Responses to Petitions to Quash

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-l, 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.

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.

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 modem 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.

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[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).

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).

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.").

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

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[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. Larch*e, 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.

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.

Responses to Petitions to Quash

# 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.

CID continued until the Petition was timely filed on November 5, 2007. Petition at 10-13. 1t 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 information[3] 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