

Interlocutory Orders, Etc.

IN THE MATTER OF

IMPAX LABORATORIES, INC.*Docket No. 9373. Order, June 27, 2018*

Order granting Complaint Counsel's Motion to Dismiss Respondent's Notice of Cross-Appeal and scheduling briefing.

ORDER OF THE COMMISSION

On May 11, 2018, Chief Administrative Law Judge D. Michael Chappell issued an Initial Decision concluding that the evidence adduced in this proceeding failed to prove a violation of Section 5 of the FTC Act and ordering that the Complaint be dismissed. After Complaint Counsel filed a Notice of Appeal, Respondent Impax Laboratories, Inc. (apparently now Impax Laboratories, LLC) filed a Notice of Cross Appeal, stating an intention to cross-appeal "portions of the Initial Decision . . . related to relevant market and market power, as well as any related findings of fact and conclusions of law." Respondent's Notice of Cross Appeal (May 29, 2019). On June 5, 2018, Complaint Counsel moved to Dismiss Respondent's Notice of Cross Appeal.

Complaint Counsel argue that Respondent's cross-appeal is improper because the Initial Decision dismissed the complaint and the cross-appeal seeks only to address alternative grounds for affirming the dismissal. Respondent opposes Complaint Counsel's motion. Respondent argues that Commission Rule 3.52(b)(1), 16 C.F.R. § 3.52(b)(1), which provides that "any party may file objections to the initial decision or order of the Administrative Law Judge" by filing a notice of appeal that "designat[es] the initial decision or order or part thereof appealed from," is not limited to parties that have been found to have violated the FTC Act. Commission Rule 3.52(b)(1), however, does not expressly address the setting where a respondent seeks to appeal an order dismissing the complaint.

The only recent case addressing the application of Rule 3.52(b)(1) was *In the Matter of LabMD, Inc.*, Docket No. 9357, Order (F.T.C. Dec. 18, 2015) ("LabMD Order"). In that case, the

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respondent acknowledged the ALJ's Initial Decision and Order "were both correct and should be affirmed," but nonetheless submitted a conditional, "protective cross-appeal" on issues the ALJ's decision did not address. *Id.* at 2. The respondent argued the cross-appeal was necessary to preserve issues for appeal to a federal court. The Commission disagreed, explaining that rationale would permit "protective cross-appeals" by the successful party in essentially every case – a result "inconsistent with general appellate practice" that "would prove highly burdensome and wasteful for all involved." *LabMD* Order at 2.

Unlike *LabMD*, Respondent's cross-appeal here would challenge an issue on which the ALJ did rule – market definition and market power – albeit in the alternative. The Commission understands the importance of permitting parties to present their arguments on both the facts and the law for the Commission's *de novo* review, especially when, as here, there are numerous issues a Commission decision may (or may not) ultimately address. The parties have proposed an alternative: Increase the word limits in Respondent's answering and Complaint Counsel's reply briefs. The Commission believes this strikes the right balance between those considerations and the ones animating our decision in *LabMD*. While Respondent requested 10,000 additional words, the Commission finds an additional 7,000 words is appropriate. Seven thousand words represents a 50% increase to the normal 14,000 word limit, is consistent with the increase the Commission granted and found effective in *LabMD*, and should easily suffice to discuss the limited issues raised in Respondent's cross-appeal. To avoid any prejudice to Complaint Counsel, the Commission increases the word limit for Complaint Counsel's reply brief by 5,000 words.

Accordingly,

T IS HEREBY ORDERED THAT Complaint Counsel's Motion to Dismiss Respondent's Notice of Cross-Appeal is **GRANTED**;

IT IS FURTHER ORDERED THAT Complaint Counsel's opening brief must be filed on or before July 2, 2018, and, if Complaint Counsel files an opening appeal brief by that date,

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Complaint Counsel's appeal from the Initial Decision will be treated as having been perfected in accordance with Commission Rule 3.52(b), 16 C.F.R. § 3.52(b);

IT IS FURTHER ORDERED THAT while Respondent may not file an opening appeal brief, it may file an answering brief that shall not exceed 21,000 words. Any such answering brief must be filed on or before August 10, 2018; and

IT IS FURTHER ORDERED THAT Complaint Counsel may file a reply brief that shall not exceed 12,000 words. Any such reply brief must be filed on or before August 24, 2018.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

SLAC, INC.

FTC File No. 172 3090 – February 13, 2018

RESPONSE TO SLAC, INC.'S PETITION TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMAND DATED DECEMBER 6, 2017

By McSWEENEY, Commissioner:

SLAC, Inc. has submitted a petition seeking to limit or quash the Civil Investigative Demand (CID) that the Commission issued on December 6, 2017. For the reasons described below, the petition is denied.

I. BACKGROUND

SLAC sells services to consumers who want to reduce their monthly student loan payments by applying for income-based repayment plans offered through the U.S. Department of Education. In connection with an investigation into whether the business practices of SLAC or other identified individuals, including SLAC's President Adam Owens, violate the FTC Act or the Telemarketing Sales Rule (TSR), the Commission issued a CID seeking information about the company and its business practices.

SLAC objects to two of the CID's specifications. It argues that Interrogatory 10, which asks for a description of "each step the Company takes to ensure that it does not collect payment from consumers until after [its student loan services] have been fully delivered or rendered," is beyond the stated scope of the investigation and therefore the Commission's jurisdiction. It also contends that Document Request 13, which asks for documents related to a presentation given by Mr. Owens at a conference of the Association for Student Loan Relief, is outside the scope of the Commission's investigation and abridges the First

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Amendment rights of both SLAC and Mr. Owens. As explained below, SLAC's objections lack merit.

II. ANALYSIS

A. Applicable legal standards

The power to investigate is vital to the Commission's ability to carry out its congressionally-mandated duty to prevent unfair or deceptive acts or practices.¹ Law enforcement agencies like the Commission "have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."² Administrative compulsory process such as a CID is proper if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the scope of the inquiry.³

Agencies have wide latitude to determine what information is relevant to their law enforcement investigations and are not required to have "a justifiable belief that wrongdoing has actually occurred."⁴ Thus, "[t]he 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."⁵ The standard of relevance in an investigatory setting "is more relaxed than in an adjudicatory one."⁶ Moreover,

¹ *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (en banc); 15 U.S.C. § 45(a).

² *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

³ *Id.*; *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *Texaco*, 555 F.2d at 874.

⁴ See, e.g., *Morton Salt*, 338 U.S. at 642-43 ("[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.").

⁵ *Texaco*, 555 F.2d at 874.

⁶ *Invention Submission Corp.*, 965 F.2d at 1090; see also *id.* ("At the

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agencies are “free to determine, in the first instance, the scope of their own jurisdiction when issuing investigative subpoenas.”⁷

B. The challenged specifications are within the scope of the Commission’s investigation.

SLAC states that it “does not challenge the FTC’s statutory authority to investigate practices that it believes may constitute deceptive or unfair trade practices when used in the course of trade.”⁸ Rather, it argues that the challenged specifications seek information “wholly unrelated to any purported fraud and deception being investigated.”⁹

Information sought in an administrative subpoena must be “reasonably relevant” to the Commission’s investigation.¹⁰ Here, the Commission described the subject of the investigation in the CID Schedule:

Whether [SLAC], Adam Owens, Scott Brown, Mindy Fincher, and others have engaged in deceptive or otherwise unlawful activity in connection with the marketing, promotion, offering for sale, or sale of student loan debt relief products or services, as defined herein, in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, or the Telemarketing Sales Rule, 16 C.F.R. Part 310, and whether the Commission action to obtain monetary relief would be in the public interest. See also attached resolution.¹¹

investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint.”).

⁷ *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

⁸ Pet. at 3-4.

⁹ *Id.* at 7.

¹⁰ *Morton Salt*, 338 U.S. at 652.

¹¹ Pet. Exh. A (CID Schedule) at 2.

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SLAC argues that Interrogatory 10 seeks information outside the stated scope of the Commission's investigation because as a student loan document preparation and assistance company, its business is not covered by the TSR.¹² In particular, SLAC argues that it does not offer "debt relief services," as the TSR defines that term.¹³ With regard to Document Request 13, SLAC argues that the specification "exceed[s] the FTC's investigatory power in that it seeks information related to lobbying efforts," and that such efforts are beyond the scope of the Commission's investigation.¹⁴ SLAC argues further that the Commission's request violates the First Amendment rights of free speech and association of both SLAC and company President Owens.¹⁵ Each of SLAC's arguments is addressed below.

1. Interrogatory 10

Interrogatory 10 asks SLAC to describe the steps it takes to ensure "that it does not collect payment from consumers until after [its student loan services] have been fully delivered or rendered." SLAC is correct in stating that the TSR prohibits telemarketers from collecting fees for "debt relief services" before delivering such services.¹⁶ SLAC is incorrect, however, to suppose that the scope of the Commission's investigation is limited by SLAC's assertion that its services do not meet the TSR's definition of "debt relief services."

Whether or not SLAC is selling "debt relief services" as defined by the TSR turns on how the company *represents* its services to consumers. SLAC states that it does not negotiate or settle consumers' debts but instead provides "document preparation services" in connection with the Department of

¹² Pet. at 8.

¹³ *Id.* at 8-11; see 16 C.F.R. § 310.2(o) (defining "debt relief service"). See also Pet. Exh. A (CID Schedule) at 7 (definition of "Debt relief product or service").

¹⁴ Pet. at 7, 11-13.

¹⁵ *Id.* at 11-13.

¹⁶ *Id.* at 8; see 16 C.F.R. § 310.4(a)(5).

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Education's student loan consolidation program.¹⁷ Notwithstanding its own characterization of its business model, if SLAC represents to consumers, directly or by implication, that it will "renegotiate, settle, or in any way alter the terms of payment ... including, but not limited to, a reduction in the balance, interest rate, or fees owed" to a creditor, then it is engaged in the provision of "debt relief services" subject to the TSR.¹⁸ The scope of the Commission's investigation includes not only determining whether SLAC has violated the FTC Act or the TSR in connection with the services it sells, but also whether those services are a "debt relief service" as defined in the TSR. The CID includes other requests seeking materials that will enable the Commission to determine how SLAC represented its services to consumers,¹⁹ and if they meet the TSR definition in question. Therefore, the Commission has the "legitimate right" to satisfy itself "that [SLAC's] behavior is consistent with the law and the public interest,"²⁰ and is entitled to make its own determination as to the nature and legal status of the services SLAC provides.²¹

Moreover, regardless of the legal characterization of the services provided, seeking information regarding the timing of payments relative to the rendering of services is potentially relevant to the issue of monetary relief, should the Commission determine that a law violation has occurred.

¹⁷ Pet. at 8-11.

¹⁸ 16 CFR § 310.2(o).

¹⁹ See, e.g., Pet. Exh. A (CID Schedule) at 5 (Document Request 3 seeking copies of advertisements, and Document Request 5 seeking copies of sales scripts).

²⁰ *Morton Salt*, 338 U.S. at 652.

²¹ We also note that at least one court has rejected arguments similar to the ones raised by SLAC here. In *CFPB v. Irvine WebWorks, Inc.*, the defendants argued that their services were simply assisting consumers in consolidating their loans with the Department of Education and therefore did not constitute a "debt relief service" under the TSR. 2016 U.S. Dist. LEXIS 36097, at *19 (C.D. Cal. Feb. 5, 2016). The court rejected this position, however, explaining that the TSR defined "debt relief services" in "broad terms" that covered "entities that engage in practices substantially similar to those of loan consolidation middlemen." *Id.* at 18.

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Therefore, Interrogatory 10 is directly relevant to the stated purpose of the investigation. SLAC's argument that it need not respond to this interrogatory because it does not offer "debt relief services" is therefore without merit. We find no reason to limit or quash the CID's request for information in Interrogatory 10.

2. Document Request 13

Document Request 13 directs SLAC to produce notes and other materials relating to a presentation by its president at the annual conference of the Association for Student Loan Relief: "An Industry Under Fire by Regulators and What Can Be Done To Help Save Our Businesses!" SLAC argues that the materials requested are outside the scope of the Commission's investigation because, it claims, the presentation involved efforts to organize lobbying activities for the student loan relief industry. SLAC argues that the request is "an unlawful attempt to censor Mr. Owens' and SLAC's First Amendment rights."²² These arguments are unfounded.

First, SLAC asserts that "[l]obbying efforts and a presentation made related to those efforts clearly fall outside the Scope of the CID."²³ But even assuming that the presentation related to lobbying efforts,²⁴ it does not follow that materials related to the presentation fall outside the scope of the investigation. Indeed, one reason businesses might decide to lobby for a change in the law could be that they believe their current practices are illegal. In such a case, the presentation could well contain relevant facts about both the practices and the presenter's knowledge that such practices are unlawful. Here, such facts would be relevant to the purpose of the Commission's investigation because Mr. Owens's conduct—and thus his knowledge of any illegality—is also a subject of the investigation. Accordingly, SLAC's assertion that Mr. Owens's presentation related to lobbying efforts does not

²² Pet. at 11-13.

²³ *Id.* at 4; *see also id.* at 12-13.

²⁴ SLAC does not offer any factual support for this assertion.

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show that the materials requested by the specification are outside the scope of the investigation.

Second, SLAC argues that by requesting information about the presentation, the Commission is “trying to bully or intimidate” SLAC, and is asking for information “as a way to silence those speaking out.”²⁵ SLAC further suggests that the CID is “an unlawful attempt to censor” SLAC and its President.²⁶ There is no basis for these claims.

To justify noncompliance with an administrative request for information such as the Commission’s CID, the recipient must make “a prima facie showing of arguable first amendment infringement.”²⁷ That showing requires “objective and articulable facts, which go beyond broad allegations or subjective fears.”²⁸ The recipient must show both “a causal link between the disclosure and the prospective harm” to its First Amendment rights and “adverse consequences” that could reasonably flow from the disclosure.²⁹

SLAC’s First Amendment claims are based on the following allegations:

- 1) an executive of the Missouri Higher Education Loan Authority attended Mr. Owens’s presentation;
- 2) the Authority services student loan debt and therefore stands to lose money if students enroll in repayment plans;
- 3) the Authority services debt for the U.S. Department of Education; and

²⁵ Pet. at 4.

²⁶ *Id.* at 13.

²⁷ *Brock v. Local 375, Plumbers Int’l Union*, 860 F.2d 346, 349 (9th Cir. 1988).

²⁸ *Id.* at 350 n.1.

²⁹ *Dole v. Local Union 375, Plumbers Int’l Union*, 921 F.2d 969, 972 (9th Cir. 1990)

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- 4) the executive later told the president of the conference sponsor that he intended to meet with the Commission and the Consumer Financial Protection Bureau to discuss the student loan industry.³⁰

SLAC concludes from these allegations that the executive was an “undisclosed agent of the federal government” who (presumably through the Commission) is “penalizing SLAC and Mr. Owens” for exercising their free speech rights and “bullying the industry to cease all efforts to lobby legislators.”³¹

SLAC’s allegations are not “objective and articulable facts” that demonstrate an arguable First Amendment violation.³² Even assuming SLAC’s averments are accurate, SLAC has not shown how producing information about the presentation would bully, censor, or intimidate SLAC or Mr. Owens. Indeed, SLAC does not describe any harm to its speech or association rights beyond broad, conclusory allegations and subjective fears. Nor has SLAC identified any consequences that could flow from producing the requested materials. The petition thus provides no reason to limit or quash the request for documents regarding Mr. Owens’s presentation.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition to Limit or Quash Civil Investigative Demand filed by SLAC be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to SLAC must now be produced on or before March 6, 2018.

By the Commission.

³⁰ Pet. at 2-3.

³¹ *Id.*

³² *Brock*, 860 F.2d at 349.

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NORDIC CLINICAL, INC.
AND
ENCORE PLUS SOLUTIONS, INC.

FTC File Nos. 172 3132 & 172 3143 – Decision, March 12, 2018

RESPONSE TO NORDIC CLINICAL, INC. AND ENCORE
PLUS SOLUTIONS, INC.’S PETITION TO STAY CIVIL
INVESTIGATION AND QUASH CIVIL INVESTIGATIVE
DEMANDS DATED DECEMBER 19, 2017

By McSWEENY, Commissioner:

Nordic Clinical, Inc. and Encore Plus Solutions, Inc. have filed a Petition seeking to stay a Federal Trade Commission investigation, and to quash two Civil Investigative Demands for Oral Testimony (“CIDs”) issued on December 19, 2017. Because replacement CIDs have now been issued, the Petition is therefore moot. Accordingly,

IT IS ORDERED THAT the Petition By Nordic Clinical, Inc. and Encore Plus Solutions, Inc. To Stay Investigation and Quash Civil Investigative Demands be, and it hereby is, **DENIED** as moot.

By the Commission.

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NORDIC CLINICAL, INC.
AND
ENCORE PLUS SOLUTIONS, INC.

FTC File Nos. 172 3132 & 172 3143 – Decision, March 12, 2018

RESPONSE TO NORDIC CLINICAL, INC. AND ENCORE
PLUS SOLUTIONS, INC.’S PETITION TO STAY CIVIL
INVESTIGATION AND QUASH CIVIL INVESTIGATIVE
DEMANDS DATED DECEMBER 19, 2017

By McSWEENEY, Commissioner:

Nordic Clinical, Inc. (“Nordic Clinical”) and Encore Plus Solutions, Inc. (“Encore Plus”) have petitioned to (1) stay two Commission investigations; and (2) quash two civil investigative demands (“CIDs”) for corporate testimony pending resolution of related criminal investigations. For the reasons stated below, the petition is denied.

I. BACKGROUND

Nordic Clinical is a Delaware corporation owned by two Canadian citizens, Vito Proietti and Vincent DiCriscio. Encore Plus is a Florida corporation owned by Mr. Proietti. The companies are direct mail marketers of nutritional supplements that they claim treat a number of age-related health conditions. Although the companies now contend they principally conduct business in Montreal, Canada, Nordic Clinical responded to an earlier CID interrogatory that its principal address is in Fort Lauderdale, Florida, and Encore Plus likewise acknowledged that its principal address is in Miami, Florida.

In Spring 2017, the Commission began investigating the companies’ marketing claims. Nordic Clinical markets its Neurocet product as an extremely strong and long-lasting pain reliever. Encore Plus sells two substantively identical products under the names Regenify and Resetigen-D, which it markets as pain relievers, memory enhancers, and treatments to reverse age-related health problems. The investigations are intended to determine whether the companies have “made false or

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unsubstantiated representations about the health-related benefits” of their products in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52, and whether Commission action to obtain monetary relief for injured consumers is in the public interest. Pet. Exhs. A, B.

On June 15, 2017, the Commission issued CIDs to both companies seeking corporate documents and information regarding, among other things, corporate location, officers and owners, marketing claims, consumer complaints, sales and refunds, and the identities of affiliated entities.¹ The companies produced documents and responded to interrogatory requests in August 2017, and Nordic Clinical produced additional responsive documents in December 2017.

As part of its continuing investigations, on March 9, 2018, the Commission issued CIDs to both companies for oral testimony. Pet. Exhs. A, B. The CIDs seek testimony on a range of topics, including: the companies’ responses to the June 2017 CIDs; their business structure; sales and refunds; consumer complaints; endorsements and testimonials; product manufacturing, substantiation, and marketing; and their relationship with affiliated companies and individuals. The CIDs also ask about the roles of Proietti and DiCriscio at the companies, as well as their background, training, and experience. Pet. Exh. A at 2-3, Pet. Exh. B at 2-3. The CIDs require the companies to designate persons who could “testify on [their] behalf” at an investigational hearing in Fort Lauderdale, Florida “about information known or reasonably available to the” companies. Pet. Exh. A at 1-2 (citing 16 C.F.R. § 2.7(h)), Pet. Exh. B at 2 (same).

On April 3, 2018, the companies filed a petition asking the Commission to stay its investigations and temporarily quash the CIDs until criminal investigations purportedly involving their products are resolved. The companies claim there are “at least

¹ The CIDs were issued under Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, and were authorized by an August 13, 2009, Commission Resolution, permitting the use of compulsory process in agency investigations into possible false advertising or marketing claims for dietary supplements, foods, or drugs.

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three separate criminal investigations related to the nutritional supplements identified in the CIDs.” Pet. 2. They support their claim with (1) a search warrant issued by an Idaho court in September 2017 for products located at a facility in Nampa, Idaho; (2) a motion filed by Nordic seeking the return of property seized from the Idaho facility and pleadings related to that motion; and (3) two December 2017 Canadian search warrants for products at two locations in Montreal. Pet. Exhs. C, D, E, F, G.

Petitioners argue the CIDs demand information about Proietti and DiCriscio that is unrelated to the FTC’s investigation, but instead is “obviously designed to glean information for criminal charges against” them. Pet. 5. According to petitioners, compelling such testimony would violate the Fifth Amendment right against self-incrimination, although it is less than clear whether they mean their own or that of Proietti and DiCriscio. Pet. 7-9. The companies assert a stay is necessary in order to “assure that Fifth Amendment rights are not compromised.” Pet. 10. Finally, the companies contend the CIDs cannot require their Canadian owners to testify in Florida.

For the reasons stated below, we deny the petition.

II. ANALYSIS

A. The requested testimony is not covered by the Fifth Amendment

The CIDs are directed to two companies—Nordic Clinical and Encore Plus—not to Messrs. Proietti and DiCriscio personally. Pet. Exhs. A, B. The companies have no Fifth Amendment rights against self-incrimination and must designate a representative who faces no such risk to testify on their behalf.

When the Commission issues a CID for oral testimony from a corporation or other business entity, “the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify *on its behalf* * * *.” 16 C.F.R. § 2.7(h) (emphasis added). The witnesses appear on

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behalf of the company, not in their individual capacities.² It has long been established that the Fifth Amendment privilege “is a purely personal one,” and that “it cannot be utilized by or on behalf of any organization, such as a corporation.” *United States v. White*, 322 U.S. 694, 699 (1944); *see also Bellis v. United States*, 417 U.S. 85, 89-90 (1974) (“the privilege against compulsory self-incrimination should be ‘limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.’”) (citing *White*, 322 U.S. at 701).

Petitioners nonetheless maintain that the CIDs, issued “in the midst of ongoing criminal investigations, * * * seek[] to compel testimony about” Proietti and DiCriscio that implicate their Fifth Amendment rights. Pet. 7-9. This claim fails for several reasons.

First, the companies have provided no evidence that they or Proietti and DiCriscio have a reasonable fear of self-incrimination or face a real threat of a criminal indictment to justify invoking any Fifth Amendment rights. *See United States v. Argomaniz*, 925 F.2d 1349, 1353 (11th Cir. 1991) (the privilege against self-incrimination “applies only in ‘instances where the party has reasonable cause to apprehend danger’ of criminal liability”) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

² The companies are thus in error when they assert the CIDs are directed to Proietti and DiCriscio “in their individual capacities” because, as owners and officers of the companies, they fall within the CID’s definition of the “Company.” Pet. 5, 8. To the contrary, the CIDs are directed only to the companies, although they ask for corporate information that employees or other agents would have about the company. That does not transform the CIDs into requests addressed to Proietti and DiCriscio in their personal capacities. The companies also claim the CID queries focused on Proietti and DiCriscio are irrelevant to the FTC’s investigation and are being asked only to pursue criminal charges against them. Pet. 6. This claim too is unfounded because the companies’ August 2017 CID responses showed that Proietti and DiCriscio, as owners of the companies, played a central role in product development and marketing. Indeed, the companies asserted that Proietti and DiCriscio are not only responsible for product advertising and promotion, but they “conducted their own research,” reviewed relevant literature, and even took the products themselves to determine if the products’ benefits were consistent with their marketing claims. The CID inquiries as to Proietti and DiCriscio are thus directly relevant to our inquiry into whether the companies’ marketing violated the FTC Act.

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The supporting materials provided by the petitioners show, at most, that Nordic Clinical may be the subject of criminal investigations into Neurocet and other products, but there is no indication that the company faces a reasonable danger of criminal liability. The United States District Court for the District of Idaho recognized as much this past February when it denied Nordic Clinical's motion to return seized property. As the court noted, no indictments had been issued and "it is unknown whether the Government will prosecute any person or entity involved in its investigation, including Nordic." *In the Matter of the Search of: Specialty Fulfillment Center*, No. 1:17-mc-09979-CWD, 2018 WL 785861, at *7 (D. Idaho Feb. 8, 2018). Petitioners provide no evidence that Encore Plus faces a threat of a criminal indictment.

Second, even if Proietti or DiCriscio faces a genuine threat of criminal indictment, that would not excuse the companies from compliance with the CID. The companies themselves have no Fifth Amendment privilege as discussed above.³ Even if the two owners are unavailable to testify, the companies still must select an officer, employee, or "agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *Kordel*, 397 U.S. at 8 (citations omitted); see generally 8 Charles Alan Wright, Arthur R. Miller, *et al.*, Federal

³ The companies' reliance on *United States v. Hubbell*, 530 U.S. 27 (2000), Pet. 8, is misplaced. *Hubbell* involved a subpoena issued to the target of a criminal investigation in his individual capacity; the Court did not address the Fifth Amendment status of corporations. As courts have consistently recognized, *Hubbell* did not reverse long-standing Supreme Court precedent that corporations lack Fifth Amendment rights. See, e.g., *In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 263 n.2 (3d Cir. 2015); *Amato v. United States*, 450 F.3d 46, 51 (1st Cir. 2006); *Armstrong v. Guccione*, 470 F.3d 89, 98 (2d Cir. 2006). The companies also get no help from *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which they claim also cast doubt on the inapplicability of the Fifth Amendment to corporations. Pet. 9. Those two cases address the application of the *First* Amendment to corporations. Nothing in them signals any departure from century-old precedents recognizing the *Fifth* Amendment privilege against self-incrimination as an individual right. See, e.g., *Grand Jury*, 786 F.3d at 261 & n.1 ("[W]e discern nothing in Supreme Court jurisprudence that suggests the Court has, in any way, signaled its readiness to depart from its longstanding precedent regarding corporate custodians' inability to invoke the Fifth Amendment privilege against self-incrimination.").

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Practice & Procedure § 2018 (3d ed. 2010) (“[T]he burden on the corporation is to designate someone to answer on its behalf who can furnish as much of the requested information as is available to the corporation without fear of self-incrimination”).⁴

Indeed, the companies cannot resist complying with the CIDs by designating Proietti and DiCriscio as their corporate representatives if the executives will simply assert the Fifth Amendment privilege at the investigational hearings. “In their official capacit[ies],” the executives “have no privilege against self-incrimination.” *White*, 322 U.S. at 699. Further, the Supreme Court has held that a corporation may not designate as its representative an officer who could assert a personal Fifth Amendment privilege and, in this way, “secure for the corporation the benefits of a privilege it does not have.” *United States v. Kordel*, 397 U.S. 1, 8 (1970) (quoting *U.S. v. 3963 Bottles of Enerjol Double Strength*, 265 F.2d 332, 336 (7th Cir. 1959)). The Court explained that “[s]uch a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents.” *Kordel*, 397 U.S. at 8. Nor may a corporate officer rely on the Fifth Amendment to avoid producing corporate records he holds in a representative capacity, even if those records might incriminate him. *Braswell v. United States*, 487 U.S. 99, 108-09 (1988).

In sum, there is no basis to quash the CIDs on Fifth Amendment grounds.

⁴ Indeed, even where there is no such person at the company who can testify, the company must retain a person with whom it was not previously associated and provide that person with sufficient knowledge to be able to testify on the company’s behalf. See, e.g., *City of Chicago, Ill., v. Wolf*, No. 91 C 8161, 1993 WL 177020, at *1-2 (N.D. Ill. May 21, 1993) (“The corporations, however, can be compelled to answer the [30(b)(6)] questions through an agent who will not invoke the privilege”) (citations omitted); *Martinez v. Majestic Farms, Inc.*, No. 05-60833-CIV, 2008 WL 239164, at *2 (S.D. Fla. Jan. 28, 2008) (citing *Wolf*). To avoid prejudicing the employee who has a legitimate Fifth Amendment right from testifying indirectly through the designated representative, the employee would not be required to provide information to the corporate designee that is solely contained in the employee’s memory and is not implied by a document. *Martinez*, 2008 WL 239164, at *3; *Wolf*, 1993 WL 177020, at *2.

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B. A stay of the Commission's investigations is not warranted

The companies relatedly contend that the Commission should stay its investigations of the two companies pending resolution of the criminal investigations. Pet. 10-16. We deny that request for many of the same reasons discussed above.

“[T]he Constitution rarely, if ever, requires * * * ‘a stay of civil proceedings pending the outcome of criminal proceedings.’” *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012) (citing *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986) (internal quotation omitted)). Indeed, “‘a stay of a civil case’ to permit conclusion of a related criminal prosecution has been characterized as ‘an extraordinary remedy,’” although a court has the discretion to do so “when related criminal proceedings are imminent or pending, * * *.” *Id.* (citations omitted). The party seeking such “a stay ‘bears the burden of establishing its need.’” *Id.* at 97 (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). And contrary to the companies’ suggestion, Pet. 12, a criminal defendant “has no absolute right” to remain free “to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.” To the contrary, it is “permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege,” and “it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).⁵

Courts consider a number of factors when deciding whether to stay a civil proceeding pending a criminal matter. These include: (1) the status of the criminal case, including whether the defendants have been indicted and their Fifth Amendment rights

⁵ Contrary to the companies’ contentions, Pet. 5, there is nothing improper with the FTC sharing information it receives pursuant to process with another domestic or foreign law enforcement agency if the information is used for official law enforcement purposes as authorized by the FTC Act, 15 U.S.C. §§ 46(f), 57b-2(b)(6), and 16 C.F.R. §§ 4.11(c) and (j).

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are implicated;⁶ (2) the plaintiff's interest in proceeding expeditiously in the civil matter and the potential prejudice to the plaintiff of a delay; (3) the extent to which the issues in the criminal and civil cases overlap; (4) the private interests of and burden on the defendants; (5) the interests of non-parties and the public; and (6) the convenience to the court and judicial economy. *See Malletier*, 676 F.3d at 99-100 & nn.13-14 (declining to stay civil counterfeiting case pending related criminal proceeding); *Keating*, 45 F.3d at 324-25 (declining to stay civil case pending resolution of criminal action because burden on the defendant was outweighed by "the public's interest in a speedy resolution of the [civil] controversy") (citing *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902-03 (9th Cir. 1989)); *see also Dresser Industries*, 628 F.2d at 1374 (allowing parallel civil and criminal suits to continue "[i]n the absence of substantial prejudice to the rights of the parties involved, * * *.").

Those factors plainly counsel against a stay here. First, as discussed above, petitioners point only to possible future criminal proceedings; neither the companies themselves nor their owners have been indicted—and they have shown no genuine threat of criminal liability at this point. Even if they did, no Fifth Amendment rights would be implicated by our investigation of the companies, because the companies have no Fifth Amendment rights as explained above. The very cases cited by petitioners recognize that "a stay in a civil proceeding when no indictment has yet issued in the criminal proceeding is rare, * * *." *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1327 (N.D. Ala. 2003). While some courts have granted pre-indictment stays, Pet. 12-13,

⁶ The strongest case for staying a civil proceeding is where the defendant "is already under indictment for a serious criminal offense" involving the same matter, *Malletier*, 676 F.3d at 101; *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980), or at least is facing a "real and appreciable" risk of criminal liability. *Kordel*, 397 U.S. at 9. But as discussed below, courts often decline to stay civil cases even in the face of related criminal proceedings. By contrast, "[p]re-indictment requests to stay parallel civil litigation are routinely denied." *United States v. Bauer*, No. 1:14-CV-1660, 2014 WL 5493184, at *2 (M.D. Pa. Oct. 30, 2014) (citations omitted). "[T]he risk of self-incrimination is reduced at the pre-indictment stage," and it is uncertain "when, if ever, indictments will be issued." *State Farm Mut. Auto. Ins. Co. v. Beckham-Easley*, No. CIV.A 01-5530, 2002 WL 31111766, at *2 (E.D. Pa. Sept. 18, 2002) (citations omitted).

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those cases nearly always involved imminent or near-certain indictments. *See, e.g., Chao v. Fleming*, 498 F. Supp. 2d 1034, 1039-40 (W.D. Mich. 2007) (granting short stay of civil case where government had indicated “that it has sufficient evidence to seek an indictment,” such that an indictment was “but ‘an eventuality’”); *Healthsouth*, 261 F. Supp. 2d at 1326 (stay issued in civil case where indictment is “but an eventuality”).

Further, both the Commission and the public have a very strong interest that the civil investigation proceed expeditiously given the potentially false claims made by the companies that their products can prevent and treat a variety of serious health conditions. *See, e.g., Kordel*, 397 U.S. at 11 (denying stay of civil action that sought to prevent distribution of misbranded drugs); *Dresser Industries*, 628 F.2d at 1377 (denying stay where doing so might permit the “[d]issemination of false or misleading information by companies” to investors). The Commission and the public would be prejudiced by being “force[d] * * * to wait until the unknown culmination of a criminal case, for which no indictment has even been issued.” *FTC v. Adept Mgmt., Inc.*, No 1:16-cv-00720-CL, 2017 WL 722586, at *4 (D. Or. Feb. 23, 2017).

For these reasons, we deny the companies’ request to stay the Commission’s investigations pending resolution of the criminal investigations.

C. The CIDs properly seek testimony in Florida

Petitioners assert that they cannot be compelled to provide testimony in Florida. The CIDs require each company to provide oral testimony where the company “resides, is found, or transacts business.” 15 U.S.C. § 57b-1(c)(14)(C). Both companies previously stated in their August 2017 CID interrogatory responses that the “principal address” for each one is in Florida: Nordic Clinical in Fort Lauderdale and Encore Plus in Miami. Now, in direct contrast to these answers, they claim they principally conduct business in Montreal. Pet. 2. Petitioners having previously told us that their principal addresses were both in Florida, we see no reason why they cannot designate a witness to testify there.

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III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Nordic Clinical, Inc. and Encore Plus Solutions, Inc. to Stay Civil Investigation and Quash Civil Investigative Demands be, and it hereby is, **DENIED**, and

IT IS FURTHER ORDERED THAT Petitioners Nordic Clinical, Inc. and Encore Plus Solutions, Inc., shall comply with the Commission's CIDs and designate a corporate representative who will testify on their behalf, on a date set after consultation with Commission staff.

By the Commission.

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**CORPUS CHRISTI POLYMERS LLC,
ALFA S.A.B. DE C.V.,
INDORAMA VENTURES PLC,
FAR EASTERN NEW CENTURY
CORPORATION,
ALOE LOHIA
AND
SUCHITRA LOHIA**

FTC File No. 181 0030 – Decision, June 26, 2018

**RESPONSE TO BANIBU II HOLDINGS, INC.’S PETITION
TO LIMIT OR QUASH SUBPOENAS DATED MAY 7, 2018**

By SLAUGHTER, Commissioner:

Banibu II Holdings, Inc. (“Banibu”) has filed a petition to limit and quash a subpoena *duces tecum* (“SDT”) and a subpoena *ad testificandum* (“SAT”) issued by the Commission on May 7, 2018. The SDT and SAT ask “the Company” – defined to include Banibu, its parents (most notably, Banco Inbursa, S.A. (“Inbursa”)), and its officers and employees – to produce documents and provide testimony. Inbursa created Banibu for the sole purpose of bidding in a bankruptcy auction for certain manufacturing assets in Corpus Christi, Texas. Banibu refuses to provide, however, what it considers to be “Inbursa-related” information.

Banibu’s petition to limit and quash advances three arguments: (1) that the request for any documents maintained by Inbursa is not valid because Inbursa was not served in Mexico; (2) that Banibu does not possess or control subpoenaed documents maintained by Inbursa; and (3) that the Federal Trade Commission (“FTC” or “Commission”) lacks the authority to compel Banibu’s Mexican principals to travel to the United States to testify at an investigational hearing. For the reasons described below, we deny Banibu’s petition to limit and quash, although we modify the location of the SAT.

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I. BACKGROUND

The FTC is investigating a proposed acquisition of a Corpus Christi-based production facility for polyethylene terephthalate (“PET”) resin, a plastic polymer used to make synthetic clothing fibers (referred to by its common name, polyester), bottles, and food packaging. The North American PET resin market is highly concentrated and dominated by only a few market participants.

The transaction under investigation arises out of a bankruptcy proceeding. M&G USA Corporation, Inc. (“M&G”), an American subsidiary of an Italian corporation, was building, in Corpus Christi, Texas, what was expected to be the largest and most efficient vertically integrated PET resin facility in North America. Before the project was completed, M&G filed for Chapter 11 bankruptcy protection on October 30, 2017. *In re: M&G USA Corp.*, No. 17-12307-BLS (Bankr. D. Del.). On March 29, 2018, the bankruptcy court approved the sale of the Corpus Christi assets for \$1.1 billion to a trilateral joint venture named Corpus Christi Polymers LLC, consisting of Indorama Ventures USA (“Indorama”), DAK Americas LLC (“DAK”), and Far Eastern New Century Corporation. FTC staff is investigating the potential competitive effects of this proposed transaction. The bankruptcy court also approved Banibu as the backup bidder for the Corpus Christi assets. *See M&G USA Corp.*, *supra* (Doc. No. 1300). Banibu will acquire the assets if the joint venture fails to close the transaction.

On February 27, 2018, Inbursa, a Mexican financial institution, created Banibu, a Delaware corporation, as its wholly owned subsidiary, specifically to bid on the Corpus Christi assets. Pet. 2-3. Banibu has four directors, who also serve as its only officers: Javier Foncerrada Izquierdo (President), Luis Roberto Frias Humphrey (Vice President, Treasurer), Guillermo Rene Caballero Padilla (Vice President, Secretary), and Frank Ernesto Aguado Martinez (Vice President). Pet. 3. These same four individuals are also officers, directors, or senior employees of Inbursa. Inbursa was the principal lender for M&G’s PET resin facility project, and it is the primary lienholder and largest secured creditor on the Corpus Christi assets. [REDACTED]

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[REDACTED]

[REDACTED]

On March 12, 2018, GFI filed the required pre-merger notification, regarding Banibu's bid for the Corpus Christi assets, to the Commission under the Hart-Scott-Rodino Act. *See* 16 C.F.R. pt. 803.

Pursuant to its investigation, on May 7, 2018, the Commission issued two substantively identical subpoenas to Banibu – one for documents and one for testimony. Pet. Exhs. A, B.¹ On May 9, 2018, the SDT and SAT were served via FedEx to Banibu's antitrust counsel in Washington, D.C. Both subpoenas ask about: "the Company's" financial interest in, rationale for bidding on, and evaluation of, the Corpus Christi assets; communications with M&G, other lienholders, bidders, potential bidders, and any other persons about the potential acquisition of the Corpus Christi assets or the bankruptcy proceeding; plans for the assets, should

¹ The SDT and SAT were issued pursuant to a January 11, 2018 resolution authorizing compulsory process to investigate whether the proposed acquisition of the Corpus Christi assets by Indorama and/or DAK would violate the FTC Act or the Clayton Act. *See* Pet. Exhs. A (last page), B (last page).

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the Company acquire them (including whether the Company intends to operate or sell the assets); and an April 17, 2018 letter from Inbursa's counsel to FTC staff concerning the bid and the Company's future plans regarding the assets. This information is relevant to the Commission's investigation. Among other things, it will enable an assessment of what would likely happen to the assets if Banibu acquired them as the backup bidder, and in analyzing any "failing firm" defense that the joint venture might raise. The SAT requests that the Company designate a person "to testify on its behalf," pursuant to Commission Rule 2.7(h), 16 C.F.R. § 2.7(h).

On May 17, 2018, Banibu filed its petition to limit and quash the SDT and SAT. It asserts it will produce responsive non-privileged documents it possesses or controls (including "documents relating to its formation, bid proposal, and related business," Pet. 5), but not documents within the possession, custody, or control of its parent Inbursa (and presumably GFI). Banibu also requests that the SAT be quashed, because all of its corporate representatives are Mexican nationals residing in Mexico.

II. ANALYSIS

A. The subpoena *duces tecum* should be enforced.

Under Section 9 of the FTC Act, 15 U.S.C. § 49, the Commission has the authority "to require by subpoena. . . the production of. . . documentary evidence relating to any matter under investigation . . . from any place in the United States, at any designated place of hearing. . . ." *See also* 16 C.F.R. § 2.7(c) (FTC's implementing rule). We have held that Section 9 authorizes subpoenas, issued both in agency investigations and in administrative adjudicatory proceedings, for testimony and documents located abroad if the subpoena is served properly on a domestic corporation over which the Commission has jurisdiction. *See In re Petition to Quash Subpoena, Nippon Sheet Glass Co.*, 113 F.T.C. 1202, 1204, 1209 (1990) (Section 9 provides authority to serve an investigational subpoena on the U.S. agent or alter ego of a foreign entity); *In re General Foods Corp.*, 95 F.T.C. 383, 383-384, 1980 WL 339002, at *1 (1980) ("Section 9 authorizes

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the Commission to subpoena documents located abroad, as well as documents located anywhere within the United States.”) (citations omitted). Courts analyzing identical language in other statutes likewise have held that the language did not limit an agency’s ability to subpoena documents located abroad in response to an administrative subpoena validly served in the United States. *See Federal Maritime Comm’n v. DeSmedt*, 366 F.2d 464, 471 (2d Cir. 1966) (agency could “require a resident by subpoena to produce documents under his control wherever they are located” pursuant to a statute authorizing the agency to compel documents “from any place in the United States.”); *SEC v. Minas de Artemisia, S.A.*, 150 F.2d 215, 217-18 (9th Cir. 1945) (court could enforce an SEC subpoena for the production of books and records located in Mexico, “provided only that service of the subpoena is made within the territorial limits of the United States” where the statute authorized the SEC to require the production of documents “from any place in the United States.”).

1. Banibu must produce documents in its possession, custody, or control.

While Section 9 itself does not expressly define the scope of a document demand, we are guided by analogous law that the person subpoenaed must produce responsive non-privileged documents within its “possession, custody, or control.” *See, e.g.*, 15 U.S.C. § 57b-1(c)(1) (FTC’s civil investigative demands); Fed. R. Civ. P. 34(a), 45(a) (party and nonparty production in federal civil litigation). Thus, Banibu – a Delaware corporation, whose principal place of business is in Corpus Christi, Texas – must produce all documents within its possession, custody, or control, even if those documents are located abroad or held by a foreign parent. *See, e.g., United States v. First Nat’l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968) (requiring production of documents from German branch of United States bank in criminal antitrust investigation, holding that “a federal court has the power to require the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person [corporation] in possession or control of the material”) (citation omitted); *Camden Iron and Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438, 442-44 (D.N.J. 1991) (United States subsidiary had control of documents possessed by Japanese parent

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relating to transaction); *NML Capital Ltd. v. Republic of Argentina*, No. 2:14-cv-492-RFB-VCF, 2014 WL 3898021, at *10 (D. Nev. Aug. 11, 2014) (federal court’s subpoena power under Rule 45 “reaches all documents – no matter where they are located – that are within a resident corporation’s custody or control”) (citation omitted); see also 9A Charles Alan Wright and Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2456 (3d ed. April 2018 update) (records kept beyond the territorial jurisdiction of the issuing court are covered by Rule 45 if they are controlled by a person, including a corporation, subject to the court’s jurisdiction).

Banibu argues that the SDT is invalid to the extent it asks for documents from Inbursa because the FTC did not serve Inbursa pursuant to the Hague Convention, which it asserts is the only authorized method to obtain such materials from the Mexican company. Pet. 6-7. To support this argument, Banibu relies on cases that quashed compulsory process where an individual or corporation was improperly served outside of the United States. See, e.g., *CFTC v. Nahas*, 738 F.2d 487, 493-95 (D.C. Cir. 1984) (administrative subpoena improperly served on a Brazilian citizen in Brazil where the agency lacked statutory authority to serve subpoena extraterritorially); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (service of FTC investigatory subpoena by registered mail on French company in France was unauthorized as it was not the customary and legitimate method of serving administrative compulsory service abroad). But here the Commission lawfully served its subpoena in the United States on Banibu, a Delaware corporation, which is obligated to produce all documents within its possession, custody, or control, whether or not its Mexican parent Inbursa maintains those materials.

2. Documents maintained by Inbursa are in Banibu’s possession, custody, or control.

Banibu next argues that it does not possess or have control over Inbursa or its documents. Pet. 8-9. We agree with Banibu that the separate corporate identities of parent and subsidiary ordinarily should be respected. We conclude, however, that

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Banibu has an obligation to produce documents it argues belongs to Inbursa for two reasons.

First, it is very likely that Banibu's principals possess many of the requested documents, even beyond the specific Banibu-related documents that it has or has stated it will produce. The SDT is narrowly focused on documents relating to the Corpus Christi assets, including why the Company bid on the assets, its evaluation of and plans for those assets, and its discussions with M&G, other lienholders, bidders, and potential bidders. Thus, responsive documents relating to the topics in the SDT possessed by Banibu's four principals must be produced. *See, e.g., General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973) ("knowledge of officers and employees of [defendant corporation], relevant to the subject matter of the instant cause, is imputed to the corporation itself.") (citation omitted); *see also Gerling Int'l Ins. Co. v. Comm'r of Internal Revenue*, 839 F.2d 131, 138 (3d Cir. 1988) ("knowledge of officers and key employees of a corporation, if relevant to the subject matter of an interrogatory or production request direct to the corporation, may be imputed to the corporation itself.") (citations omitted).² Banibu's four officers and directors are also officers, directors, or senior employees of Inbursa, which has a major investment stake in the Corpus Christi assets, and were directly involved in Banibu's bid for the Corpus Christi assets.³ Indeed, [REDACTED]

² At the same time, we are unpersuaded by Banibu's reliance on *Gerling* to support its petition. *See* Pet. 9. In *Gerling*, the Third Circuit held that the president of a Delaware corporation, which had a contractual relationship as a reinsurer of a Swiss insurance company, had no obligation to disclose the extent of his holdings in the Swiss company, which he owned in his *personal* capacity. 839 F.2d at 139. Indeed, *Gerling* reiterated the well-established principle that corporate officers and directors have an obligation to provide business information they possess *on behalf of the corporation* they operate, but not personal information obtained outside the scope of their official duties. *See id.* ("Nothing in the record suggests that Gerling's ownership in [the Swiss company] has anything to do with the business of [the Delaware company]"). Here, the SDT is only requesting documents from Banibu and its officers and directors in their official, not personal, capacities.

³ [REDACTED]

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[REDACTED] and the Asset Purchase Agreement submitted with Banibu's bid indicated that all notices and communications should be directed to Messrs. Frias and Caballero. See *M&G USA Corp.*, *supra* (Doc. No. 1277-13 at PDF pg. 100) (Exh. H-1 at 94).

Second, we conclude that Banibu has the requisite control over all the documents responsive to the SDT, including those maintained by Inbursa. As Banibu acknowledges, an entity has the requisite "control" of documents if it has the "the legal right, authority or ability to obtain documents upon demand." Pet. 8 (quoting *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005) (citation omitted)); accord *Bush v. Ruth's Chris Steak House, Inc.*, 286 F.R.D. 1, 5 (D.D.C. 2012) ("Control does not require that the party have legal ownership or actual physical possession of the documents at issue, but rather 'the right, authority or practical ability to obtain the documents from a non-party to the action.'" (citation omitted); *Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179-PRM, 2018 WL 2348669, at *2 (W.D. Tex. May 23, 2018) (same) (citations omitted); *Shell Global Solutions (US) Inc. v. RMS Eng'g, Inc.*, No. 4:09-cv-3778, 2011 WL 3418396, at *2 (S.D. Tex. Aug. 3, 2011) (same) (citations omitted). The D.C. Circuit has recognized five instances in which a subsidiary has the requisite control over documents in its parent corporation's possession, more specifically where:

- (1) the alter ego doctrine ... warranted 'piercing the corporate veil';
- (2) the subsidiary was an agent of the parent in the transaction giving rise to the lawsuit;
- (3) [t]he relationship is such that the agent-subsidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation;
- (4) [t]here is access to documents when the need arises in the ordinary course of business; [or]

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(5) [the] subsidiary was [a] marketer and servicer of the parent's product. . . in the United States.

ASAT, 411 F.3d at 254 (citing *Camden Iron*, 138 F.R.D. at 441-42 (citing *Gerling*, 839 F.2d at 140-41)); accord *CMACO Auto. Systems, Inc. v. Wanxiang America Corp.*, No. 05-60087, 2007 WL 656893, at *2 (E.D. Mich. Feb. 26, 2007) (citing *Camden Iron* and applying same factors), *aff'd*, 2007 WL 2331863 (E.D. Mich. Aug. 13, 2007); *Shell Global*, 2011 WL 3418396, at *2 (applying similar factors) (citation omitted); *Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998) (applying similar grounds to conclude that subsidiary may be required to produce parent's documents where there is sufficient "intermingling of directors, officers, or employees, or business relations."). A finding of any one of the five factors can satisfy the "control" requirement. See *Camden Iron*, 138 F.R.D. at 441; *Pitney Bowes, Inc. v. Kern Intern., Inc.*, 239 F.R.D. 62, 66-67 (D. Conn. 2006). The party seeking the documents has the burden to show that the subsidiary controls the parent's documents. ASAT, 411 F.3d at 254.

We conclude that the ASAT factors demonstrate that Banibu "controls" the documents requested in the SDT, even if they are nominally possessed by Inbursa. Documents produced in the bankruptcy proceeding, and those reflecting communications both before and after the bankruptcy auction, reveal that Banibu is acting as Inbursa's agent "in the transaction giving rise to" a portion of the Commission's investigation – Banibu's potential acquisition of the Corpus Christi assets (satisfying the second ASAT factor). Inbursa created Banibu as a shell corporation, for the express purpose of bidding on the Corpus Christi assets, installed its own principals as Banibu's principals, [REDACTED]

Further, as noted above, [REDACTED]

[REDACTED] and those regarding Banibu's asset purchase agreement with Messrs. Frias and Caballero.

Satisfaction of the second ASAT factor is sufficient to find that Banibu has the requisite control over the requested documents.

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But, additionally, we conclude that given Banibu's purpose and Inbursa and Banibu's close relationship, including overlapping officers, directors, and employees, it is highly likely that Banibu would have access to Inbursa's documents regarding its potential acquisition of the Corpus Christi assets "when the need arises in the ordinary course of business," and the ability to "secure documents of [Inbursa] to meet its own business needs" – even those prepared before Banibu was created. This satisfies the third and fourth *ASAT* factors.

The documents sought in the SDT relate specifically to the activities for which Inbursa incorporated Banibu and its plans for the assets should it obtain them. While Banibu has produced some documents relating to the bid itself, it claims not to possess or have control over documents relating to other aspects of the Corpus Christi assets that are important to the FTC staff's investigation (particularly those created prior to Banibu's creation), such as how Inbursa valued the assets and came up with its bid amount, what its future plans are for the site, and what return it expects if it obtains the assets and sells them. These are relevant documents for the Commission's investigation and must be produced pursuant to the SDT.

Inbursa should not be able to create a shell corporation as an acquisition vehicle under the protection of United States law with the express purpose of engaging in a significant business transaction here, yet disclaim any obligation to respond to valid law enforcement inquiries about that proposed transaction. Banibu was created for the sole purpose of doing business in the United States on behalf of its principal Inbursa and should not be allowed to evade law enforcement inquiries due to such machinations. In sum, we find there is a sufficient "nexus between the subpoenaed documents and [Banibu's] relationship with [Inbursa], taking into account, among other things, [Banibu's] business responsibilities," *ASAT*, 411 F.3d at 255, to support our conclusion that Banibu controls the requested documents.⁴

⁴ Indeed, these facts may show that Banibu was Inbursa's alter ego for purposes of the Corpus Christi asset transaction such that the corporate veil between them should be pierced to allow Commission access to the documents.

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Courts have found sufficient control by subsidiaries over documents nominally possessed by their parent corporations in situations very similar to here. *See, e.g., Camden Iron*, 138 F.R.D. at 442-44 (finding control by wholly owned domestic subsidiary of transaction-related documents possessed by its foreign parent, which played a significant role in setting up and benefitting from transaction and where subsidiary obtained documents relating to transaction from parent in the normal course of business, even where there was little overlap of the companies' officers and directors); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919-20 (S.D.N.Y. 1984) (finding control by a domestic distributor and service company over subpoenaed service manual and blueprint documents possessed by foreign airplane manufacturer affiliate such that it would have been "inconceivable that [the domestic company] would not have access to these documents and the ability to obtain them for its usual business."); *CMACO Auto. Syst.*, 2007 WL 656893, at *2 (holding that domestic subsidiary controlled subpoenaed documents held by foreign counterparts under the second, third, and fourth ASAT factors); *see also Ysleta del Sur Pueblo*, 2018 WL 2348669, at *3 (defendant Indian tribe controlled documents held by nominally independent tribal fraternal organization because tribe had legal right and practical ability to obtain documents, where organization was "wholly controlled" by tribe and tribal official was also official of the organization with apparent access to the requested documents).

The cases upon which Banibu relies in its petition present circumstances distinguishable from the instant case. In those cases, courts found insufficient control by the domestic subsidiary over its foreign parent's documents where the subsidiary did not have routine access to the subpoenaed documents, which were unrelated to the subsidiary's business activities. *See, e.g., ASAT*, 411 F.3d at 255 (finding lack of control by subsidiary of documents possessed by foreign parent because "[i]t is quite conceivable that [the subsidiary] does not have routine access to [its foreign parents' subpoenaed] documents because they do not seem to relate directly to its principal activities."); *Power*

But we need not make that finding to conclude that Banibu has sufficient control over the requested documents to comply with the SDT.

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Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc., 233 F.R.D. 143, 145-46 (D. Del. 2005) (finding lack of control where domestic subsidiary had arms-length vendor relationship with foreign parent and subsidiary did not use the subpoenaed information “in the normal course of its business”). The current matter is more analogous to those cases finding the domestic subsidiary controls documents maintained or possessed by a parent corporation, given the complete overlap of Banibu’s officers and directors with Inbursa, the interconnectedness of Inbursa’s and Banibu’s business interests and activities regarding the Corpus Christi assets, and the SDT’s request for documents relating specifically to those assets. For these reasons, we reject Banibu’s objections and deny its petition to quash the SDT.

B. The subpoena *ad testificandum* should be enforced.

Banibu also argues that the SAT must be quashed because it exceeds the Commission’s Section 9 subpoena authority by “compel[ing] a Mexican national to travel to the United States and sit for a deposition.” Pet. 10-11. It relatedly argues, relying on Fed. R. Civ. P. 45, that it has “no representative within the jurisdictional reach of any U.S. district [court].” *Id.* Both arguments fail for the reasons described below.

1. The Commission’s subpoena authority under Section 9 compels testimony of Banibu’s officers, directors, or managing agents, or designees who consent, to testify on its behalf.

Like its authority to require the production of relevant documentary materials, the Commission has broad authority to require the testimony of United States corporations in furtherance of its investigations. *See supra* at 3. Under Section 9 of the FTC Act, the Commission has the “power to require by subpoena the attendance and testimony of witnesses. . . relating to any matter under investigation. . . . Such attendance of witnesses. . . may be required from any place in the United States, at any designated place of hearing. . . . The Commission may order testimony to be taken by deposition in any proceeding or investigation . . . at any stage of such proceeding or investigation. . . .” 15 U.S.C. § 49; *see also* 16 C.F.R. § 2.7(c) (FTC’s implementing rule). When the

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Commission issues a subpoena for oral testimony from a corporate entity, “the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify *on its behalf*. . . .” 16 C.F.R. § 2.7(h) (emphasis added); *cf.* Fed. R. Civ. P. 30(b)(6) (applying similar language for corporate depositions in federal civil discovery). The witnesses appear on behalf of “the Company,” not in their individual capacities.

Banibu asserts that the Commission “has no power to subpoena an alien nonresident to appear before it from a foreign land.” Pet. 10 (quoting *Nahas*, 738 F.2d at 495 (quoting *SEC v. Zanganeh*, 470 F. Supp. 1307 (D.D.C. 1978))). The cases on which Banibu relies involve service on a foreign national on foreign soil (*Nahas*) or service in the United States requiring a particular nonresident alien to appear before the agency from a foreign land (*Zanganeh*). But here, the Commission subpoenaed Banibu – a Delaware corporation, whose principal business activity is related to its bid on the Corpus Christi assets in Texas. Banibu is indisputably within the Commission’s subpoena authority. The SAT seeks testimony from knowledgeable corporate officers, directors, managing agents, or designees, not particular individuals located in Mexico, personally. While Banibu may designate its Mexican officers to testify on its behalf, the SAT does not require it to do so.

2. Banibu’s invocation of Fed. R. Civ. P. 30(b)(6) and 45 is unavailing.

Banibu further argues, citing Fed. R. Civ. P. 30(b)(6) and 45(c), that the SAT must be quashed because Banibu does not employ anyone within 100 miles of any United States judicial district. Pet. 10-11. It cites no authority, however, that the Commission’s subpoena authority under Section 9 of the FTC Act is subject to Rule 45’s territorial limits. Indeed, as noted above, Section 9 explicitly states that witness testimony “may be required from any place in the United States, at any designated place of hearing.”

But, as noted above, even if we were to consider the Federal Rules of Civil Procedure as guidance for our investigatory

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subpoenas, Banibu's argument still fails. Rule 45(c)(1)(A) limits a subpoena issued to a nonparty to testify "within 100 miles of where the person resides, is employed, or regularly transacts business in person." The cases relied upon by Banibu simply stand for the unremarkable proposition that a nonparty nonresident organization cannot be compelled to designate a suitable employee to testify who works over 100 miles from the district where the litigation is pending or a deposition is noticed. *See, e.g., Estate of Klieman v. Palestinian Auth.*, 293 F.R.D. 235, 239 (D.D.C. 2013) (subpoena issued to the BBC based in the United Kingdom where relevant documentary was produced), order stayed on other grounds, 18 F. Supp. 3d 4 (D.D.C. 2014); *Krueger Invs. LLC v. Cardinal Health 110, Inc.*, No. CV 12-0618-PHX-JAT, 2012 WL 3264524, at *3 (D. Ariz. Aug. 9, 2012) (no responsive DEA witness worked within 100 miles of Arizona litigation). But the subpoenas were issued to Banibu, a domestic corporation over which the Commission indisputably has jurisdiction. Thus, even using Rule 45(c)(1)(A) as guidance (which we are not obliged to do given the language of Section 9), Banibu needs to designate an officer, director, managing agent, or other person to testify on its behalf, who resides, works, or regularly transacts business within 100 miles of a suitable investigational hearing location.

While Banibu claims that all four of its officers and directors are Mexican nationals who work and reside in Mexico, Pet. 3, Exh. C ¶ 4, Banibu has an affirmative obligation to "select a designee and educate her in accordance with its duty" to designate a corporate deponent whose testimony "represents the knowledge of the corporation," because "the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation." *Wultz v. Bank of China Ltd.*, 298 F.R.D. 91, 99 (S.D.N.Y. 2014) (citations omitted); *accord NML Capital*, 2014 WL 3898021, at *10 ("the unique status of the corporate person permits a federal court to compel a non-party resident corporation to designate a nonresident employee to 'thoroughly educate' an in-forum employee to testify on the corporation's behalf") (citing *Wultz*); *Rahman v. The Smith & Wollensky Rest. Group, Inc.*, No. 06 Civ. 6198LAKJCF, 2009 WL 773344, at *1 (S.D.N.Y. Mar. 18, 2009) ("A corporation has an affirmative duty to prepare the designee 'to the extent matters

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are reasonably available, whether from documents, past employees, or other sources.””) (citations omitted). In *Wultz*, the court found that requiring a nonparty bank in Israel with a New York branch office, to educate a person in New York to comply with a corporate subpoena, did not impose an undue burden. 298 F.R.D. at 99. Therefore, Banibu must either send one of its four Mexican officers to the United States to testify, or designate and prepare a person with relevant knowledge to testify on its behalf.⁵

Finally, we note that one court, in requiring a foreign witness to travel more than 100 miles, from abroad, to testify on behalf of nonparty resident shell corporations, observed that “[a] company cannot purposefully avail itself of the law’s benefits by incorporating in this jurisdiction and then excuse itself from the court’s subpoena power by abusing the corporate form. This would allow a corporation to exploit the benefits created by the law without shouldering the concomitant burdens and responsibilities imposed by the law.” *NML Capital*, 2014 WL 3898021, at *11-*12 (observing that shell corporations “exalt artifice above reality,” citing *Abramski v. United States*, 134 S. Ct. 2259, 2270 (2014)). While we do not suggest that Inbursa incorporated Banibu for a nefarious purpose, we conclude that similar considerations apply here. Foreign companies that operate in the United States through shell companies, enjoying the benefits and protections of United States law, and engaging in significant domestic transactions, should not be permitted to shield their officers or directors with knowledge of the transaction from the reach of a United States law enforcement investigation. Nothing indicates that Congress intended to limit the Commission’s investigatory subpoena authority under Section 9 in the manner that Banibu suggests.

For the reasons described above, we deny Banibu’s motion to quash the SAT. While we are not bound by the Federal Rules of Civil Procedure, in an effort to lessen the burden on witnesses consistent with the purposes underlying Rule 45(c), we are modifying the place for the investigative hearing, and order that it

⁵ Indeed, we note that the Company retains several agents working in the United States in various consulting and advisory roles, including the Company’s attorneys and corporate restructuring consultants.

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take place within 100 miles of either Corpus Christi, Texas (where Banibu transacts business) or Wilmington, Delaware (where Banibu is incorporated), or at another place in the United States agreed to by the parties.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Banibu II Holdings, Inc.'s Petition to Limit and Quash Subpoena Duces Tecum and Subpoena Ad Testificandum Dated May 7, 2018 be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Banibu II Holdings, Inc. shall comply in full with the Commission's subpoena *duces tecum* by 10 days from the date of this order; and shall appear to testify on the topics in the subpoena *ad testificandum* at a mutually agreeable date and location, which is within 100 miles of either Corpus Christi, Texas or Wilmington, Delaware, or at another place in the United States agreed to by the parties.

By the Commission.