by WSN regarding WSN[®] Diabetic Pack and WSN[®] Nerve Support Formula (hereinafter “WSN’s products”). The CID was issued pursuant to the Commission’s Resolution of May 12, 2006. On August 27, 2007, WSN timely filed its Petition to Quash.

WSN’s Petition to Quash claimed that the CID should be quashed for three reasons: (1) the FTC “has neither the authority nor the expertise to make a determination as to whether a product is a drug, medical food or a dietary supplement;” Petition at 4; (2) “the CID was not properly tailored to yield information that is relevant and material to this request for information;” *id.* at 9; and (3) the “CID is unreasonably overbroad and unduly burdensome,” *id.*

Commissioner Harbour, acting as the Commission’s delegate, see 16 C.F.R. § 2.7(d)(4), directed the issuance of a Letter Ruling on October 25, 2007 denying WSN’s Petition to Quash finding that the Commission had jurisdiction to investigate WSN’s advertising

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claims, that the information being sought was within the scope of the investigation, and that WSN had failed to establish that compliance with the CID would be unduly burdensome. The Order further directed WSN to comply with the CID by November 5, 2007.¹

WSN filed its Notice of Appeal on November 1, 2007 and submitted its Memorandum in Support of Request for Review (“Mem. in Support”) on the following day. On this appeal, WSN seeks review of the denial of its Petition to Quash, Mem. in Support at 1, and supplements its Petition to Quash with additional claims for relief not previously raised. WSN now claims for the first time that the CID must also be quashed because: (1) the FTC should defer to the Food and Drug Administration’s (“FDA”) consideration of WSN’s pending request for an advisory opinion on whether WSN’s products should be classified as medical foods, Mem. in Support at 2; (2) *res judicata* and collateral estoppel doctrines bar further investigation of WSN’s advertising claims because of the pendency of the FDA’s consideration of WSN’s request for an advisory opinion, *id.* at 7; (3) the FTC has no authority to regulate the practice of medicine, *id.*; and (4) compliance with the CID is unduly burdensome during the pendency of the FDA’s consideration of WSN’s request for an advisory opinion. *Id.* at 10. Neither WSN’s Petition to Quash nor its Mem. in Support provide any substantial legal or factual support for any of WSN’s claims for relief, including those first raised in this appeal.

II. WSN Waived Its Supplemental Grounds for Relief By Failing to Include Them In Its Petition to Quash.

¹ In its Mem. in Support at 1, WSN requested a stay of the requirement to comply with the CID by November 5 pending disposition of its appeal. The Commission, however, has reason to believe that WSN mooted its application for a stay pending appeal when it requested and received an extension of time from staff within which to comply with the CID until November 14, 2007. The Commission further has reason to believe that WSN substantially complied with the CID on that date. At a minimum, WSN’s substantial compliance with the CID also moots any claim that compliance with the CID would be unduly burdensome.

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The Commission's rules expressly provide that a Petition to Quash "shall set forth all assertions of privilege or other factual or legal objections to the subpoena or civil investigative demand, including all appropriate arguments, affidavits and other supporting materials." 16 C.F.R. § 2.7(d)(1). The rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID. WSN has made no showing that extraordinary circumstances should excuse it for not having included its supplemental arguments in its Petition to Quash. Accordingly, the Commission deems that WSN has waived any entitlement to relief on those supplemental grounds, and will not consider them on this appeal.²

² Consideration of the merits of WSN's supplemental claims would not change the outcome of this appeal. First, WSN concedes that the FTC and the FDA have concurrent jurisdiction over its advertising claims. Mem. in Support at 5. Neither the FDA warning letter nor WSN's request for an advisory opinion are in any way duplicative of the FTC's investigation of false advertising claims under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. Concurrent investigation and litigation of claims by the FTC and FDA, each seeking different remedies under different federal laws, is not uncommon. For example, the FTC and FDA both filed complaints against Seasilver USA, Inc. in federal district court. See Press Release, Fed. Trade Comm'n, Marketers of Seasilver Agree to Pay \$4.5 Million to Settle FTC Charges, *available at* www.ftc.gov/opa/2004/03/seasilver.shtm. Second, WSN has not identified any final judgment which could be capable of supporting its claims of *res judicata* or collateral estoppel. Indeed, the fact that the FDA sent a warning letter to WSN does not mean that the FDA has opened an investigation of WSN, much less reached a final judgment. An advisory opinion from the FDA addressing the classification of WSN's products for FDA purposes has no relevance to whether WSN's advertising claims are false or deceptive in violation of Section 5 of the FTC Act. Third, WSN's claim that the FTC lacks the authority to regulate the practice of medicine is inapposite. WSN, in its Petition to Quash, does not assert that WSN, its principals, or its employees practice medicine. Even if they did, the FTC, pursuant to the powers granted to it by Congress, has the authority to investigate whether WSN's advertising claims for its products are false or unsubstantiated. Finally, WSN mooted its burden of production arguments by substantially complying with the CID.

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III. WSN's Substantial Compliance with the CID Moots This Appeal from the Denial of the Petition to Quash

WSN's Petition to Quash in effect claimed that the Commission lacked jurisdiction to investigate its advertising activities. The Commission's "investigations should not be bogged down by premature challenges to its regulatory jurisdiction." *Federal Trade Comm'n v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987) (then-Judge Breyer) (quoting *Federal Trade Comm'n v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977)). Resolution of the jurisdictional issue with respect to whether the Commission has jurisdiction to investigate does not compromise any jurisdictional claim WSN might later raise as a defense to an FTC enforcement action or suit. *See Monahan*, 832 F.2d at 689. WSN's Petition to Quash also claimed that the CID sought material outside of the scope of the investigation, and that compliance would be unduly burdensome on WSN. Substantial compliance with the CID moots each of these claims that WSN should be granted relief by being excused from CID compliance that has already occurred.³

IV. Order

For the reasons set forth herein, the WSN's Request for Review should be, and it hereby is, **DISMISSED**.

By Direction of the Commission.

³ Had the Commission reached the merits of WSN's appeal from the denial of its Petition to Quash, the Letter Ruling of October 25, 2007 would have been affirmed for substantially the reasons stated therein.

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BANNER HEALTH

FTC File No. 081 0054 – Decision, May 15, 2008

RESPONSE TO BLUE CROSS BLUE SHIELD OF ARIZONA, INC.’S PETITION TO QUASH OR LIMIT SUBPOENA DUCES TECUM

Dear Ms. Peck:

This letter advises you of the disposition of the Petition to Quash or Limit Subpoena Duces Tecum (“Petition”) filed by Blue Cross Blue Shield of Arizona, Inc. (“Petitioner” or “BCBSAZ”). The subpoena duces tecum (“subpoena”) was served on BCBSAZ in conjunction with the Federal Trade Commission’s (“FTC” or “Commission”) investigation of a proposed merger between two hospital services providers located in Arizona. The Petition is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the subpoena is May 27, 2008.

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

Petitioner is a health insurer that provides a variety of “health insurance products, services and networks to more than 1 million Arizonans[, including] . . . various health plans for individuals, families, and small and large businesses.” Petition at 1-2. The Commission is conducting an investigation to determine whether the proposed merger of two hospital services providers in Arizona is likely to violate § 7 of the Clayton Act, 15 U.S.C. § 18, or § 5 of the

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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Federal Trade Commission Act, 15 U.S.C. § 45. The Petition does not question the fact that the information sought by the subpoena is relevant to the Commission's investigation or that the act of producing the records and information sought by the subpoena would impose an undue hardship or burden on Petitioner. Petitioner has, however, requested particular guarantees from Commission Staff to protect the confidentiality of certain sensitive business information in the event the Commission seeks to enjoin the merger it is investigating. Petitioner is particularly concerned about the continued confidentiality of its "contracts with member hospitals in Maricopa and/or Pinal County, as well as documents relating to the negotiations of those contracts (the 'Confidential Contract Information')." Petition at 3. In effect, the Petitioner wants the Commission to guarantee that any use of such Confidential Contract Information, during a subsequent judicial proceeding brought by the FTC to enjoin the merger being investigated, will occur only if the court shall have imposed a protective order deemed adequate by Petitioner. *Id.*

Petitioner conditions its compliance with the subpoena on the Commission's agreement to one of BCBSAZ's two alternative proposals for assuring confidentiality of its sensitive information. The Commission's first option would be to enter into an agreement "that should a satisfactory protective order not be entered into in any subsequent litigation with [the merging parties], that the FTC would agree to return any unredacted copies of BCBSAZ's Confidential Contract Information back to BCBSAZ." *Id.* (intending to cite Goodwin Aff. ¶ 8). "BCBSAZ's second proposal recommended that, in lieu of producing unredacted copies, that BCBSAZ could provide access to FTC counsel to review unredacted copies of BCBSAZ's hospital documentation. . . . During this review, FTC counsel would be permitted to review the documents at length, and make notes of any review, so long as the FTC agreed that it would assert work product protection over any such notes should the Investigation proceed to litigation." *Id.* (intending to cite Goodwin Aff. ¶¶ 9-10). Commission Staff advised Petitioner that these alternatives are "not workable." *Id.* at 4 (intending to cite Goodwin Aff. ¶ 12).

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Petitioner claims that the disclosure of its Confidential Contract Information to the merging parties through discovery² “would jeopardize BCBSAZ’s ability to compete in the marketplace, and unnecessarily risk disrupting its business relationships. The information would be deemed valuable not only by BCBSAZ’s negotiating partners, but also by BCBSAZ’s competitors and the marketplace generally.” Petition at 5. Petitioner further claims that disclosure of such information to a merging party would permit such party,

in subsequent negotiations with BCBSAZ, to demand that it receive the highest reimbursement rates of all the hospitals with which BCBSAZ contracts. . . . Allowing large hospital entities . . . to dictate the terms of reimbursement would impact not only BCBSAZ, but its many thousands of insureds in the event BCBSAZ is no longer able to pay the inflated amounts that [such entities] might demand. . . . BCBSAZ may no longer be able to provide its insureds with covered access to [such entities], or might be forced to eliminate or reduce other coverages, in other areas, just to pay the amounts [such entities] might demand. . . . It is also possible that. . . [such entities] might. . . obtain a competitive advantage as against other hospitals in the relevant areas, affecting the number of hospitals available for consumers in a manner that would eclipse any competitive effect of the proposed merger that is the subject of the instant Investigation.

² “BCBSAZ is aware that it will have the opportunity to challenge any disclosure of its confidential contract information to [the merging party] in an adjudicative proceeding. The FTC, however, has refused to agree that should BCBSAZ *lose* such a challenge, and a protective order not be entered by the court, that the FTC will not produce such documentation to [the merging party]. Simply put, the FTC is unwilling to bear that risk, however remote the FTC believes it to be.” Petition at 5 n. 2 (emphasis in original).

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Id. at 6 (citing Hannon Aff. ¶¶ 15-17). The Commission disputes neither the commercial significance of Petitioner’s Confidential Contract Information nor the importance of maintaining it in confidence, or, at least, out of the hands of competitors and other market participants; that, however, provides no sufficient basis for limiting or quashing this subpoena.

II. Petitioner Has Provided No Factual Or Legal Basis for Relief

It is necessary at the outset to emphasize the fact that the party who petitions the Commission to quash or limit an investigative subpoena bears the burden of demonstrating that a particular subpoena specification is unreasonable – the Commission does *not* need to demonstrate that a specification is reasonable. “[T]he burden of showing that an agency subpoena is unreasonable remains with the respondent, . . . 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. (Citations omitted).” *Fed. Trade Comm’n v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979), quoting *Sec. and Exchange Comm’n v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). Petitioner has mistakenly argued that the Commission “has not offered any factual or legal justifications for why BCBSAZ’s proposals are unworkable.”³ Petition at 7. The Commission has no such burden to provide a factual or legal justification for rejecting BCBSAZ’s proposals.

³ The unworkability of Petitioner’s alternative proposals is virtually self-evident. The first proposal could effectively obligate the Commission either to put itself in contempt of court or engage in some other form of litigation misconduct. If the court denied BCBSAZ’s application for a protective order, or entered an order not deemed acceptable to BCBSAZ, and at the same time ordered the Commission to produce Petitioner’s Confidential Contract Information to the merging parties, a response from the Commission that it had, pursuant to its agreement, returned the evidence to BCBSAZ would quite likely be viewed as contumacious or some other form of litigation misconduct subject to sanction, and either finding could result in the dismissal of the Commission’s complaint. *See e.g.* Fed. R. Civ. P. 37(b)(2)(A)(v). Alternatively, obtaining the contracting data under

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Petitioner has offered no legal support for its claim that this subpoena should be quashed or limited through the imposition of one of its two conditions on the Commission. The factual predicates for the harms that Petitioner alleges might occur are too speculative and uncertain to justify limiting or quashing the subpoena. See *Exxon Corp. v. Fed. Trade Comm'n*, 589 F.2d 582, 589 n.14 (DC Cir. 1978) (“[J]udicial intervention to prevent potential injury from prospective governmental misconduct [improper disclosure of confidential information] is only justified when such misconduct is imminent, not merely hypothetical.”). Petitioner has failed to meet its burden.

The Commission also finds that BCBSAZ’s legitimate concerns with the confidentiality of its sensitive business information are adequately protected by 15 U.S.C. § 57b-2 and, in the event the Commission’s investigation leads to federal court litigation, by the Federal Rules of Civil Procedure, see Fed. R. Civ. P. 26(c)(1) (“A party or any person from whom discovery is sought may move for a protective order. . . (g) requiring that. . . confidential research, development, or commercial information not be revealed or be revealed only in a specified way. . .”). Accordingly, Petitioner has

the second proposal would mean that the Commission would get the data it requires for the sophisticated economic analyses and modeling utilized in modern merger litigation by way of notes taken from complex contract documents. Those notes would also be subject to work product protections. The Commission’s trial evidence would, thus, be based on data collection practices lacking in the rigor and reliability necessary to support expert economic testimony. Further, withholding our “notes” on the basis of work product claims would be totally at odds with the FTC’s discovery obligation to provide the data upon which its expert analyses depended. See Fed. R. Evid. 705. The resulting evidence would rightly be excluded from the trial because it was both unreliable (suspect data collection practices) and because the data supporting the evidence had not been produced in discovery. Based on its experience in the enforcement of the antitrust laws against mergers, the Commission, like Staff, finds these options unworkable and inconsistent with its responsibility to enforce the antitrust laws of the United States. Indeed, Petitioner’s conditions for access to the evidence necessary to enforce this nation’s antitrust laws would hold public law enforcement hostage to each subpoena recipient’s perceived data security needs. The Commission cannot countenance such a vision of the public good.

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failed to demonstrate that the Commission should grant BCBSAZ's Petition as a matter of discretion.

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED** that the Petition be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), Petitioner must comply with the CID by May 27, 2008.

By direction of the Commission.

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NUTRACEUTICALS INTERNATIONAL, LLC*FTC File No. 082 3130 – Decision, June 25, 2008***RESPONSE TO NUTRACEUTICALS INTERNATIONAL, LLC’S PETITION
TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND**

Dear Mr. Klivinyi:

This letter advises you of the disposition of the Petition to Quash or Limit Civil Investigative Demand (“Petition”) filed by Nutraceuticals International, LLC (“NI” or “Petitioner”). NI’s Petition claims that the Civil Investigative Demand (“CID”) seeks information that is “clearly beyond the scope of the investigation as defined by the Commission.” Petition at 1. The Petition is denied because it is procedurally defective and substantively without merit. Pursuant to 16 C.F.R. § 2.7(e), Petitioner is ordered to comply with the CID on or before July 7, 2008 at 5:00 p.m. E.S.T.

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

This Petition deals with the second of two CIDs that have been served on NI during the course of this investigation. “The first civil investigative demand served upon the Company was fully answered and submitted in the time agreed. The interrogatories requested the number of employees and the identification of employees involved

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. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

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in the marketing of hoodia gordonii material. The instant CID seeks the names, addresses, email addresses and job description of all employees, whether or not they have been involved in the marketing of hoodia gordonii material. The CID also demands bank account information and the identities of signatory authorities for any such accounts.” Petition at 1.² The Petition claims that all the information sought by this second CID is “clearly beyond the nature and scope of the investigation as defined by the Commission.” *Id.* The CID was issued on May 16, 2008, returnable on June 6, 2008. The Petition, dated June 3, 2008, was received by the Secretary on June 6, 2008.

The Petition consists of a single page letter addressed to the Commission’s Secretary that was written on plain, non-letterhead, paper, and a two-page clerical employee’s affidavit dealing with investigatory events which are ancillary to, but not a part of, the merits of this Petition. The letter is signed by Zoltan Klivinyi, Managing Director. The Petition indicates that NI is not represented by counsel. Additionally, the Petition does not include the statement required by Commission Rule 2.7(d)(2), 16 C.F.R. § 2.7(d)(2), stating that it had conferred with staff in advance of filing its Petition in an attempt to resolve issues raised in the Petition. NI indicates it has included no such statement because: (1) NI was not represented by counsel who could have engaged in such discussions with counsel for the Commission; and (2) NI “believes that any such attempt would [have been] fruitless given the misconduct of the Commission counsel in this matter as detailed below.” Petition at 1.

The Petition also seeks relief on the grounds of the allegedly “appalling, abusive and abhorrent conduct of two members of [the Commission’s] staff.” *Id.* The Petition describes this conduct as follows,

² Petitioner’s description of the specifications of CID provide an accurate, but incomplete, summary of the CID specifications.

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A person who only identified herself as “Deb” called the Company’s office on May 13, 2008, and threatened the young female receptionists who answered the phone with “obstruction of justice”, crimes and arrest by the Constable for not giving the unidentified caller the private cell phone numbers of certain managers of the Company. The caller from the FTC so upset the young lady that she had to leave the office early and was ill for several days with worry that she had committed a crime and was subject to arrest. . . . This is a clear case of abuse of power and authority of a federal employee and attorney over an office clerical worker acting in good faith.

Id. In addition to requesting that the CID be limited or quashed because of this alleged misconduct, the Petition requests an investigation of this conduct by the Commission’s Inspector General, and states that a copy of the Petition would be forwarded to the Inspector General under separate cover. *Id.* Finally, the Petition requests that this investigation be reassigned to other attorneys. *Id.*³

II. The Petition Is Procedurally Defective

Commission Rule 4.1(a)(2) provides in relevant part that a “corporation or association may be represented by a bone fide officer thereof *upon a showing of adequate authorization.*” 16 C.F.R. § 4.1(a)(2) (emphasis supplied). The Petition provides no evidence to satisfy the requirements of our rule other than an indecipherable signature accompanied by a signature block that includes the name “Zoltan Klivinyi” and the title “Managing

³ The Commission is vigilant in insuring that its employees conduct the Commission’s business at all times in a professional manner. However, since NI indicated that it was separately requesting the Inspector General to investigate this episode, it would be premature for the Bureau of Consumer Protection to consider any staffing adjustments or other disciplinary responses prior to receiving a report on this matter from the Inspector General.

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Director.” That signature by itself, however, fails to satisfy our Rule in that it does not factually demonstrate that:

1. Zoltan Klivinyi is the signatory of the letter; or
2. Zoltan Klivinyi is a bone fide officer of NI, a Delaware limited liability corporation; or
3. Zoltan Klivinyi has been authorized by corporate resolution or otherwise to represent the corporation before the Commission in this matter.

Further, the managing director title is not, insofar as the Commission is aware, a term of art under the laws of Delaware with respect to corporate governance such that it would inherently connote authorization to speak on behalf of a Delaware corporation. At a minimum, our Rule requires that a corporate officer seeking to represent a corporation before the Commission must submit a sworn statement or other proofs setting forth the officer’s status as a corporate officer and the source of his or her authority to appear before the Commission on behalf of the corporation. NI has provided no such evidence supporting its Petition.

Commission Rule 2.7(d)(2) requires that every petition to quash or limit a CID must be accompanied by a statement showing that the petitioner has attempted to resolve the issues raised by the petition with Commission counsel in advance of filing the petition. 16 C.F.R. § 2.7(d)(2). The purpose for this rule to avoid unnecessary challenges to investigatory process. The Commission generally lacks advanced knowledge of the records of a particular company. As a result, the specifications of process might, inadvertently, create avoidable compliance problems that might not have arisen if staff had possessed better knowledge of the recipient’s actual information storage and retrieval procedures. To address such problems and burdens, Rule 2.7(c), 16 C.F.R. § 2.7(c), grants particular staff managers authority to modify the terms of compliance with investigatory CIDs during such discussions. Neither the use of the word “counsel” in Rule 2.7(d)(2) nor an earlier episode of allegedly

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abusive behavior by one or more Commission attorneys excused NI from its obligation to confer with Commission staff to resolve, if possible, its problems with the CID in advance of the filing of its Petition.⁴

III. The Petition Is Otherwise Without Merit

Even if NI had filed a procedurally sufficient Petition, its Petition is otherwise without merit. The information sought by the CID is not outside the scope of the investigation. The CID was issued pursuant to the Resolution adopted by the Commission on May 12, 2006.⁵ NI's claim that the CID demands information "clearly beyond the nature and scope of investigation as defined by the Commission," Petition at 1, is wholly lacking in merit. The resolution, not a prior CID issued to NI, defines the scope of the investigation.

The *Morton Salt* and *Invention Submission Corp.* cases state the broad scope of the Commission's investigatory reach. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."), and *Federal Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) ("It is well established that a district court must enforce a federal agency's investigative subpoena if the

⁴ The Rule reads, "Each petition 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 and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference." *Id.* The fact that NI is represented here by one of its officers, rather than counsel, does not excuse its non-compliance with the Rule.

⁵ Resolution Directing the Use of Compulsory Process in a Non-Public Investigation of Unnamed Persons Engaged Directly or Indirectly in the Advertising or Marketing of Drugs, Devices, Dietary Supplements or Any Other Product or Service Intended to Provide A Health Benefit or to Affect the Structure or Function of the Body (May 12, 2006).

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information is reasonably relevant . . . – or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the [agency] . . . – and not unduly burdensome to produce.”) (citations and internal quotation marks omitted).

Apparently in reliance on the scope of an earlier CID, NI is construing the scope of the investigation in a manner that would artificially limit the investigation to include only NI’s marketing and sales of “*hoodia gordonii*.”⁶ See Petition at 1. The scope of the investigation is determined by the terms of the resolution authorizing the CID. *Invention Submission Corp.*, 965 F.2d at 1091-92 (“The Commission’s compulsory process resolution did not restrict the investigation to possible oral misrepresentations, however, and we have previously made clear that ‘the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.’”) (citations omitted). The scope of the investigation includes, therefore, all of the goods and services described in the resolution; it is not limited to a single product, such as *hoodia gordonii*. A review of the specifications of the CID shows that the information requested is relevant to the subject of the Commission’s investigation as defined by the resolution. Accordingly, we find that the information sought by the CID is reasonably relevant to the investigation.

With regard to the allegations of staff misconduct, even assuming the Petition and Affidavit accurately describe events that transpired between Commission attorney(s) and an NI employee on May 13, 2008, the Commission has no reason to believe that such conduct affected in any way the issuance of the CID or its contents. In the absence of any evidence that the CID was itself the product of FTC misconduct, this episode provides no grounds for quashing or limiting the CID.

⁶ The Petition offers no explanation for its claim that the identities of its employees and the details of its banking arrangements are “clearly beyond the nature and scope of the investigation as defined by the Commission.” *Id.* NI’s claim has been construed in the light most favorable to it, based on inferences drawn from what little information NI has provided regarding this claim.

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IV. Order

For the reasons set forth herein, **IT IS ORDERED** thatNI's Petition should be, and it hereby is, **DENIED**. NI shall respond to the CID on or before July 7, 2008 at 5:00 p.m. E.S.T.

By direction of the Commission.

ADVISORY OPINION

IN THE MATTER OF

U.S. FORECLOSURE NETWORK

FTC File No. P084801 Opinion, March 19, 2008

Re: Whether the Fair Debt Collection Practices Act (“FDCPA”) prohibits a debt collector from notifying a consumer of settlement options that may be available to avoid foreclosure.

Dear Ms. Sinsley and Mr. Newburger:

This is in response to the request from the USFN, formerly known as the U.S. Foreclosure Network, for a Commission advisory opinion (“Request”) regarding whether the Fair Debt Collection Practices Act (“FDCPA”)¹ prohibits a debt collector in the foreclosure context from discussing settlement options in the collector’s initial or subsequent communications with the consumer. The Request asserts that the receipt of information about settlement options could enable the consumer to save his or her home from foreclosure. As explained more fully below, the Commission concludes that debt collectors do not commit a *per se* violation of the FDCPA when they provide such information to consumers. Moreover, the Commission believes that it is in the public interest for consumers who may be subject to foreclosure to receive truthful, non-misleading information about settlement options, especially in light of the recent prevalence of mortgage borrowers who are delinquent or in foreclosure.²

¹ 15 U.S.C. §§ 1692- 1692p.

² According to press reports, in 2007, there were an estimated 2.2 million foreclosure filings in the United States, a 75% increase from 2006. The number of foreclosure filings increased late in 2007- in December there were 215,749 foreclosure filings, a 97% increase from the number of filings in December 2006. December was the fifth consecutive month in which foreclosure filings topped 200,000. Associated Press, *Home Foreclosure Rate Soars in 2007*, N.Y. TIMES,

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USFN submitted the Request pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, 16 C.P.R. §§ 1.1-1.4. The Request focuses on two sections of the FDCPA, Sections 807 and 809, 15 U.S.C. §§ 1692e, 1692g,³ and presents three specific questions for consideration:

(1) Does a debt collector violate the FDCPA when he, in conjunction with the sending of a "validation notice" pursuant to Section 809(a) of the FDCPA, notifies a consumer of settlement options that may be available to avoid foreclosure?

(2) Does a debt collector violate the FDCPA when he, subsequent to sending the validation notice pursuant to Section 809(a) of the FDCPA, notifies a consumer of settlement options that might be available to avoid foreclosure?

(3) Does a debt collector commit a false, misleading or deceptive act or practice in violation of Section 807 of the FDCPA when he presents to a consumer settlement options that are available to the consumer to avoid foreclosure?

Jan. 29, 2008, available at www.nytimes.com/aponline/us/AP-Foreclosure-Rates.html. Mortgage delinquency is also escalating. The number of borrowers falling behind on first-lien mortgage payments for residences during 2007 was the highest it has been since 1986-2.64 million borrowers fell behind on payments. Michael M. Phillips, Serena Ng & John D. McKinnon, *Battle Lines Form Over Mortgage Plan*, WALL ST. J., Dec. 7, 2007, at A1.

³ The Commission has considered only these sections in rendering this opinion and it should not be construed to pertain to any other section of the FDCPA, to any other law, or to any issue of legal ethics.

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The Request states that there is no case law addressing these specific questions. We address the questions *seriatim*.

USFN's first two questions specifically reference Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a). Section 809(a) provides, in pertinent part, that a debt collector must, within the first five days after the initial communication with the debtor, provide a written notice containing specific information including the amount of the debt, the debtor's right to dispute the validity of the debt in writing within 30 days, and the collector's obligation to obtain verification of the debt in response to the consumer's dispute document. Congress enacted Section 809 to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."⁴

Section 809(a) does not expressly prohibit debt collectors from adding language to the written validation notice with the mandatory disclosures. The statute also does not expressly prohibit debt collectors from presenting information to consumers about settlement options in subsequent communications. The Commission therefore concludes that there is no *per se* violation of Section 809(a) of the FDCPA if a debt collector includes information regarding foreclosure settlement options along with a validation notice or in subsequent communications after that notice is delivered.

Nevertheless, collectors must take care that communicating information about settlement options does not undermine the consumer protections in Section 809(a). The touchstones of Section 809(a) are the consumer's rights to dispute his or her debt in writing within 30 days and to obtain verification of that debt from the collector. To protect these rights, in 2006 Congress amended Section 809(b) to expressly state that "[a]ny collection activities and

⁴ S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698.

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communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt. ..."⁵ This statutory amendment ratified court decisions holding that debt collectors that provide consumers with information in addition to the mandatory disclosures violate Section 809(a) if the additional information effectively obscures the consumer's right to dispute his or her debt and obtain verification from the collector.⁶

Specifically, these cases concluded that providing additional information is unlawful if it overshadows or contradicts required disclosures or creates confusion regarding the basic right to dispute the debt and obtain verification from the collector.⁷ In making these determinations, courts considered the communication from the perspective of an unsophisticated consumer.⁸

In sum, with respect to USFN's first two questions presented in its Request, the Commission concludes that there is no *per se* violation of Section 809(a) if a debt collector in the foreclosure context discusses settlement options in the collector's initial or subsequent communications with the consumer. This conclusion, however, does not prevent a fact-based finding that a specific communication violates the Act if it overshadows or is inconsistent with the disclosures of the consumer's right to dispute the debt within 30 days.

⁵ 15 U.S.C. § 1692g(b).

⁶ See, e.g., *Swanson v. Oregon Credit Servs.*, 869 F.2d 1222 (9th Cir. 1988).

⁷ *Id.*; See, e.g., *Durkin v. Equifax Check Servs.*, 406 F.3d 410 (7th Cir. 2005); *Shapiro v. Riddle & Assocs.*, 351 F.3d 63 (2d Cir. 2003); *Renick v. Dun & Bradstreet Receivable Mgmt. Servs.*, 290 F.3d 1055 (9th Cir. 2002).

⁸ See, e.g., *Sims v. G.C. Servs.*, 445 F.3d 959 (7th Cir. 2006) ("unsophisticated consumer"); *Smith v. Transworld Sys.*, 953 F.2d 1025 (6th Cir. 1992) ("least sophisticated consumer").

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USFN's third question asks whether a debt collector commits a false, misleading or deceptive act or practice in violation of Section 807 of the FDCPA when he presents to a consumer settlement options that are available to the consumer to avoid foreclosure. Section 807 of the FDCPA establishes a general prohibition against the use of any "false, deceptive or misleading representation or means in connection with the collection of any debt" and provides a list of 16 specific practices that are *per se* false, deceptive or misleading under the Act. In enacting Section 807, Congress noted that this general prohibition on deceptive collection practices would "enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."⁹

As a general matter, the Commission concludes that a debt collector's communication with a consumer regarding his or her options to resolve mortgage debts and to potentially avoid foreclosure would not necessarily violate either the general or specific prohibitions of Section 807. However, we also stress that a particular communication with settlement option information could be deceptive in violation of Section 807 if it contains a false or misleading representation or omission of material fact. Determining whether a specific communication is false or misleading is a fact-based inquiry that considers all the facts and circumstances surrounding the particular communication at issue.¹⁰

After reviewing the language of the FDCPA, its legislative history, and relevant case law, as well as the information contained in the Request, the Commission concludes that a debt collector in the foreclosure context does not commit a *per se* violation of

⁹ S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698.

¹⁰ *See Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985) (noting that FDCPA expands pre-existing FTC deception authority); *see also FTC Policy Statement on Deception, appended to In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174-84 (1984) (setting forth deception test).

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Sections 807 or 809 of the FDCPA when he or she addresses settlement options in the collector's initial or subsequent communications with the consumer.

By direction of the Commission.