RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

LIQUIFIED PETROLEUM GAS INVESTIGATION

FTC File No. 091 0115 Decision, January 8, 2010

RESPONSE TO RAMÓN GONZÁLEZ CORDERO'S AND RAMÓN GONZÁLEZ SIMONET'S PETITION TO QUASH OR MODIFY CIVIL INVESTIGATIVE DEMAND AND SUBPOENA AD TESTIFICANDUM

Dear Mr. Méndez-Gómez:

This letter advises you of the Commission's disposition of Petitioners' Request for Rehearing of Denial of Petition to Quash or Limit Compulsory Process in the Matter of Empire Gas Inc. and Liquilux Gas Corp. filed on December 10, 2009 ("Request"). On November 19, 2009, Petitioners Ramón González Cordero and Ramón González Simonet, officers, directors, and stockholders of Empire and Liquilux, timely filed a petition to quash or modify civil investigative demands ("CIDs") and subpoenas ad testificandum ("Petition") on the ground that the FTC Act does not give the FTC jurisdiction to investigate the conduct of Empire and Liquilux based on the state action doctrine. On December 3, 2009, Commissioner Harbour directed the issuance of a Letter Ruling denying the Petition on the grounds that the state action doctrine, if applicable, is an affirmative defense that must be asserted during the trial of any FTC claims alleging antitrust or FTC Act[1] violations.[2]

Petitioners now request a rehearing of the issues raised by the Petition before the full Commission. No new evidence or arguments are presented in support of this rehearing request.

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[1] 15 U.S.C. § 45, as amended.

[2] The Petition also requested that the subpoenas be made returnable in Puerto Rico. Petitioners do not seek a rehearing on the denial of that request. Request at 1.

Additionally, you ask the Commission to stay the return of the subpoenas until: (1) the Commission's decision on the Request; and (2) the Commission's compliance with Rule 2.6, 16 C.F.R. § 2.6, which directs that subpoena recipients be "advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation." Request at 2. For the reasons set forth herein, the Letter Ruling is affirmed; and the request for stay is denied as moot.

The State Action Doctrine Is An Affirmative Defense.

The Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), the progenitor of the state action doctrine, that Congress did not intend by its adoption of the Sherman Act, 15 U.S.C. § 1, to permit the antitrust laws to regulate the sovereign activities of state governments. Subsequent cases have applied the doctrine to the FTC Act. *See, e.g., FTC v. Ticor Ins. Co.*, 504 U.S. 621 (1992). Petitioners incorrectly frame their state action argument as one involving the FTC's jurisdiction. *See* Petition at 1, 12. The state action doctrine is an affirmative defense, not a jurisdictional limitation. *South Carolina Board of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006) (denying an interlocutory appeal from an adverse ruling on respondent's state action defense).

In *FTC v. Monahan*, 832 F. 2d 688 (1st Cir. 1987) (Breyer, J.), the First Circuit held that a state action claim could not be used to deprive the Commission of the opportunity to investigate because doing so would improperly limit the Commission's ability to evaluate the facts that might form the basis for such a defense and allow the FTC to determine for itself whether there was a basis for pursuing a law enforcement action. *Id.* at 689-90 ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of" a state action defense.). The Letter Ruling

correctly held that the state action doctrine, if applicable, would only be an affirmative defense that could be raised by Empire during the trial of any FTC allegations of an antitrust or FTC Act violation.[3]

The Request for A Stay Is Moot.

Petitioners ask for a stay until the Commission satisfies its obligations under Rule 2.6, and issues a ruling on the Request. The Commission satisfied its obligations under Rule 2.6 when it adopted a resolution fully describing the scope of the investigation. The Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation for this investigation states that the nature and scope of the investigation is:

> To Determine whether Empire Gas ("Empire"), Tropigas de Puerto Rico, Liquilux Gas Corporation ("Liquilux"), or other unnamed persons, partnerships, or corporations have engaged or are engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, through various acts or practices, including but not limited to, agreements to fix prices or allocate customers, exclusive dealing, or other

[3] Even if Petitioners' state action arguments were jurisdictional, investigations by administrative agencies should not be bogged down unnecessarily with jurisdictional challenges. *FTC v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001); *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996) ("[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until [a substantive law] enforcement action is brought against the subpoenaed party."); *Monahan*, 832 F. 2d at 690; *FTC v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977) ("An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly spurious."). The Letter Ruling correctly held that the state action doctrine is not an immunity from investigation.

> conduct regarding liquified petroleum gas or related products in Puerto Rico; and to determine whether Empire or Liquilux has engaged or is engaging in unlawful acquisitions in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended.[4]

Petitioners' only remaining justification for a stay, the Commission's ruling on the Request, is mooted by the issuance of this letter disposing of the Request.[5]

Conclusion and Order

For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

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[4] Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, FTC File No. 091-0115 (Sept. 15, 2009) ("Resolution"). The Resolution was attached to the CIDs and subpoenas, copies of which can be found in the Request, Appendix B.

[5] Petitioners waived any claim that the CIDs or subpoenas should be quashed because the Resolution did not comply with Rule 2.6 when they failed to raise that claim in their Petition. *Wellness Support Network*, FTC File No. 072-3179 at 2 (Apr. 24, 2008) (Letter Ruling dismissing appeal from denial of petition to quash CID) ("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."). Petitioners have offered no explanation for not having raised this issue in the Petition.

Petitions to Quash or Limit

DEBT RELIEF USA, INC.

FTC File No. 092 3052 Decision, January 8, 2010

RESPONSE TO DEBT RELIEF USA, INC.'S PETITION TO QUASH CIVIL INVESTIGATIVE DEMANDS FOR TESTIMONY

Dear Messrs. Reilly, Wojcik, and Bell:

The Commission is investigating whether Debt Relief USA, Inc. ("DRUSA") has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in the advertisement and sales of debt relief products and services. On October 23, 2009, the Commission issued separate Civil Investigative Demands for testimony ("CIDs") to each of the Petitioners, individuals who are officers, directors and stockholders of DRUSA. On October 28, 2009, Petitioners filed their Petition to Quash CIDs ("Petition"), citing the pendency of bankruptcy proceedings involving DRUSA and the supposed protection of the "corporate veil" of DRUSA as grounds. Petition at 2. The Petition is wholly without merit; and must, therefore, be denied. In accordance with the provisions of Rule 2.7(e), 16 C.F.R. § 2.7(e), Petitioners shall comply with the CIDs on the following dates, at the times and places stated in the CIDs: Mr. Reilly on January 19, 2010; Mr. Wojcik on January 20, 2010; and Mr. Bell on January 21, 2010.

This letter advises you of the Commission's disposition of the Petition. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioners have 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]

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[1] Computation of the time for appeal should be calculated from the date you receive 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

I. Petitioners Must Comply with the CIDs.

Petitioners are officers, directors and stockholders of DRUSA, and appear to possess information regarding DRUSA's sales and marketing of debt relief products and services to consumers. Petitioners have not claimed that the CIDs were issued for an improper purpose, or that the information that would be sought through their testimony would be irrelevant, privileged, or unduly burdensome to provide.[2]

Petitioners' arguments appear to be largely based on the assumption that the Commission's investigation of DRUSA's activities can only result in relief directed at DRUSA itself, and that the liquidation of DRUSA in bankruptcy "would negate the need for this action to continue." Petition at 3. This premise is incorrect. Petitioners may be independently liable for injunctive and monetary relief for the corporate acts of DRUSA in violation of the FTC Act. An individual may be liable for corporate violations of the FTC Act where it can be shown that such individual participated in or had control over corporate practices and had knowledge of such practices. *Fed. Trade Comm'n v. Amy Travel Serv.*, 875 F.2d 564, 573 (7th Cir. 1989).[3] There is thus no

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full Commission shall not stay the return date established pursuant to this decision.

[2] *See Fed. 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 information sought is reasonably relevant, . . . –or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the [agency], . . . –and not unduly burdensome to produce.") (internal quotations and citations omitted).

[3] "Once corporate liability is established, the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them. . . . Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. . . . The

need to "pierce the corporate veil" to impose liability on petitioners individually.

Accordingly, ascertaining the nature of each petitioner's actions regarding and knowledge of DRUSA's activities is plainly a proper subject of the Commission's investigation. Further, in the absence of any contrary facts or authorities, each Petitioner must be held to be the best available source for evidence regarding that Petitioner's knowledge of, and involvement in, the business operations of DRUSA. Moreover, it is highly likely that each Petitioner is one of the next best sources of evidence available regarding the other Petitioners' knowledge of, and involvement in, the business operations of DRUSA.

Petitioners also invoke the automatic stay provided by the Bankruptcy Code as a ground for quashing the CIDs. Petition at 2.[4] This argument is also without merit. The FTC is conducting a law enforcement investigation of the conduct of DRUSA and the petitioners. Pursuant to 11 U.S.C. § 362(b)(4), the stay provisions of 11 U.S.C. § 362(a) do not prevent the FTC from exercising its police and regulatory duties as an agency of the government of the United States regarding the conduct of DRUSA. Furthermore, Petitioners are not themselves in bankruptcy, and are not entitled to any of the protections of the Bankruptcy Code. In short, the Commission's continuing investigation of DRUSA's activities, including taking testimony from Petitioners, will not violate any provisions of the Bankruptcy Code.

FTC must show that the individual had some knowledge of the practices. The knowledge requirement is the key issue in this case." *Id*. (citations omitted).

[4] Petitioners also claim that the bankruptcy clerk failed to provide notice to all potential creditors of DRUSA in a timely fashion; and that such failure, in turn caused unnoticed creditors to ask the "FTC to protect their assets." *Id*. Neither the timing or scope of notice provided to DRUSA's creditors by the bankruptcy clerk nor the source of any complaints that may have alerted the Commission to possible law violations is relevant to the resolution of this Petition.

II. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Petitioners shall comply with the CIDs on the following dates: Mr. Reilly on January 19, 2010; Mr. Wojcik on January 20, 2010; and Mr. Bell on January 21, 2010.

By direction of the Commission.

Petitions to Quash or Limit

CHURCH & DWIGHT, INC.

FTC File No. 091 0037 Decision, February 16, 2010

RESPONSE TO CHURCH & DWIGHT, INC.'S REQUEST FOR REHEARING BY THE FULL COMMISSION OF THE DENIAL OF PETITION TO QUASH OR LIMIT SUBPOENA DUCES TECUM AND CIVIL INVESTIGATIVE DEMAND

Dear Mr. Hittinger:

This letter advises you of the Commission's disposition of Church & Dwight, Inc.'s ("C&D") Request for Rehearing by the Full Commission of the Denial of C&D's Petition and Request for Leave ("Request for Rehearing). On November 13, 2009, C&D filed its Petition on the grounds that the subpoena and CID seek irrelevant Canadian marketing documents, and that it would be unduly burdensome for it to produce Canadian marketing documents that are located in Canada. On December 7, 2009, C&D filed its Request for Leave seeking to raise a further ground for quashing or modifying the subpoenas and CIDs in order to permit it to redact "irrelevant" information regarding C&D's non-condom products from otherwise responsive documents. On December 23, 2009, Commissioner Harbour directed the issuance of a Letter Ruling denying C&D any of the relief requested in either the Petition or Request for Leave on the grounds that: (1) C&D had allowed the time for filing a petition to quash to lapse before seeking an extension from staff of the deadline for filing a petition to quash; (2) C&D had not offered any credible justification for not having filed its Request for Leave at the same time as the Petition; and (3) even if the Petition and Request for Leave had not been time-barred, the requested relief would have been denied because (a) Canadian marketing documents and information regarding non-condom products are relevant to the investigation, (b) C&D had not proven that it would be unduly burdensome for it to produce its Canadian marketing documents, including those kept and maintained in Canada, and (c) C&D had not advanced any plausible data security justification that could

only be remedied by its redaction of information related to its non-condom products from otherwise relevant documents.

On December 28, 2009, C&D filed its Request for Rehearing based on its disagreement with the Letter Ruling denying its Petition and Request for Leave. Request for Rehearing at 1. The Request for Rehearing presents no new evidence or arguments, and does not suggest that Commissioner Harbour's Letter Ruling is based on any mistakes of law or fact. The Request for Rehearing additionally asks the Commission to stay the January 26, 2010, return dates on the subpoena and CID "until such time as the full Commission has reviewed the Petition and Request [for Leave] and has reached a final decision on the important issues raised that have not heretofore been addressed by the Commission or the federal courts." Request for Rehearing at 1.[1]

For substantially the same reasons as those stated in Commissioner Harbour's Letter Ruling of December 23, 2009, the Letter Ruling is affirmed, and the request for a stay of compliance pending the Commission's decision must be denied as moot.

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[1] The alleged issues of first impression raised by C&D's claims for relief are not in fact self-evident. As Commissioner Harbour found, C&D's claims for relief are in most cases not even supported by the authorities cited by C&D in its Petition and Request for Leave. *See, e.g.,* Letter Ruling at 5. Counsel for C&D asks the Commission to decide these "important issues" without providing the Commission with any substantial assistance. Further, the issues that are self-evident from the Petition and Request for Leave are relatively settled. It is self-evident that relevant information has to be produced, even if that production entails some burden. *FTC v. Texaco*, 555 F.2d 862, 871-74, 882 (D.C. Cir. 1976); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). It is also self-evident that the relevance of material to be produced must be measured against the purposes stated in the resolution authorizing the use of process. *Texaco*, 555 F.2d at 874. Finally, it is self-evident that the petitioner bears the burden of proving that the specifications of a subpoena or CID are unreasonable. *FTC v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979). And, as Commissioner Harbour found, it is equally self-evident that C&D has not factually or legally supported its claims for relief.

For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

IT IS FURTHER ORDERED THAT C&D's request for a stay of compliance with the subpoena and CID be, and it hereby is, **DENIED** because it is moot.

By direction of the Commission.

Petitions to Quash or Limit

D. R. HORTON, INC. / LENNAR CORPORATION

FTC File Nos. 102 3050 and 102 3051 Decision, March 9, 2010

RESPONSE TO D. R. HORTON, INC. AND LENNAR CORP.'S PETITIONS TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMANDS

Dear Mr. Kider:

The Commission is investigating whether DRH and LC, both builders and sellers of homes, have engaged, or are engaging, in unfair acts or practices or have violated, or are violating, the Consumer Credit Protection Act, in their marketing and sales of homes, and their related sales mortgage lending acts and practices. The use of compulsory process for the conduct of these investigations was authorized by the Commission based on two separate Commission resolutions which provide detailed statements of the scope and purpose of these investigations; a copy of each resolution was attached to the Civil Investigative Demands ("CIDs") that were separately served on DRH and LC. *See* DRH and LH Petitions at 2.[1] On December 11, 2009, DRH

[1] FTC Resolution Directing Use of Compulsory Process In Nonpublic Investigation: Unnamed Violators of the Equal Credit Opportunity Act (Aug. 1, 1994) describes the nature and scope of investigation authorized as follows:

> To determine whether certain unnamed persons, partnerships, corporations, associations or other entities have been or may be engaged in acts or practices in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* and Regulation B, 12 C.F.R. § 202 *et seq.*, and to determine whether these persons, partnerships, corporations, associations or other entities have been or are engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such acts and practices may include, but are not limited to, discriminating in the extension of credit on the basis of national origin, color, age, religion, receipt of public assistance income, or because an applicant in good faith

and LC timely filed substantially similar petitions to limit or quash the CIDs served upon them on the grounds that the CIDs: (1) seek information that is beyond the scope of the investigation authorized by the resolutions,[2] (2) request information that is too indefinite because the CIDs do "not identify any specific actions

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> exercised any right under the Consumer Credit Protection Act. This investigation is also to determine whether Commission Action to obtain redress of injury to consumers, or others would be in the public interest.

Id. at 1.

FTC Resolution Directing Use of Compulsory Process In Non-Public Investigations of Various Unnamed Loan Brokers, Lenders, Loan Servicers, and Other Marketers of Loans (Dec. 15, 2008) describes the nature and scope of investigation authorized as follows:

> To determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaging in deceptive or unfair acts or practices in or affecting commerce in the advertisement, marketing, sale, or servicing of loans and related products in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The investigation is also to determine whether various unnamed loan brokers, lenders, loan servicers, and other marketers of loans have engaged or are engaging in acts or practices in violation of the Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq., as amended. The investigation is also to determine whether Commission action to obtain monetary relief, including consumer redress, disgorgement, or civil penalties, would be in the public interest."

Id. at 1. Taken together, those resolutions provide the basis against which the relevance and scope of materials or information being sought from DRH and LC will be determined. *Fed. Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) (". . . 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.' [*Fed. Trade Comm'n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)].").

[2] DRH Petition at 9 ("Neither of these resolutions is designed to inquire into homebuilding or the practices related to the sale of [sic] home, nor could they reasonably be construed to do so."); LC Petition at 8 ("Neither of these resolutions is designed to inquire into homebuilding or the practices related to the sale of homes, nor could they reasonably be construed to do so.").

or business practices [sic] it believes [DRH and LC] may have pursued . . .;"[3]; (3) require the production of information and materials that are unduly burdensome to produce; and (4) command the production of privileged information.[4] As discussed below, Petitioners have not provided adequate legal or factual support for the relief requested. Accordingly, their Petitions shall be denied, and the CIDs will be returnable on March 24, 2010.

This letter advises you of the Commission's disposition of the Petitions. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), 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.[5]

I. Preliminary Matters and Standard of Review

Petitioners are substantial, multi-state builders of homes. DRH "is a Fortune 500 company and, during the time period at issue here, was ranked as the largest homebuilder by units sold in the United States since 2003. The company employs approximately 3,000 workers nationwide. [DRH] builds single-family homes in 83 markets in 27 states. . . . The company has

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[3] DRH Petition at 6; LC Petition at 5 ("The CID does not identify any specific actions or business practices [that the Commission] believes [LC] may have pursued . . . .").

[4] DRH Petition at 13 and 33; LC Petition at 12, n.4 and 29.

[5] This letter ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive 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 pursuant to this decision.

four homebuilding segments: North, South, East, and West, which consist of 33 geographical divisions."[6] LC "is a Fortune 500 company that was ranked as the nation's third largest homebuilder in 2008. Currently [LC] builds single-family homes in 41 markets in 16 states. . . . . The Company has four homebuilding segments: East, Central, West, and Houston. These segments have homebuilding operations in . . . 14 states."[7] Each company appears to have a large number offices and facilities spread over a substantial portion of this country, and the managers of each office and facility have some degree of discretion regarding local operations.[8] Each Petitioner has a subsidiary or affiliated company that provides mortgage loans and other loan-related services to Petitioners and buyers of Petitioners' homes.[9] Many of the objections expressed in the Petitions appear at bottom to be problems created by the business organization and management philosophies of the companies, not by the CIDs. The Commission is aware of no authority that would excuse a company from complying with law enforcement process because that company elected to create an unwieldly array of facilities and/or[10] adopted a decentralized management style.

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[6] DRH Petition at 3.

[7] LC Petition at 2.

[8] *See, e.g.,* DRH Petition at 16 (". . . a full response to this interrogatory [regarding compliance training of employees] will require the Company to retrieve information from every office that was in existence at any time [during the relevant time period"); LC Petition at 42 (". . . due to the decentralized nature of its homebuilding operations, this specification [the performance evaluation process] presents an undue burden because each office has responsibilities for the supervision of its employees and overall operation.").

[9] DRH Petition, Declaration of Jennifer Hedgepeth (Dec. 11, 2009) at ¶¶ 1-5 (DHI Mortgage Co., Ltd is an indirect subsidiary of DRH) ("Hedgepeth Decl."); LC Petition, Declaration of Becky L. Moore (Dec. 11, 2009) at ¶¶ 1-3 (Universal American Mortgage Co. ("UAMC") is a subsidiary of LC) ("Moore Decl.").

[10] Petitioners object to the CID instruction that requires the words "and" and "or" to be construed both conjunctively and disjunctively, as necessary, in order to insure completeness of responses. DRH Petition at 9-10; LC Petition at 8-9.

Petitions to Quash or Limit

These Petitions raise a recurrent law enforcement problem: the attempt "to get information from those who best can give it and who are most interested in not doing so." *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). In *Morton Salt*, the Court recognized that investigatory process should be enforced "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id*. at 369. Subsequent court decisions have provided a more fulsome understanding of what it means to be "reasonably relevant" to the investigation. *See, e.g., FTC 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 information is reasonably relevant . . . or, put differently, not plainly incompetent or irrelevant to any lawful purpose. . . and not unduly burdensome to produce.") (citations and internal quotation marks omitted). The Courts recognize that

> the question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus, courts have refused to modify subpoenas unless compliance threatens to unduly disrupt or seriously

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The Commission prefers to write CID specifications in relatively simple language. Sentences using "and/or" tend to become more cumbersome and/or more difficult to follow and understand. Rather than increasing either burden or uncertainty, the challenged instruction both eliminates uncertainty, and, more importantly, limits the opportunities for semantic obfuscation or evasions on the part of CID respondents and counsel. Almost a century's experience in process enforcement has taught the Commission that law enforcement benefits from limiting such latter opportunities.

> hinder normal operations of the business. . . . There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations.[11]

II. The CIDs Request Information That Is Reasonably Relevant to the Investigation.

"The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution." *Texaco,* 555 F.2d at 874. Petitioners' claims that the CIDs seek information that is irrelevant to the investigation are based on a mistaken assumption of law and a semantic evasion. Petitioners contend that "[t]he CID does not identify any specific actions or business practices [sic] it believes [DRH or LC] may have pursued."[12] Unlike complaints or indictments, CIDs are not charging documents.[13] CIDs, and the resolutions authorizing them, do not identify suspected unlawful conduct; rather, CIDs identify the subject matters that are being investigated. At this stage of the inquiry the FTC "is under no obligation to propound a narrowly focused theory of a possible future case." *Texaco*, 555 F.2d at 874. "Certainly a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance." *Id.* at 877.

Petitioners' claims that the resolutions are not "designed to inquire into homebuilding or the practices related to the sale of

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[11] *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (footnotes omitted).

[12] DRH Petition at 6; LC Petition 5.

[13] Likewise, Petitions to Limit or Quash are not discovery devices in the nature of a more particularized statement of the subject under investigation.

[homes]" are simply wrong.[14] Almost every residential real estate transaction involves at a minimum a purchase-money mortgage–that is to say, a loan product. Typically, the home being purchased is the collateral that secures the purchase-money mortgage, i.e., a loan related product. Each Petitioner concedes that the resolutions extend at least to "loans and related products."[15] Further, each resolution directs an inquiry to determine if monetary relief would be in the public interest. This latter inquiry would, at a minimum, include an inquiry into the fiscal integrity of the parties being investigated.

Neither the general objections of DRH and LC nor their particularized objections directed to individual specifications of the CIDs establish that any of the information or materials being sought by the CIDs are irrelevant to the investigation measured by the purposes set forth in the resolutions authorizing the use of process. Stated differently, all of the information sought by the CIDs is reasonably relevant to purposes of the inquiry determined by reference to the resolutions. The law requires nothing more.[16]

III. DRH and LC Have Provided Insufficient Evidence To Support Their Undue Burden Claim.

"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

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[14] DRH Petition at 9; LC Petition at 8.

[15] DRH Petition at 9; LC Petition at 8.

[16] Claims that the CIDs are too indefinite in their description of the information and materials to be produced are simply without merit. The Petitions viewed in their entirety actually demonstrate an overarching concern by DRH and LC that the specifications are so definite and inclusive as to preclude substantial room for credible avoidance of production.

the particular specifications at issue)." *Nat'l Claims Service, Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998). DRH and LC made no reasonable attempt to show factually that their responses to the CIDs would "unduly disrupt or seriously hinder normal operations of [their] business[es]."[17] To the extent that DRH and LC have identified the records and the assumptions on which their claims of undue burden rest, those claims of burden lack credibility because they rest on their own misreadings of the specifications, instructions, and definitions of the CIDs. The assertions that the CIDs require the production of virtually every document generated by them in the last four years, DRH Petition at 9, LC Petition at 6, are based on erroneous constructions of the CIDs that fail to admit that many of the challenged specifications are specifically limited in scope to marketing, sales, or mortgage lending activity. Moreover, as to many specifications, Petitioners' asserted burden results in large part from their own decentralized management style and document storage. Burden caused by Petitioners' own organizational design cannot excuse them from compliance with the CIDs. Further, many of the additional claims of burden, *e.g.*, having to interview every current and former employee, or review every loan file, appear to be overblown. To the extent Petitioners have specific concerns of burden as to certain specifications, those concerns should be addressed to counsel and staff, who in appropriate circumstances and through good-faith negotiations can adjust production schedules, provide additional guidance as to specifications, and even modify certain specifications.[18]

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[17] *Texaco*, 555 F.2d at 882 ("Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.").

[18] In fact, as LC acknowledged in its correspondence with staff dated February 22, 2010, staff has already "provide[d] a prioritization" of the specifications in the CID to LC, and asked that LC "make specific requests for relief" to avoid unnecessary burden on the company. Letter from David M. Souders, counsel for LC, to Rebecca J.K. Gelfond, counsel for FTC, at 3 (Feb. 22, 2010).

The production burdens quantified by DRH and LC appear to include unrealistically high estimates of the number of staff hours required to comply because, as discussed above, the companies' estimates are based on erroneous, overblown constructions of the CIDs. Moreover, even if those quantified estimates of burden-hours had any credibility, they seem relatively insignificant when measured against the size of the companies. DRH claims that it would take 960 staff hours to review every document it has generated over the last four years. Hedgepeth Decl. ¶ 17. However, 960 work hours amounts to less than a week's work for 20 people. LC initially claimed that it would take it 1360 hours to conduct document review. Moore Decl. ¶ 13. Similarly, 1360 work hours is about 8½ days' work for 20 people. In *Texaco*, the company claimed that it would have to review over four million documents at a cost of approximately 62 work years and $4 million. *Texaco*, 555. F.2d at 922 (Wilkey, J. and MacKinnon, J., dissenting). The suggestion that compliance by DRH and LC, Fortune 500 companies, would "unduly disrupt or seriously hinder [their] normal operations" is unsupported by the record.[19]

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[19] On February 22, 2010, LC filed a Supplemental Submission in Support of Its Petition to Limit or Quash Civil Investigative Demand ("LC Supplemental Petition"), in which LC states that it has "reevaluated the burden" of complying with the CID and provides two additional declarations supporting its claims of burden. LC now asserts that it will take approximately 8,700 hours for LC and 19,742 hours for its mortgage subsidiary to comply with the CID. Howard Decl. ¶ 13; Moore Supp. Decl. ¶ 39. The Rules do not address the possibility of filing supplemental materials. Nor did LC file a Motion with the Secretary seeking leave to file these supplemental materials. As a matter of discretion, the Commission will accept this new evidence into the record for what it is worth.

In this instance, the new evidence possesses very little probative value. First, LC does not and cannot reconcile its new assertion that its over 20-times increase in the expected hours of compliance is due to a "more complete understanding of the scope and breadth" of the CID, LC Supp. Petition at 1, with the fact that its original estimate was already based on its overbroad reading of the CID as requiring review of "every document it has produced in the last four years." LC Petition at 6. Accordingly, LC has not adequately explained how any information newly available to it justifies its revised

estimates, and instead repeats in its Supplemental Petition many of the same objections from its original Petition. *Compare, e.g.*, LC Petition at 17 (objecting to Specification R-11 because of purported difficulty in obtaining information on the "[t]housands of [LC's] employees . . . involved in marketing and sales"), *with* Howard Decl. ¶ 17 (basing estimated time required for compliance on purported difficulty in obtaining information on the "more than two thousand employees who were in direct contact with customers or potential customers"). Additionally, similar to LC's initial estimate, its revised estimate continues to be based on misreadings of the scope of the CID's specifications, duplicate compliance efforts, questionable search methodologies, LC's own decentralized organization, and overstatements of the likely time required for compliance. Thus, particularly in view of the size of LC and the resoureces available to it, LC has still failed to meet its burden of demonstrating that the CID would "unduly disrupt or seriously hinder [its] normal operations."

Second, each of these new declarations has internal inconsistencies and redundancies that deprive it of substantial reliability. For instance, Moore's supplemental declaration claims that the subsidiary will need 19,742 hours, exclusive of redactions, to comply; however, an itemized listing of the hours claimed paragraph-by-paragraph for compliance with those specifications actually adds up to 21,194 hours. The discrepancy between claimed total hours and actual total hours is less striking in the declaration from Howard; that declaration claims 8,700 hours, but the actual total is 8,580. The itemizations in each of these declarations claim that LC will make redundant, seriatim, separate requests for information from each relevant employee in order to comply with the various specifications of the CID. LC's Petition makes no showing that such redundancy is required.

Third, all of the numbers in the Howard declaration appear to be the product of some type of reverse engineering. Each estimate of the hours to comply with a specification is a multiple of 130 hours. Comparing the hours claimed for compliance with the number of LC's proposed calendar days for that compliance indicates that it would take a single employee working 5 hours each week on compliance exactly 6 months in order to devote 130 hours to compliance. *See* Howard Decl. ¶ 14. This relationship appears to be constant for the Howard declaration, except for the compliance estimates found in paragraph 22–those employees appear to be twice as productive as other employees since those two employees will complete 1040 hours of work in one year (not two). Fourth, LC has provided no explanation of the time estimating methodology being used to generate these estimates; nor has it provided any evidence demonstrating the reasonableness of these estimates. That said, however, neither these declarations nor the Petition, as supplemented, clearly demonstrate any understanding by LC that a CID recipient is required to comply in a timely manner. *Texaco*, 555 F.2d at 882 ("Some burden on

IV. The CIDs Do Not Require the Production of Privileged Materials.

The CIDs expressly do not require the production of privileged materials. The instructions contained within each CID direct that any material responsive to the CID which is being withheld based on a claim of privilege shall be described in a privilege log that must be served on the Commission in compliance with Commission Rule 2.8A, 16 C.F.R. § 2.8A. It should also be noted that each Petition recites some dubious claims of "privilege." For example, DRH's Petition at page 33 (LC's Petition at page 29) asserts a claim of privilege regarding the production of information "relating to any non-public investigations or 'proceedings' by any other 'governmental and/or law enforcement [entity].'" The Commission is familiar with rules of law that prohibit a public agency conducting a law enforcement investigation from publicly disclosing details of the investigation–the rule protecting the secrecy of grand jury proceedings is one such rule. The Commission is not, however, familiar with rules of law that prohibit the recipient of FTC process from disclosing the fact that such process has been received or the nature of his/her/its responses thereto.

Additionally, both Petitions claim protection from disclosure of confidential business and proprietary information, trade secrets, and the privacy rights of third parties (including the Petitioners' own current and former employees). DRH Petition at 13; CL Petition at 12, n.4. Petitioners have provided no legal authority that supports either claims of privilege for any such materials or

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subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest.").

the standing of the companies to raise such claims on behalf of third parties. Indeed, the putative assertion of the privacy rights of third parties, especially those of their own employees, could easily be supposed to be little more than a thinly-veiled pretext for the corporations to seek to obtain privacy rights to which they were not otherwise entitled. Further, Petitioners have made no showing that the confidentiality provisions of 15 U.S.C. § 57b-2 and Commission Rule 4.10, 16 C.F.R. § 4.10, would be inadequate to protect anyone's legitimate interests in avoiding public disclosure of confidential or sensitive information.

Finally, Petitioners claim that the records of their voluntary compliance programs are protected from disclosure by the "self-evaluative reports privilege" (DRH Petition at 44, LC Petition at 42); however, those claims are not even supported by their own cited authority. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5431 (General Rule–Other Novel Privileges) at 716 (Supp. 2009):

> In recent years there has been some recognition by federal courts of a privilege for certain corporate records under the rubric of 'self-evaluative reports.' . . . [It] is generally used to refer to records required to be kept by some administrative regulation and that may contain admissions or statistics of use to an opposing litigant in a suit arising under the regulatory scheme of which the report is a part. The decisions are divided, and there seems little justification for creating a new privilege if the matter sought to be protected falls outside of the required reports privilege. (footnotes omitted).

Id. The Petitioners offer no facts or law that would support the conclusion that their voluntary monitoring of compliance with their own sales and marketing policies would, or should, be entitled to protection under the required records privilege.[20]

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[20] These Petitions contain a substantial number of other objections that are wholly without merit. Many of those claims turn upon unreasonable

V. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** DRH's and LC's Petitions be, and they hereby are, **DENIED**.

IT IS FURTHER ORDERED THAT DRH and LC shall comply with the CIDs at issue on March 24, 2010.

By direction of the Commission.

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constructions of the specifications or instructions of the CIDs, including various definitions. For instance, there is an instruction advising DRH and LC to consult with staff prior to compliance, if their responses were likely to contain sensitive, personal information. That instruction was not a direction to redact information. Presumably, during that consultation, there would have been a discussion of whether redaction or encryption would be the appropriate manner of dealing with the problem.

Petitions to Quash or Limit

MAINEHEALTH / MAINE CARDIOLOGY ASSOCIATES / CARDIOVASCULAR CONSULTANTS OF MAINE, P.A.

FTC File No. 101 0010 *Decision, March 10, 2010*

RESPONSE TO MAINEHEALTH'S PETITION TO LIMIT COMPULSORY PROCESS; AND CARDIOVASCULAR CONSULTANTS OF MAINE, P.A. AND MAINE CARDIOLOGY ASSOCIATES' JOINT PETITION TO LIMIT COMPULSORY PROCESS

Dear Mr. Kopit:

On January 25, 2010, subpoenas duces tecum ("SDTs") and civil investigative demands ("CIDs) were separately served on MaineHealth ("MH"), Cardiovascular Consultants of Maine, PA ("CC"), and Maine Cardiology Associates ("MC")[79] as part of the Commission's investigation to "determine whether the proposed acquisition by [MH] of [MC] and [CC] violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, or Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended; and to determine whether the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a, have been or will be fulfilled with respect to said transaction."[80] On February 17, 2010, MH's Petition and the Joint Petition of CC and MC ("Joint Petition") were accepted for filing by the Secretary.[81]

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[79] MH Petition at 1; Joint Petition at 1. MH, CC, and MC are collectively referred to herein as "Petitioners."

[80] FTC Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation (Jan. 25, 2010).

[81] MH, CC, and MC were granted extensions to file petitions to limit or quash until Friday, February 12, 2010. MH Petition, Attch. C at 1; Joint Petition, Attch. B at 1. On February 12, 2010, the Petitioners attempted to file confidential petitions to limit that did not comply with Rule 4.2(d)(4), 16 C.F.R. § 4.2(d)(4). The FTC Secretary's office refused to accept the confidential petitions for filing because they were accompanied by neither public versions nor express requests for confidential treatment in accordance with Rule 4.2(d)(4). The Secretary advised Petitioners' counsel that the Commission would deem the Petitions to have been timely filed if Petitioners waived the confidential designation and tendered only public versions of the Petitions for filing within a reasonable time. Alternatively, Petitioners could file a motion for leave to file compliant, confidential Petitions out of time. On

Petitions to Quash or Limit

MH petitions to limit the SDT and CID served upon it on the grounds that (1) they are overly burdensome, MH Petition at 3, (2) the demands are unreasonable because the merger will not significantly reduce competition, MH Petition at 8, (3) the FTC has no jurisdiction over either employment contracts or asset acquisitions by non-profit entities such as MH, MH Petition at 10, and (4) state approval of the transaction through the grant of a Certificate of Public Advantage ("COPA") would immunize the transaction from federal antitrust challenge "by virtue of the State Action Exception."[82] MH Petition at 9. The Joint Petition seeks to limit the SDTs and CIDs served on CC and MC on the grounds that (1) they are overly burdensome, Joint Petition at 3, (2) the demands are unreasonable because the merger will not significantly reduce competition, Joint Petition at 4, and (3) state approval of the transaction through the grant of a COPA would immunize the transaction from federal antitrust challenge "by virtue of the State Action Exception." Joint Petition at 6. As discussed below, Petitioners have failed to demonstrate that the SDTs and CIDs are unreasonable, and the Petitions must therefore be denied.

Commissioner Pamela Jones Harbour, acting as the Commission's delegate, *see* 16 C.F.R. § 2.7(d)(4), has determined, in her sole discretion, to refer these Petitions to the full Commission for disposition. This Letter Ruling advises you of the Commission's ruling on your Petitions to Limit Compulsory Process.

February 17, 2010, Petitioners tendered the public versions of the Petitions to the Secretary for filing.

[82] Presumably, MH is referring to the state action doctrine which owes it genesis to the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943) (holding that Congress did not intend the Sherman Act to apply to state regulation of commerce).

Petitioners Have Not Demonstrated that the SDTs and CIDs are Unduly Burdensome

"Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party." *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1997); *see also United States v. Powell*, 379 U.S. 48, 58 (1964); *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3rd Cir. 1962) (holding that the subpoena recipient must create a record demonstrating its burden of production rather than merely asking the tribunal to assume it to be so). This burden is not easily met where, as here, the FTC seeks information that is reasonably relevant to its investigation. "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)." *Nat'l Claims Service, Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998).

As an initial matter, we note that Petitioners have not offered any factual support for their requests for relief in the form of "affidavits and other supporting documentation" as required by Rule 2.7(d)(1), 16 C.F.R. § 2.7(d)(1). Instead of offering evidence or other proofs, the Petitions are advanced only by unsupported assertions and conjecture. In particular, Petitioners have made no reasonable attempt to show that responding to the SDTs and CIDs would "unduly disrupt or seriously hinder normal operations of [their] business."[83] Further, staff's repeated offers to work with Petitioners to mitigate the burdens of complying with the FTC's compulsory process have been met with take-or-leave-it proposals and outright refusals to provide staff with a principled basis for evaluating Petitioners' claims of burden or for devising meaningful counter proposals. This record does not demonstrate any substantial support for Petitioners' claims that they have

[83] *Texaco*, 555 F.2d at 882 ("Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.").

negotiated compliance issues with staff in good faith. MH Petition at 3; Joint Petition at 2.

Petitioners assert–again without any supporting documentation–that it is "beyond impossible" to comply with the SDTs and CIDs by the return date even if their proposed limitations were accepted. Joint Petition at 3; MH Petition at 4. They seek an extension for compliance until April 15, 2010, Joint Petition at 4, and June 1, 2010, MH Petition at 2. As Petitioners are aware, however, a state regulatory review process relating to the proposed transactions is already underway, with a public hearing scheduled for April 6, 2010 and a final decision in May. If, as a result of that proceeding, Petitioners' request for a COPA is granted, Petitioners will be free to consummate their proposed transactions. Thus, the Commission must gather evidence in an expedited fashion to determine whether there is reason to believe the acquisitions substantially lessen competition.

Additionally, the suggestion that the SDTs and CIDs are burdensome because it cannot be demonstrated that competition will be significantly reduced is an inappropriate attempt to conflate the enforcement of investigatory process with the ultimate merits of the merger claims. Boiled down to its essence, Petitioners' argument creates a logical tautology destructive of most law enforcement investigations: law enforcement subpoenas cannot seek evidence of unlawful conduct unless unlawful conduct can already be demonstrated.[84]

Challenges to the FTC's Jurisdiction Are Premature.

"With rare exceptions . . . , a subpoena enforcement action is not the proper forum in which to litigate disagreements over an agency's authority to pursue an investigation. Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced." *FTC v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001). "[A]t the subpoena

[84] This claim also implies that the FTC has the burden of demonstrating the likelihood of success on the merits of the ultimate claims before its process can be enforced. Petitioners have not directed to Commission to any supporting authority for this proposition, and the Commission is not independently aware of such authority.

enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party." *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996). Investigations should not be bogged down prematurely with jurisdictional challenges. *FTC v. Monahan*, 832 F. 2d 688, 690 (1st Cir. 1987) (Breyer); *FTC v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977) ("An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly spurious.").[85]

The Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), that Congress did not intend by its adoption of the Sherman Act, 15 U.S.C. § 1, to permit the antitrust laws to regulate the sovereign activities of state governments. This so called "state action doctrine" creates a potential affirmative defense to be asserted in litigation – it does not create an immunity from law enforcement proceedings. *South Carolina Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006).

The fact that Petitioners may have a good faith basis for asserting a state action doctrine defense in response to an FTC law enforcement action against them does not excuse them from responding to the SDTs and CIDs. Excusing Petitioners from compliance at this point in the FTC's investigation would deprive the Commission of the chance to evaluate the facts that might form the basis for such a defense, and to make its own decision of whether challenging this merger would be in the public interest. *Monahan*, 832 F.2d at 689-90 ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a 'clearly articulated and affirmatively expressed' state policy. . . . Again, we cannot now say, without knowing more facts, whether or not

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[85] The parties in *Swanson* were tour operators who claimed only to be subject to regulation by the Civil Aeronautics Board.

this additional 'state supervision' condition will apply.").[86] Accordingly, Petitioners are not entitled to have their CIDs or subpoenas quashed or modified by reason of the state action doctrine.

In addition to being premature, Petitioners' claims that the Commission lacks jurisdiction appear at this early stage to lack merit. Section 7 of the Clayton Act applies to both nonprofit and for-profit entities. *See FTC v. Freeman Hosp.*, 69 F.3d 260, 267 (8th Cir. 1995); *FTC v. Univ. Health*, 938 F.2d 1206, 1224 (11th Cir. 1991). MH's argument that Section 7 does not reach the acquisition of employment agreements, in addition to lacking any supporting legal authority, ignores that MH would obtain control of substantially all of the assets of CC and MC, including existing contracts, facilities, and equipment–all of which fall squarely within Section 7's ambit.

CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** the Petitions be, and they hereby are, **DENIED**.

IT IS FURTHER ORDERED THAT Petitioners shall comply with the SDTs and CIDs on March 26, 2010.

By direction of the Commission.

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[86] *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979) ("But where, as here, the FTC does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding prior to the conclusion of the agency's adjudication.); *South Carolina Bd. of Dentistry*, 455 F.3d at 444 (holding that the Board's state action defense did not qualify for interlocutory appeal because the state action issue would not be "effectively unreviewable" on appeal from the FTC's final decision).