IN THE MATTER OF

GUILD MORTGAGE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TRUTH IN LENDING ACT, REGULATION Z, AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3320. Complaint, Dec. 31, 1990—Decision, Dec. 31, 1990

This consent order requires, among other things, a San Diego, Ca., corporation to accurately calculate and disclose the annual percentage rate, finance charge, payment schedule and other information required by Regulation Z; and to make adjustments to the accounts of consumers listed, by paying restitution to consumers totalling almost $500,000 over a five-year-period.

Appearances

For the Commission: *Carole L. Reynolds* and *Stephen Cohen.*

For the respondent: *Stephen Douglas Royer, Seltzer, Caplan, Wilkins & McMahon,* San Diego, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Guild Mortgage Company, a corporation, hereinafter sometimes referred to as respondent, has violated the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45-58, as amended, and the Truth in Lending Act (TILA), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR Part 226, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and alleges:

PARAGRAPH 1. Guild Mortgage Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4180 Ruffin Road, San Diego, California.

PAR. 2. Respondent has been and is now engaged in the business of offering "consumer credit" to the public and is a "creditor," as those terms are defined in the TILA and Regulation Z.

PAR. 3. The acts and practices of respondent alleged in this

complaint have been and are in or affecting commerce, as "commerce" is defined in the FTC Act.

PAR. 4. Respondent, in the course and conduct of its business, on numerous occasions, has failed to disclose accurately a composite annual percentage rate and, thus, has underdisclosed the annual percentage rate and finance charge in its TILA disclosures for discounted adjustable rate mortgages.

PAR. 5. Respondent's aforesaid practice violates Sections 106, 107 and 128 of the TILA, 15 U.S.C. 1605, 1606 and 1638, respectively, and Sections 226.4, 226.22, and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4, 226.22 and 226.18 (d) and (e), respectively, and Section 226.17(c)(1) of Regulation Z, 12 CFR 226.17(c)(1), as more fully set out in Sections 226.17(c)(1)-8 and 226.17(c)(1)-10 of the Federal Reserve Board's Official Staff Commentary to Regulation Z (Commentary), 12 CFR 226.17(c)(1)-8 and 226.17(c)(1)-10 (formerly Sections 226.18(f)-2 and 226.18(f)-8 of the Commentary, 12 CFR 226.18(f)-2, 226.18(f)-8), and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 6. Respondent, in the course and conduct of its business, on numerous occasions, has failed to disclose accurately the annual percentage rate and finance charge in its TILA disclosures.

PAR. 7. Respondent's aforesaid practice violates Sections 106, 107 and 128 of the TILA, 15 U.S.C. 1605, 1606 and 1638, respectively, and Sections 226.4, 226.22, and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4, 226.22 and 226.18(d) and (e), respectively, and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 8. Respondent, in the course and conduct of its business, on numerous occasions, has failed to include the premiums for mortgage insurance in the annual percentage rate, finance charge and monthly payments scheduled to repay the obligation in its TILA disclosures.

PAR. 9. Respondent's aforesaid practice violates Sections 106, 107 and 128 of the TILA, 15 U.S.C. 1605, 1606 and 1638, respectively and Sections 226.4(b)(5), 226.22 and 226.18(d), (e) and (g) of Regulation Z, 12 CFR 226.4, 226.22 and 226.18(d), (e) and (g), respectively, and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

PAR. 10. Respondent, in the course and conduct of its business, on numerous occasions, has failed to disclose accurately the number,

amount, and timing of payments scheduled to repay the obligation in its TILA disclosures.

PAR. 11. Respondent's aforesaid practice violates Section 128 of the TILA, 15 U.S.C. 1638, and Section 226.18(g) of Regulation Z, 12 CFR 26.18(g), and constitutes an unfair and deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

Commissioner Strenio dissenting as to the terms of the consent order, and Commissioner Starek not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondent with violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* and its implementing Regulation Z, 12 CFR Part 226, and the Federal Trade Commission Act, 15 U.S.C. 45 *et seq.;* and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts and Regulation, and that complaint should issue stating its charge in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Guild Mortgage Company is a corporation organized, existing, and doing business under and by virtue of the laws of the

state of California, with its principal office and place of business located at 4180 Ruffin Road, San Diego, California.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions apply:

1. *Composite APR* means a blend of interest rates as described in Section 226.17(c)(1)-10 of the Federal Reserve Board's Official Staff Commentary to Regulation Z;

2. *First adjustment date* is the date on which the consumer's monthly payment of principal and interest is first changed, in accordance with the terms set forth in the consumer's note or adjustable rate rider;

3. *Original TIL disclosure* is the last TIL disclosure given to a consumer by respondent before consummation of the loan.

I.

It is ordered, That respondent Guild Mortgage Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to disclose accurately in its discounted adjustable rate mortgages a composite annual percentage rate and, thereby, failing to disclose accurately the annual percentage rate and the finance charge, as required by Sections 106, 107 and 128 of the Truth in Lending Act, 15 U.S.C. 1605, 1606 and 1638, and Sections 226.4, 226.22, and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4, 226.22 and 226.18 (d) and (e) and Section 226.17(c)(1) of Regulation Z, 12 CFR 226.17(c)(1), as more fully set out in Section 226.17(c)(1)-10 of the Federal Reserve Board's Official Staff Commentary to Regulation Z, 12 CFR 226.17(c)(1)-10.

2. Failing to disclose accurately the annual percentage rate and finance charge, as required by Sections 106, 107 and 128 of the Truth in Lending Act, 15 U.S.C. 1605, 1606 and 1638, and Sections 226.4, 226.22 and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4, 226.22 and 226.18(d) and (e).

3. Failing to include the premiums for mortgage insurance when computing the annual percentage rate, finance charge, and number, amount and timing of payments scheduled to repay the obligation, as required by Sections 106, 107 and 128 of the Truth in Lending Act, 15 U.S.C. 1605, 1606 and 1638, and Sections 226.4, 226.22 and 226.18(d), (e) and (g) of Regulation Z, 12 CFR 226.4, 226.22 and 226.18(d), (e) and (g).

4. Failing to disclose accurately the number, amount, and timing of payments scheduled to repay the obligation, as required by Section 128 of the Truth in Lending Act, 15 U.S.C. 1638, and Section 226.18(g) of Regulation Z, 12 CFR 226.18(g).

5. Failing to make all disclosures determined in accordance with Sections 106 and 107 of the Truth in Lending Act, 15 U.S.C. 1605 and 1606, and Sections 226.4 and 226.22, in the manner, form and amount required by Sections 226.17, 226.18, 226.19 and 226.20 of Regulation Z, 12 CFR 226.17, 226.18, 226.19 and 226.20.

II.

It is further ordered, That:

A. In accordance with Section 108(e) of the TILA, 15 U.S.C. 1607, and as shown on the attached Exhibits 1 (adjustable rate mortgage list), 2 (mortgage insurance premium list), and 3 (adjustable rate mortgage and mortgage insurance premium list), respondent shall make adjustments to the current and past accounts of each consumer listed who was extended credit by respondent; except, any adjustment relating solely to respondent's failure to use a composite annual percentage rate shall be limited to the time period up to the first adjustment date;

B. For those adjustments resulting from mortgage insurance premium errors, respondent shall refund the mortgage insurance premium collected to date as shown on Exhibits 2 and 3;

C. Not later than thirty (30) days following the date of service of this order, for those consumers listed on Exhibits 2 and 3, respondent shall have either cancelled the remaining mortgage insurance or taken

whatever action is necessary so that the applicable consumer is not charged for any additional mortgage insurance premiums for the life of the loan;

D. Respondent shall have a five-year period in which to complete the adjustments described in paragraphs A and B; except, where the amount of the adjustment is $200 or less, the adjustment shall be completed by the end of the first year. Each consumer listed on Exhibits 1, 2, and 3 shall receive payment from respondent for at least one fifth of the applicable adjustment for that consumer no later than the last day of each calendar year beginning with the current year.

III.

It is further ordered, That all payment adjustments required by this order shall be made by mailing the consumer a check by first class mail, certified, return receipt requested, to the current or last known address of each such consumer.

IV.

It is further ordered, That by not later than thirty (30) days from the date of service of this order, respondent shall send a letter by first class mail to all consumers listed on Exhibits 2 and 3 to eliminate the consumer's liability for future mortgage insurance premiums.

V.

It is further ordered, That respondent shall maintain for at least six (6) years from the date of service of this order and, upon request, make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this order.

VI.

It is further ordered, That respondent, its successors and assigns, shall distribute a copy of this order to any present or future officers, agents, representatives, and employees having responsibility with respect to the subject matter of this order and that respondent, its successors and assigns, shall secure from each such person a signed statement acknowledging receipt of said order.

VII.

It is further ordered, That respondent shall promptly notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall, within one hundred and twenty (120) days of the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order. Within thirty (30) days of the end of each year for five years, starting with the current year, respondent shall forward a copy of all checks mailed to consumers in that year to the Federal Trade Commission, Enforcement Division, Washington, D.C. 20580.

IX.

It is further ordered, That respondent shall have the right to request modification of this order.

Commissioner Strenio dissenting as to the terms of the consent order, and Commissioner Starek not participating.

EXHIBIT 1—FTC RESTITUTION INFORMATION

GUILD LOAN	RESTITUTION AMOUNT
FAB022443T	1,173.04
FAB202555X	687.48
FAB202574X	541.96
FAD780215T	808.23
FAD791001T	1,663.52
FAI208382T	651.24
FAI208396T	510.08
FAI208417T	558.74
FAI208468T	451.66
FAI208471T	657.39
FAQ210208T	1,070.70
FAR270323T	927.74
FAT200564T	1,114.24

GUILD LOAN	RESTITUTION AMOUNT
FAW560264X	327.78
FBB200144T	764.46
FBB430137T	607.74
FBB430207T	985.30
FCD190714T	1,334.59
FCD200688T	226.41
FCD200803T	1,663.35
FCD200902T	283.13
FCE081017X	268.66
FCE171068T	796.78
FCE191130X	718.27
FCE191859T	714.01
FCE200704T	1,434.13
FCE200738T	883.20
FCG030594T	351.42
FCG200457T	740.97
FCJ200051T	663.02
FCJ200079T	1,509.15
FCJ200215T	765.91
FGS080219T	1,153.32
FGS080229T	1,481.89
FGT020250T	171.91
FGT020265T	631.32
FGT030280T	1,666.34
FGT040287T	1,249.11
FGT050247T	973.19
FGT050262T	516.83
FGT050323T	42.57
FGT060230T	583.77
FGT060234T	978.17
FGT060255T	1,400.26
FGT060295T	360.60
FGT060301T	950.92
FGT060320T	972.76
FGT060327T	581.21
FGT060330T	132.63
FGT060335T	656.17
FGT060398T	317.91
FGT060442T	59.34
FGT060451T	81.54
FGT200211T	75.87
FGT200220T	396.02
FGT200233T	365.19
FGT200374T	170.27
FZA205419T	607.53
FZA205461T	655.08

GUILD LOAN	RESTITUTION AMOUNT
FZA205473T	517.06
FZA205513T	309.08
FZA395593T	502.47
GAB022423T	340.06
GAB202556X	687.72
GAB202562X	751.13
GAB330760T	1,387.21
GAB330774T	1,590.99
GAD202324T	522.13
GAD202330X	707.06
GAD202333X	707.44
GAD202334X	707.44
GAD202336X	737.09
GAD202337X	660.84
GAD202340X	884.51
GAD202342X	836.41
GAD202348X	495.29
GAD202350X	227.33
GAD202351X	796.68
GAD202355X	691.98
GAD202357X	805.74
GAD202368X	865.05
GAD231003T	447.65
GAD260832T	2,275.50
GAD260866T	1,633.79
GAD264145T	1,891.86
GAD264190T	1,319.52
GAD264216T	441.91
GAD570604X	563.15
GAD570735T	599.48
GAD690209T	561.86
GAD690213T	662.81
GAD690214T	850.11
GAD690230T	921.01
GAD690234T	1,354.43
GAD690357T	782.51
GAD690403T	648.13
GAD692053X	595.34
GAD693523T	694.57
GAD710249T	1,304.38
GAD713014X	306.11
GAD750214T	537.52
GAD750215T	831.71
GAD780203T	2,215.79
GAD781004T	749.27
GAD788026X	715.04

GUILD LOAN	RESTITUTION AMOUNT
GAD788034X	520.41
GAD788040T	755.27
GAD800219T	1,066.96
GAD804021X	884.51
GAG041000T	561.40
GAG041002T	203.23
GAG136993T	311.01
GAG207113T	482.14
GAG207381T	789.93
GAG707119T	1,295.85
GAG707123T	1,976.32
GAG707124T	1,769.43
GAG707307X	385.56
GAG707320X	648.81
GAG787141X	408.55
GAG837046T	1,127.35
GAI048250T	1,312.78
GAI108165T	1,105.44
GAI108244T	1,471.51
GAI148749T	774.53
GAI208568X	333.77
GAI208584T	200.63
GAI318274T	533.93
GAI328273T	292.45
GAJ040001T	913.78
GAJ200001X	476.11
GAJ200004X	558.92
GAJ200005X	621.66
GAJ200007X	70.49
GAJ200018X	573.48
GAJ200026X	157.23
GAJ208315T	3,154.29
GAJ209971X	767.01
GAJ209975X	477.84
GAJ209992X	637.67
GAJ298904T	1,413.88
GAJ298985T	3,066.84
GAJ299072T	828.96
GAJ299090T	1,304.92
GAJ299107T	965.30
GAJ299108T	949.41
GAJ299128T	153.76
GAJ299224T	71.89
GAJ299262T	1,049.64
GAJ299323T	2,649.60
GAJ299338T	714.74

GUILD LOAN	RESTITUTION AMOUNT
GAJ299544T	751.67
GAJ299579T	57.30
GAJ299917T	2,873.32
GAJ340552T	1,051.08
GAJ340554T	933.15
GAJ340644T	1,002.17
GAJ340648T	603.51
GAJ510110T	263.96
GAJ688769T	702.72
GAJ689078T	917.91
GAJ689198T	1,143.90
GAJ698606T	784.40
GAJ698777T	1,596.83
GAJ699330T	87.77
GAJ868759T	444.84
GAJ899887X	715.07
GAJ899907X	852.90
GAJ979180T	871.98
GAJ979255T	1,835.30
GAK032454T	718.70
GAK033083X	790.70
GAK033356T	658.01
GAK062424T	2,483.47
GAK102484T	1,395.25
GAK103032X	619.99
GAK103092X	505.57
GAK103114X	584.82
GAK113046T	1,473.11
GAK202641T	1,732.33
GAK202664T	1,892.47
GAK203075T	387.83
GAQ150280T	1,889.59
GAQ180218T	611.14
GAQ180241T	764.22
GAQ180243T	957.19
GAQ180254T	501.09
GAQ180278T	196.55
GAQ180313X	322.33
GAQ201311T	856.20
GAQ201312T	1,305.78
GAQ201355T	441.39
GAQ201367T	472.75
GAQ201371T	79.70
GAQ201390T	1,007.66
GAQ201426T	396.69
GAQ201433T	86.67

GUILD LOAN	RESTITUTION AMOUNT
GAQ201473T	552.88
GAQ201474T	595.22
GAQ201475T	386.09
GAQ201487T	1,263.11
GAQ201532T	638.22
GAQ201553T	153.94
GAQ201594T	829.74
GAQ201595T	622.48
GAQ201605X	559.01
GAQ201606X	724.75
GAQ210211T	932.26
GAQ210251T	319.34
GAQ220213T	313.07
GAQ220218T	682.42
GAQ220220T	983.42
GAQ220267X	490.24
GAQ220268X	440.25
GAR110560T	987.73
GAR205646X	729.04
GAR280180T	245.15
GAT110439T	1,139.97
GAT110474T	1,890.33
GAT110480T	304.95
GAT110508T	1,065.14
GAT110509T	522.13
GAT110556T	281.74
GAT110566T	418.40
GAT110603T	523.54
GAT140541T	612.32
GAT140544T	612.32
GAT150354T	787.58
GAT150358T	1,524.70
GAT180104T	857.02
GAT180105T	850.77
GAT180107T	1,316.57
GAT180109T	1,847.62
GAT190104T	1,016.66
GAT200551T	828.72
GAT200552T	557.72
GAT200679T	1,098.18
GAT200721X	751.36
GAT280101X	717.97
GAW201341T	898.04
GAW201418X	822.33
GAW201457X	77.36
GAW201461X	674.69

GUILD LOAN	RESTITUTION AMOUNT
GAW340513T	763.93
GAW340531T	634.41
GAW450423X	195.36
GAW470370T	1,120.62
GAY142546T	781.03
GAY142572T	1,534.31
GAY142573T	3,326.89
GAY142607T	3,047.40
GAY142627T	2,073.17
GAY142683T	733.36
GAY142686T	358.81
GAY142742T	375.67
GAY142804T	116.05
GAY142805T	424.97
GAY142868T	1,058.29
GAY142941T	165.27
GAY143031T	252.21
GAY143032X	893.95
GAY143144T	197.45
GAY143391T	1,509.96
GAY172640T	639.32
GAY173057X	1,273.16
GAY173058X	1,022.20
GAY173065X	640.59
GAY173133X	954.74
GAY183204T	2,159.23
GAY212419T	455.31
GAY232336T	2,026.48
GAY232345T	1,697.76
GAY232593T	2,088,71
GAY232618T	673.56
GAY232665T	387.30
GAY232682T	328.29
GAY232688T	1,707.53
GAY272358T	519.64
GAY272583T	1,244.33
GAY272612T	685.95
GAY282523T	1,968.78
GAY282554T	590.40
GAY282565T	3,620.16
GAY282570T	2,132.89
GAY282588T	562.31
GAY282625T	1,750.46
GAY282626T	674.22
GAY282653T	1,327.66
GAY282676T	437.38

GUILD LOAN	RESTITUTION AMOUNT
GAY282697T	1,548.33
GAY282932T	192.88
GAY283020X	943.92
GAY283035X	1,115.36
GAY283052X	787.93
GAY283134X	1,030.32
GAY283394T	1,545.13
GAY302584T	1,433.15
GAY302609T	988.11
GAY302915T	277.39
GAY302922T	1,771.69
GAY303048X	1,007.34
GAY303063X	958.22
GAY303092X	818.20
GAY312561T	1,253.36
GAY322695T	353.89
GBB450178T	434.38
GBB450371T	578.72
GBC410107T	341.76
GBC451404T	294.66
GBE030487T	470.08
GBE040363T	215.48
GBE060446T	572.31
GBE200223T	1,080.10
GBE200332T	986.31
GCD130582T	2,271.21
GCD170319T	1,638.41
GCD170331T	938.00
GCD200581T	1,006.46
GCD200587T	1,498.22
GCD201066T	499.01
GCD201075X	419.72
GCD201087T	571.26
GCD201097X	629.33
GCD201099X	629.33
GCD201105X	629.33
GCD201108X	488.75
GCD201110T	535.99
GCD210723T	614.66
GCD220994T	267.97
GCD221080X	653.63
GCD251489T	606.71
GCD251611T	506.88
GCE060471T	471.50
GCE060487T	779.47
GCE080753T	1,420.77

GUILD LOAN	RESTITUTION AMOUNT
GCE171897T	470.61
GCE191114X	715.26
GCE200540T	937.51
GCE232141T	571.07
GCF030211T	1,183.70
GCF030213T	765.66
GCF030247T	547.20
GCF030316X	705.97
GCF050382X	306.15
GCF050437X	764.89
GCF050440X	828.41
GCF200292T	1,448.55
GCF200319T	933.81
GCG020641T	533.12
GCG020642T	498.16
GCG200234T	431.96
GCH020202T	1,225.12
GCH020253T	1,617.92
GCJ200220T	718.77
GCK110783X	525.55
GCK270119X	542.86
GCL040281T	679.38
GCL200254T	792.73
GCO030242T	53.78
GCO040232T	588.25
GCO040241T	289.82
GCP200226T	244.85
GEA840251T	2,718.04
GEA840252T	2,167.97
GEA840253T	1,625.57
GEA840254T	2,568.29
GEA840260T	594.06
GEA840263T	1,505.51
GEC840228T	698.23
GEH840216T	6,923.01
GEH840217T	5,541.50
GEH840225T	749.70
GEH840226T	418.62
GEI840214T	3,520.01
GEI840217T	1,296.68
GEJ010001T	923.42
GEJ010002T	2,884.72
GFY840481T	3,000.84
GFY840488T	3,210.14
GFY840491T	971.26
GFY840493T	1,192.49

GUILD LOAN	RESTITUTION AMOUNT
GFY840498T	2,201.60
GFY840502T	1,728.23
GFY840505T	1,146.25
GFY840513T	1,452.67
GFY840517T	838.83
GFY840546T	644.73
GFZ840284T	870.65
GFZ840287T	1,134.07
GFZ840294T	1,265.18
GFZ840309T	553.97
GFZ840315T	1,467.85
GFZ840322T	474.31
GFZ850225T	895.22
GGH022606T	1,578.53
GGH022612T	212.42
GGH022613T	798.25
GGH022617T	451.07
GGH022704T	56.52
GGH072636T	234.06
GGH072692T	368.83
GGH202642T	29.48
GGR030636X	222.27
GGR200403T	765.34
GGR200717X	135.96
GGS070310T	578.77
GGS070313T	1,130.35
GGS090206T	1,079.44
GGS090254T	1,015.62
GGS090267T	256.91
GGS090375X	431.32
GGS090376X	513.39
GGS090387X	495.13
GGS100269T	463.74
GGS110220T	874.47
GGS200320T	1,466.39
GGS200390T	1,081.85
GGS200392T	1,325.37
GGS200396T	199.33
GGS200452T	826.58
GGS200564T	339.89
GGS200567T	392.29
GGS200610X	691.48
GGS200718X	518.65
GGT020243T	484.75
GGT020293T	806.69
GGT020299T	538.27

GUILD LOAN	RESTITUTION AMOUNT
GGT020377T	188.41
GGT020393T	549.23
GGT050271T	1,181.77
GGT050380T	115.35
GGT060308T	1,505.26
GGT060506X	229.10
GGT070242T	350.29
GGT070313T	543.11
GGT070340T	973.70
GGT090510X	756.99
GGT090511X	475.31
GGT090513X	314.19
GGT090514X	305.96
GGT090517X	442.97
GGT200304T	611.29
GGT200515X	839.98
GGT200518X	582.36
GGT200523X	370.06
GZA195199T	1,420.68
GZA195200T	1,662.05
GZA195624T	294.04
GZA195901T	428.94
GZA195917T	292.89
GZA285286T	2,602.79
GZA335357T	139.24
GZA335432T	417.61
GZA385512T	2,330.60
GZA385517T	1,874.50
GZA385527T	1,455.40
GZA385540T	1,355.34
GZA385574T	762.69
GZA385618T	517.72
GZA385675T	841.62
GZA385954T	684.61
GZA386028T	245.72
GZA386139T	565.88
GZA386241T	220.07
GZA386264T	991.32
GZA386294T	991.32
RAG837061T	3,505.47
RAI188095T	2,878.49
RFZ840281T	6,789.49
RGS090247T	5,160.43
	432,025.27 *

TOTAL NUMBER OF RECORDS PROCESSED 470

EXHIBIT 2—MORTGAGE INSURANCE SCHEDULE

Loan No.	Total Refund Due
GAJ10-0035T	$1,016.45
GBD45-1193C	$994.61
GBE04-0252F	$517.98
GBB43-0577F	$1,151.68
GAY31-3614C	$674.85
GCO05-0285C	$908.63
GBC45-1403F	$964.79
GCO02-0205C	$791.35
GBC99-1129C	$915.33
FAD78-1328C	$1,418.17
GCO03-0338C	$1,349.26
GBE05-0280C	$185.40
GBE20-0285F	$1,421.67
GBE03-0409C	$742.74
FBB43-0770F	$831.27
GBE02-0625C	$762.70
GAY18-3548C	$1,417.87
GAY27-3704C	$822.67
GBC66-1811C	$780.54
GBC43-0936C	$686.84
GBC20-0554C	$798.00
GBC55-1104C	$962.03
GCJ08-0207F	$757.26
GBC99-1146C	$1,831.41
GBC99-1343C	$1,012.69
FBE07-0437F	$1,151.09
GBB54-1168C	$1,317.96
GBC45-1301F	$1,140.76
GBC43-0455F	$759.41
FBB43-0921F	$1,047.49
GBC55-1258F	$938.53
GAY18-3075X	$1,869.49
	$31,940.92

EXHIBIT 3

Loan No.	Restitution Amount for ARM Discount Only	Restitution Amount for MI Portion Only	Total Restitution Amount
GCL03-0223T	$300.75	$1,718.98	$2,019.73
FGT06-0319T	$741.90	$1,527.39	$2,269.29

GAY18-3067X	$305.16	$1,987.79	$2,292.95
GAR20-5642X	$208.89	$1,762.27	$1,971.16
GAJ04-9924X	$198.98	$1,691.71	$1,890.69
GAY18-3061X	$423.69	$1,993.78	$2,417.47
			$12,861.29

DISSENTING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

Good law and sound policy considerations support requiring respondent Guild Mortgage Company to fully redress consumers for its alleged violation of the Truth-In-Lending Act. Because the company should not receive a 0.25% "tolerance" deduction, I oppose final issuance of this consent order.

Re: Petition to Quash Subpoena
Nippon Sheet Glass Co., et al.
File No. 891-0088

January 17, 1990

Dear Mr. Hobbs:

This is to advise you of the Federal Trade Commission's response to the Petitions to Quash Investigational Subpoenas (Petition), which you filed on behalf of your client, Pilkington plc ("Pilkington" or "petitioner"), in the above matter.

The ruling set forth herein has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). *See* 49 Fed. Reg. 6089 (Feb. 17, 1984). Pursuant to Rule 2.7(f), within three days after service of this decision, petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

The petition is denied for the reasons stated below.

I. Background

On June 8, 1989, the Commission issued a resolution authorizing the use of compulsory process in its investigation of the proposed acquisition by Nippon Sheet Glass Co. ("NSG") of shares in Libby-Owens-Ford Company ("LOF"), a wholly-owned subsidiary of Pilkington. The resolution states that the purpose of the investigation is to determine whether the proposed acquisition violates or may violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, or Section 7 of the Clayton Act, 15 U.S.C. 18. *See* Resolution, June 8, 1989. Two subpoenas have been issued to petitioner, one on December 14, 1989 and the other on December 29, 1989. The first one, addressed to Pilkington c/o Anthony R. Pilkington in his capacity as director of LOF (Mr. Pilkington is also the Chairman of Pilkington), was received at LOF in Toledo, Ohio on or about December 18, 1989. When Pilkington advised that Mr. Antony R. Pilkington was no longer a director of LOF, a second subpoena was issued, addressed to Pilkington c/o Derek Cook, who is a director of LOF as well as of Pilkington. That subpoena was received at LOF January 2, 1990. Both subpoenas purport to require testimony from petitioner on three matters. The testimony is to be delivered by Mr. Geoffrey H. Iley, who

is a director of Pilkington and a resident of the United Kingdom, or by another Pilkington employee having knowledge of the matters specified on the subpoena.

On January 2, 1990 Pilkington filed its Petition to quash the subpoena. The Petition advances four arguments: first, that Section 9 of the Federal Trade Commission Act does not give the Commission authority to subpoena a foreign corporation or individual; second, that the Commission does not have authority to subpoena Mr. Iley because he lacks the requisite contacts with the United States; third, that the subpoena was not served properly because service on the United States subsidiary is not sufficient for service on a foreign corporation and because service through the corporation was not sufficient to effect extraterritorial service on Mr. Iley personally; and fourth, that the subpoena is overbroad and burdensome and the testimony of Mr. Iley would be cumulative because other Pilkington officials have been deposed on the specified matters.

Commissioner Calvani has carefully reviewed the Petition. He has also considered the presentations by the petitioner and Commission counsel at the hearing on the petition conducted on January 10, 1990. Petitioner's objections to the subpoena are discussed below.

II. Specific Objections

Commission counsel has made clear that the subpoena is directed to Pilkington plc, seeking testimony from a knowledgeable employee: it is not directed to Mr. Iley personally. *See* transcript, January 10, 1990 at 56-57. Commission counsel believes, based on the investigation to date, that Mr. Iley is the person at Pilkington most qualified to give evidence on the specified matters. Nonetheless, counsel is willing to take testimony under oath from any knowledgeable representative Pilkington in good faith believes can satisfactorily answer the questions. If such a representative can indeed give the necessary evidence, counsel does not insist on an appearance by Mr. Iley. Therefore, the following discussion presumes that the subpoena is directed only to the corporation, and all arguments addressed to problems that would arise with a subpoena directed to Mr. Iley personally are dismissed as moot.

Whether there is *in personam* jurisdiction over a foreign party and whether there has been proper service of process on that party are often treated together because they involve the same of similar issues. 4A C. Wright and A. Miller, *Federal Practice and Procedure* Section

1104, p. 135 (2d ed., 1989). Here, the critical issues involve whether LOF acts as the *de facto* agent or *alter ego* of its foreign parent, Pilkington.

A. *Jurisdiction Under Section 9*

Pilkington has cited Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, for the proposition that the Commission has no authority to serve by any means an investigational subpoena to a foreign "person", either natural or corporate. Section 9 provides that:

> the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence 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.

(emphasis added). Similar language in the statutes of other federal agencies has been held by some courts to mean that the agency lacks authority to enforce an investigational subpoena against a foreign citizen who is located outside the United States, *CFTC v. Nahas,* 738 F.2d 487, 496 (D.C. Cir. 1984); *SEC v. Zanganeh,* 470 F. Supp. 1307 (D.D.C. 1978); *contra, FMC v. DeSmedt,* 366 F.2d 464 (2d Cir.), *cert. denied,* 385 U.S. 974 (1966). Thus, according to the law applied in the D. C. Circuit, to attempt to serve compulsory process on a foreign corporation directly would be outside the Commission's statutory grant of power for the service of process.

The Commission, however, may exercise jurisdiction over, and serve process on, a foreign entity that has a related company in the United States acting as its agent or alter ego. *See Yuasa-General Battery Company,* File No. 841-0013, letter from Emily H. Rock, Secretary, Federal Trade Commission, to Miles W. Kirkpatrick, counsel for Yuasa, dated November 29, 1984 ("Yuasa Letter"). The Commission there ruled that service of process on a Japanese company's wholly owned United States subsidiary was effective under Commission Rule 4.4(a)(2) because:

> the evidence obtained by the Commission indicates that Yuasa Japan's relationship with Yuasa America goes beyond that of mere ownership of an independent subsidiary. . . . Accordingly, the subsidiary may be served as an agent or alter ego of its parent.

(Yuasa Letter at 6). That subpoena directed the foreign company to produce for examination a witness who was not in the United States.

Whether a corporation is another's alter ego is determined by

examining their actual relationship. The standard by which that relationship is measured has been described variously and inconsistently. At the extreme is rhetoric equating "alter ego" with "mere instrumentality", *see, e.g., Lowendahl v. Baltimore & Ohio Railroad,* 287 N.Y.S. 62, *aff'd,* 272 N.Y. 360, 6 N.E.2d 56 (1936); *see also Quarles v. Fuqua Ind., Inc.,* 504 F.2d 1358 (10th Cir. 1974); *Akzona Inc. v. E. I. DuPont de Nemours & Co.,* 607 F.Supp. 227 (D. Del. 1984). Other cases speak of "continuous exercise of supervision and intervention", *see, e.g., United States v. Scophony Corp. of America,* 333 U.S. 795, 814 (1948). Still more modern authorities, particularly in antitrust cases, have taken a "business enterprise" approach, emphasizing that in an "era of multinational corporations" conducting business through "worldwide corporate empires," a finding of jurisdiction over the parent is "practically mandated." *Hitt v. Nissan Motor Co.,* 399 F.Supp. 838, 844 (S.D. Fla. 1975), *vacated on other grounds sub nom. In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. 1977); *see also Audio Warehouse Sales, Inc. v. U. S. Pioneer Electronics Corp.,* 1975-1 Trade Cas. [CCH] ¶60,213 (D.D.C. 1975); *Newport Components v. NEC Home Electronics,* 671 F.Supp. 1525, 1536 (C.D. Cal. 1987); *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.,* 508 F.Supp. 1322 (E.D.N.Y. 1981). Moreover, the required degree of contact with the forum, achieved by relationship with the subsidiary, can vary depending on the nature of the legal controversy. "Continuous" and "systematic" oversight and control may be required to establish "general jurisdiction" for all purposes. However, where the contacts relate to the basis for the cause of action itself, a less substantial relationship may still support a finding of "special jurisdiction". *See Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 414 (1984); *Consolidated Gold Fields v. Anglo American Corp.,* 698 F.Supp. 487, 494-96 (S.D.N.Y. 1988).

The fact of 100 percent ownership, although relevant, does not by itself confer alter ego status upon the parent. Some factors that can indicate alter ego status include interchange of personnel, exclusive United States distributorship of the foreign parent's products, and sharing of trademarks. *See Chrysler Corporation v. General Motors Corporation,* 589 F. Supp. 1182, 1200-01 (D.D.C. 1984). One particularly thoughtful analysis of the problem, in the antitrust context, identifies several factors in foreign parent-domestic subsidiary relationships that can show the parent to be acting through the subsidiary. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,*

Ltd. 402 F. Supp. 262, 327-28 (E.D. Pa. 1975). The decision is largely based on the principles announced in *United States v. Scophony Corp.*, 333 U.S. 795 (1948). For more general discussion, *see also,* 2 J. Moore, *Federal Practice* ¶ 4.41-1[6] (2d ed., 1989); 4 C. Wright and A. Miller, *Federal Practice and Procedure* § 1069 (2d ed., 1989). The factors identified and discussed in *Zenith* include: the subsidiary's performance of business activities that the parent could perform directly; a "partnership in world-wide business competition between" the parent and the subsidiary; capacity of the parent, through controlling stock interest, interlocking directorates, or otherwise, "to influence decisions of the subsidiary or affiliate that might have antitrust consequences"; the part the subsidiary plays in the parent's overall business activity; the existence of an integrated sales system among functionally distinct corporations, perhaps indicated by the subsidiary's status as the parent's marketing arm; presentation of a common marketing image, or holding out to the public as a single entity that is conveniently departmentalized, nationally or world-wide. 402 F. Supp. at 327–28. Where, as here, a holding company is involved, one whose own business activity is really just the management of its subsidiaries', jurisdiction (and propriety of service) should be determined by examining "the actual unity and continuity of the whole course of conduct," rather than by "atomizing it into minute parts or events". 402 F. Supp. at 319, citing *Scophony,* 333 U.S. at 817. These two cases specifically distinguish the holding company situation from that of more traditional manufacturing operations, and from cases declining to find relationships among those more traditional kinds of enterprises.

The cases on which petitioner primarily relies, *Quarles v. Fuqua Ind., Inc.*, 504 F.2d 1358 (10th Cir. 1974) and *Akzona Inc. v. E. I. DuPont de Nemours & Co.*, 607 F.Supp. 227 (D. Del. 1984), illustrate the problem's complexity. In each, the court declined to find the subsidiary to be the parent's alter ego. But neither holds, as Pilkington implies, that a wholly owned subsidiary of a holding company, one whose only business is managing its subsidiaries, can never be its parent's alter ego. *Quarles* is a fact-specific judgment about the degree of relationship between the particular parent and the particular subsidiary, in light of the particular substantive claims at issue. The parent, an investment company with only 40 employees, owned eighteen different "highly diversified" subsidiaries; its relation to the particular subsidiary at issue, which it had owned for only

eighteen months and which it had sold barely three weeks after the complaint had been filed (and which went bankrupt seven months later), was obviously purely financial; and not only did the parent not manage the subsidiary with respect to the business activities that prompted the lawsuit, but the subsidiary did not even report to the parent about them. 504 F.2d at 1363. In the context of the fraud and misrepresentation claims at issue, the court understandably looked to the line of precedent, interpreting the terms of the state long-arm statute, that attaches liability to an individual who uses a corporation merely as an instrumentality to conduct his own personal business, and then only when the liability arises from fraud or injustice to third parties dealing with the corporation. *Id.* at 1362. *Akzona* involved a relationship that appears to be more like that between Pilkington and its subsidiaries. But, based on the particular evidence before it, the court found that the necessary degree of control had not been proven; for example, it noted that just because the subsidiary reported to the parent, it could not infer that the parent controlled the subsidiary without knowing "when and under what circumstances" that reporting occurred. 607 F. Supp. at 238. Moreover, the court found that the patent claim before it would not be governed by the "more lenient standard for jurisdiction" that the courts have found "necessary to effectuate the policies of the antitrust acts," *id.* at 239–40, citing *Scophony* and *Zenith.*

In *Yuasa,* the Commission found the following factors significant in showing that the domestic firm was the agent or alter ego of its foreign parent. Its directors (all but one) were employees or directors of the parent, and all were nominated and approved by the parent's senior management and board. Its president had been employed by the parent and continued to receive compensation (through his family) from the parent. Its debts were guaranteed by the parent. The parent rotated employees through it and maintained a regular flow of communications with it. Finally, and probably most importantly, it permitted the parent to exert direct control over the U.S. joint venture of which it was the nominal co-owner (along with another U.S. company). These factors, taken together, showed that it was so controlled by the foreign parent that it was properly the parent's agent for service of investigational process.

In denying that LOF is the alter ego of Pilkington, despite being a wholly-owned subsidiary, petitioner submits the following allegations of fact: It has separate officers, board of directors, books, records,

headquarters and manufacturing facilities. None of LOF's officers are employees of Pilkington, and only four of the ten LOF directors are now employees of Pilkington (but one additional LOF director is a retired Pilkington director). LOF's officers have complete control of LOF's daily operations. In the proposed transaction, NSG would invest in LOF, not in Pilkington, in exchange for LOF securities. Petition at 9-10. These allegations of fact are not supported by affidavits, but, with one significant exception, are not contested.

The significant exception is the degree of control that Pilkington exerts over LOF activities.

The degree and nature of Pilkington's interest in LOF is not merely that of a portfolio investor. Pilkington is engaged in the glass business. It does so through a network of subsidiaries, the "Group", around the world, including LOF. Although these subsidiaries retain a substantial degree of autonomy to manage their own local operations, together they implement Pilkington's competitive and commercial strategies in the glass industry.

Some of Pilkington's intervention in LOF management discloses only the kinds of interests normally expected of a shareholder with a position so large that its accounts must be consolidated.

More significant is evidence showing Pilkington influence over LOF management of the business.

More significant is the evidence disclosing that the transaction under investigation is being directed and implemented by Pilkington, to achieve Pilkington's strategic and commercial objectives. That individual members of the Pilkington Group exercise autonomous judgment over details of their own operation is only to say that Pilkington uses decentralized techniques to manage what its own executives call its "divisions".

Comparing this evidence to the factors described in the relevant case law leads to the conclusion that LOF is indeed the alter ego of Pilkington, sufficient to support jurisdiction over Pilkington in this antitrust investigation. Not all of the factors point in the same direction, but the most important ones do. Pilkington's annual report announces with apparent pride that it is engaged in a partnership in worldwide business competition with its LOF and other subsidiaries, *cf. Zenith Radio Corp.*, 402 F. Supp. at 327–28. Through its promotion of the very investment that is the subject of this investigation, Pilkington demonstrates its capacity, through controlling stock interest, interlocking directorates, or otherwise, "to

influence decisions of the subsidiary or affiliate that might have antitrust consequences". *Id.* The subsidiary plays a crucial part in the parent's over-all business activity; indeed, but for the subsidiaries the parent would have no business activity. *Id.* There is evidence of coordination among members of the group, but less evidence than in other cases of an integrated sales system among functionally distinct corporations, and certainly LOF is not merely the marketing arm for products made by other Pilkington units. But although the members of the group do not all sell under the same tradenames or present a common marketing image, Pilkington holds itself out to the public as a single worldwide entity, and LOF holds itself out as a member of that entity. *Id.*

B. *Mr. Iley's Contacts with the United States*

Assuming that the subpoena specifically seeks the attendance of Mr. Iley, Pilkington argues that Mr. Iley lacks the constitutionally requisite minimum contacts with the United States. Because Commission counsel seeks to compel the corporation, not Mr. Iley personally, to give evidence, this argument is dismissed as moot.

C. *Sufficiency of Service Through Subsidiary or to Individual*

Pilkington objects to the manner of service, through LOF, on the grounds that such service would only be proper if LOF were Pilkington's alter ego. Because the Commission finds that LOF is indeed Pilkington's alter ego for purposes of establishing jurisdiction, the same factors support finding it to be the alter ego for service of process.

In addition, Pilkington claims that the subpoena cannot be treated as analogous to a FRCP Rule 30(b)(6) subpoena because this subpoena names Mr. Iley as well as the corporation, yet FRCP Rule 30(b)(6) does not call for the subpoena to name the individual. If it is not a FRCP Rule 30(b)(6) subpoena, Pilkington argues, then it must be one addressed to Mr. Iley personally, and service cannot be effected on Mr. Iley personally by delivery to LOF, but instead other procedures must be used, which the Commission has not employed. But despite the naming of one individual, the target corporation retains the power to designate another as competent to provide the evidence. Whether the corporation complies with the subpoena depends on whether the individual it designates can provide that evidence, not on whether it produces the individual the subpoena

names. Consistent with Commission counsel's representations at the January 10 hearing, the subpoena applies only to the corporation. The naming of Mr. Iley is construed only as a request, a suggestion that he might be a most appropriate witness, and not a demand that he appear.

D. *Overbreadth and Burden*

Finally, Pilkington claims that it has already provided witnesses to testify on the specified matters, so that further testimony would be duplicative and would impose an undue burden on Mr. Iley. Pilkington does not contend that the matters are irrelevant.

The testimony to which Pilkington refers includes questions on subjects about which the witnesses identified Mr. Iley as a more knowledgeable source. Thus Pilkington's contention that the evidence has already been provided is incorrect.

A recipient of a Commission subpoena bears a heavy burden of proof to sustain an objection that a subpoena is unduly burdensome. The applicable standard was stated in *FTC v. Texaco,* 555 F.2d at 882:

> We emphasize 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 of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.

The Commission finds that petitioner has failed to meet this standard. Petitioner has provided no evidence, affidavits or testimony to support this objection other than its conclusory statement quoted above. Accordingly, the subpoena will not be quashed on the grounds that it imposes an undue burden.

III. Conclusion

For the foregoing reasons, Pilkington's Petition to Quash Subpoena is denied. Pilkington is directed to comply with the subpoena on or before January 26, 1990.

Pursuant to Rule 2.7(f), within three days after service of this ruling, the petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed

when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b) (1987). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise specifies.

By direction of the Commission.

Re: Nippon Sheet Glass Co., File No. 891-0088
Petition of Pilkington plc

January 26, 1990

Dear Mr. Hobbs:

The Commission has considered (a) the petition to quash subpoenas and supporting materials that you filed on behalf of Pilkington plc ("Petition"); (b) the January 17, 1990 letter ruling denying the Petition; (c) your request for full Commission review filed on January 22, 1990, including the supporting materials and the additional submission made on January 24, 1990; and (d) the subpoenas in issue.

The Commission has determined that your request for full Commission review does not raise any new issues regarding the requested quashing of the subpoenas and that the petition was properly denied for the reasons stated in the January 17 ruling. The Petition repeats an argument mentioned in the proceedings before Commissioner Calvani, that cases about service of complaints are not relevant to service of subpoenas because the burden of responding to a subpoena is greater than that of responding to a complaint. *See* Petition for Review by the Full Commission, at 2-3, and Attachment B, n. 7. But the authorities cited for that proposition, *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson,* 636 F.2d 1300, 1307-11 (D.C. Cir. 1980), and *Commodity Futures Trading Commission v. Nahas,* 738 F.2d 487, 494 (D.C. Cir. 1984) have nothing to do with the matter at issue here, namely under what conditions a foreign company's wholly-owned American subsidiary is its alter ego and thus an appropriate vehicle for service of process on it, within the United States. Rather, both *Saint Gobain* and *Nahas* deal with the propriety of particular methods of service outside the United States; neither even mentions the alter ego issue, and *Nahas* does not even involve a corporate entity. Neither holds, as Pilkington's argument implies, that the criteria for establishing alter ego status should vary, depending on whether the affiliate is receiving a subpoena or a notice of a complaint.

The Commission also denies your request for oral argument before

the Commission and for a stay of the January 26 return date. Accordingly, the full Commission concurs with and hereby adopts that ruling in this matter.

For the foregoing reasons, the request for full Commission review is denied. Pilkington plc is directed to comply with the subpoena by January 26, 1990.

By direction of the Commission.

Re: Petition to Quash Investigational Subpoena Planters LifeSavers Company, File No. 901-0023

February 12, 1990

Dear Mr. Cutter:

This is to advise you of the Federal Trade Commission's response to the Petition to Quash Investigational Subpoena ("petition"), which you filed on behalf of your client, Planters LifeSavers Company ("Planters") in the above-referenced matter. The petition requests that the Commission quash a subpoena *ad testificandum* dated February 9, 1990, issued against Candice Borreson, which bears a return date of February 12, 1990. In the alternative, it asks that the Commission postpone the return date to February 20, 1990.

This ruling has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). *See* 49 Fed. Reg. 6089 (Feb. 17, 1984). Commissioner Calvani has carefully reviewed the petition and accompanying Declaration of Richard C. Weisberg. In short, Planters argues that the subpoena is unreasonably burdensome given Ms. Borreson's previously-scheduled commitments and the disruptively short notice for compliance. Upon consideration, Commissioner Calvani rejects the arguments advanced to quash the subpoena. Accordingly, the petition to quash is denied. However, Commissioner Calvani grants the alternative request to postpone the return date to February 20, 1990.

By direction of the Commission.

Re: Petition to Extend Return Date or Limit or Quash Subpoena Nestle Foods Corporation, File No. 901-0023

February 14, 1990

Dear Mr. Maulsby:

This is to advise you of the Federal Trade Commission's response to the Petition to Extend Return Date of Subpoena Or Limit or Quash ("petition"), that you filed on behalf of your client, Nestle Foods Corporation ("Nestle") in the above-referenced matter.

The petition concerns a subpoena issued Friday, February 9, 1990, seeking the appearance of a Nestle Foods manager at a deposition that had been scheduled for Monday, February 12, 1990. It requests an enlargement of time to accommodate the witness' prior commitments. After careful consideration, Commissioner Calvani has determined to grant this request. Nestle is hereby ordered to respond on or before February 21, 1990.

This ruling has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). *See* 49 Fed. Reg. 6089 (Feb. 17, 1984).

By direction of the Commission.

Re: Petition to Quash CID issued to Elden Huntling in File No. 862-3148

March 15, 1990

Dear Mr. Torrance:

This is to advise you of the Federal Trade Commission's response to the Petition for Order to Set Aside Demand ("Petition"), which you filed on behalf of Mr. Huntling ("petitioner") in the above matter.

The ruling set forth herein has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). *See* 49 Fed. Reg. 6089 (Feb. 17, 1984). Pursuant to Rule 2.7(f), within three days after service of this decision, petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

The petition is denied for the reasons stated below.

I. Background

On October 7, 1982 the Commission issued a resolution authorizing the use of compulsory process in the investigation of possible unfair methods of competition or unfair or deceptive acts or practices, in violation of Section 5 of the Federal Trade Commission Act, in the development, promulgation, dissemination, or use of product standards, seals of approval, or other forms of product certification. Pursuant to that authority, a Civil Investigative Demand was issued to Mr. Elden Huntling in connection with an investigation of the International Association of Plumbing and Mechanical Officials. The CID was issued on February 14, 1990.

On February 28, 1990 this Petition, dated February 22, was filed. The Petition states that "Mr. Huntling respectfully refuses to respond to your questionnaire on the basis of his constitutional right against self-incrimination." The Petition requests that a grant of immunity be obtained; if that is done, "Mr. Huntling will reconsider his refusal to respond." The Petition makes a blanket assertion of the Fifth Amendment privilege against self-incrimination. Petitioner's claim evidently extends to all the questions on the interrogatory, including such questions as his name, address, and employment.

Such a blanket claim is improper. *See Baker v. Limber,* 647 F.2d 912, 916-17 (9th Cir. 1981); *Davis v. Fendler,* 650 F.2d 1154, 1160 (9th Cir. 1981); *United States v. Allshouse,* 622 F.2d 53, 56 (3rd Cir. 1980); *United States v. Pierce,* 561 F.2d 735, 741 (9th Cir. 1977), *cert. denied,* 435 U.S. 923 (1978). Instead, the privilege should be asserted in response to particular questions, both to clarify whether the privilege is justified with respect to each question, and to prevent a blanket claim of privilege being used as a shield for unprivileged information. *Allshouse,* 622 F.2d at 56.

Not only is the claim's application to each interrogatory not specified, but also petitioner's basis for asserting the privilege claim is unstated. The Fifth Amendment privilege is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman v. United States,* 341 U.S. 479, 486 (1951); "the witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say so does not of itself establish the hazard of incrimination." *Id.* at 486; *see also Brunswick Corp. v. Doff,* 638 F.2d 108, 110 (9th Cir. 1981), *cert. denied,* 454 U.S. 862 (1981). The privilege claim is evaluated based on all the available facts. *Hoffman,* 341 U.S. at 486-87; *Fendler,* 650

F.2d 1154 at 1159; *Baker*, 647 F.2d at 917. Moreover, there must be a nexus between the risk of criminal conviction and the information requested. *Baker*, 647 F.2d at 917; *Martin-Trigona v. Gouletas*, 634 F.2d 354, 360 (7th Cir. 1980), *cert. denied*, 449 U.S. 1025 (1980).

When the danger of incrimination is not immediately evident from the nature of the question or other facts, the person claiming the privilege bears the burden of showing the danger of incrimination. *See Fendler*, 650 F.2d at 1159-60; *Baker*, 647 F.2d at 917. The claimant must "tender some credible reason why a response would pose a real danger of incrimination, not a remote and speculative possibility." *Gouletas*, 634 F.2d at 360. The Petition tenders no such reason, and the Commission is unaware of any information that would imply there is any reasonable danger of incrimination. *Compare Hoffman*, 341 U.S. at 487-89 (grand jury impaneled, subpoenas issued; claimant had notorious criminal history).

Petitioner's assertion of privilege is rejected as an improperly asserted blanket claim as to all the CID's interrogatories, and as unsupported by any information showing that a response to any of the interrogatories could pose a real danger of incrimination.

In addition, the Petition does not comply with Commission Rule 2.7(d)(2). The Petition is not accompanied by a signed statement that petitioner's counsel conferred with Commission counsel in a good faith effort to resolve any issues raised by the petition.

III. Conclusion

For the foregoing reasons, the Petition is denied. Mr. Huntling is directed to comply with the CID on or before March 23, 1990.

Pursuant to Rule 2.7(f), within three days after service of this ruling, the petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b) (1987). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise specifies.

By direction of the Commission.

Re: Madison County Veterinary Medical Association, File No. 891-0063: Petitions To Limit or Quash Subpoenas Duces Tecum

March 21, 1990

Dear Mr. Hughes:

This is to advise you of the Federal Trade Commission's response to the seven Petitions to Limit or Quash Subpoena Duces Tecum ("petitions"), which you filed on behalf of your clients, Donald R. Popejoy, DVM, Charles Smith, DVM, Jim Chancellor, DVM, Robert N. Cole, DVM, Sam Eidt, DVM, David Hertha, DVM, and Joseph Atkins Pettus, III, DVM ("petitioners") in the above matter.

This ruling has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). *See* 49 Fed. Reg. 6089 (Feb. 17, 1984). Pursuant to Rule 2.7(f), within three days after service of this decision, petitioners may file with the Secretary of the Commission a request for full Commission review. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b) (1989). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise specifies.

The petitions are denied for the reasons stated below.

I. Background

On January 9, 1990 the Commission issued a resolution authorizing the use of compulsory process in this matter. The resolution states that the purpose of the investigation is to determine whether the Madison County Veterinary Medical Association ("MCVMA"), its members or any persons, partnerships or corporations in Madison County, Alabama, or surrounding areas "have engaged in or are engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, by participating in unlawful concerted activities with respect to the sale or offering for sale of veterinary goods or services." *See* Resolution, January 9, 1990. The subpoenas were issued on January 25, 1990 and specified return dates between February 20 and February 23, 1990.[1]

On February 20, 1990 the seven petitions were filed with the

[1] Neither petitioners nor Commission staff offered evidence of the date on which petitioners were actually served with the subpoenas.

Secretary.[2] The petitions are all identical in substance. Four arguments are set forth in each petition. First, petitioners claim that Commission staff has refused to provide their counsel, who is also counsel for MCVMA, with copies of "testimony given voluntarily by other members of this association [MCVMA] and of any documents provided to the commission staff as provided in 16 CFR 2.9." Petitioners allege that staff has "willfully withheld" transcripts of such testimony and copies of such documents that are in their possession. Second, petitioners assert that the subpoenas do not "contain an appropriate specification of the purpose and scope of the investigation." The third argument is that the subpoenas, served within 20 days from the date of the scheduled depositions, do not give reasonable notice of the date and place of the proposed depositions. Finally, petitioners argue that the subpoenas are "thereby vague, ambiguous and overbroad, thereby causing such matters to be burdensome and expensive." Petitioners request that the subpoenas be quashed and that the Commission order that any future subpoena duces tecum issued in this matter be limited in scope to matters which are relevant and material to the pending Commission investigation.

On February 26, 1990, a hearing was held in this matter before Commissioner Calvani at the United States Courthouse in Birmingham, Alabama. During the hearing, petitioners abandoned their third argument—that the subpoenas did not provide reasonable notice of the date and place of the scheduled depositions. (Tr. 10, 11).[3] At the conclusion of the hearing, Commissioner Calvani stated he would entertain post-hearing submissions through March 2, 1990.

Commissioner Calvani has carefully reviewed the petitions, the arguments made at the February 26, 1990 hearing, and the supplemental submission.[4] Petitioners' remaining objections to the

[2] The certificates of service accompanying the petitions state that each was served "upon all counsel of record" by first class mail, postage prepaid, on February 12, 1990. The petitions were not deemed filed, however, until the day of delivery by the Post Office, February 20, 1990. 16 CFR 4.4(b) (1989).

[3] The petitions assert that the subpoenas were served fewer than 20 days from the date of the proposed depositions, and that such service fails to "give reasonable notice" of the date and place of the subpoenas. Title 16 CFR 2.7(d) provides that a petition to limit or quash must be filed with the Secretary of the Commission "within twenty (20) days after service of a subpoena or civil investigative demand, or, if the return date is less than twenty days after service, prior to the return date." The substance of this language is also contained on the face of the subpoenas. This language clearly contemplates that there will be instances in which the Commission may lawfully set a return date less than 20 days after service of compulsory process. Commission investigations conducted pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. 18a (1988), for example, would be severely handicapped if, as a matter of law, the Commission could not schedule a deposition within 20 days after service of a subpoena. Finally, it should be noted that the subpoenas set forth the exact location of the proposed depositions. In any event, petitioners have abandoned this argument. (Tr. 10, 11.)

[4] The transcript of the February 26, 1990 hearing on the petitions to quash or limit is cited as "Tr. ___ ." The March 1, 1990 supplemental letter submitted by petitioners' counsel is cited as "Hughes ___ ."

subpoenas, and the grounds for denying the petitions, are discussed below.

II. Petitioners' Objections

A. *Objections Based Upon 16 CFR 2.9*

Petitioners assert that 16 CFR 2.9 entitles them to obtain from Commission staff transcripts of testimony and documents given voluntarily by three other members of the MCVMA.[5] Petitioners argue that staff's alleged failure to comply with this rule excuses petitioners' noncompliance with the subpoenas. (Hughes 5-7).

Rule 2.9(a) of the Commission's Rules of Practice provides in pertinent part:

> Any person compelled to submit data to the Commission or to testify in an investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted by him and of his own testimony as stenographically reported, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of his testimony.

16 CFR 2.9(a) (1989) [emphasis added].

Petitioners' argument fails for at least two reasons. First, petitioners point to no authority, either in the Commission's Rule of Practice or elsewhere, to support the proposition that staff's failure to provide one witness with a statement pursuant to Rule 2.9(a) excuses another witness from complying with compulsory process. Rule 2.9(a) applies only to a witness who seeks copies of transcripts of his own testimony or of documents that the Commission compelled the witness to produce. The fact that Mr. Hughes also represents other veterinarians who previously gave voluntary statements to the Commission staff does not empower the petitioners to invoke Rule 2.9(a) to obtain the prior statements of those other veterinarians.[6] *Cf. United States v. Van Allen,* 28 F.R.D. 329, 334 (S.D.N.Y. 1951) (defendant is not

[5] The three other veterinarians whom petitioners claim voluntarily provided testimony and documents earlier in the investigation are Donna Lauderdale, DVM, Susan Muller, DVM, and Bill Renfroe, DVM. Each of these witnesses was provided with a copy of his or her testimony following an earlier deposition. The witnesses read, signed, and returned the transcripts without retaining copies. (Tr. 23.) Petitioner Pettus previously also gave voluntary testimony to Commission staff, the transcript of which is also requested by petitioners pursuant to Rule 2.9(a). However, petitioners admit that when petitioner Pettus was provided with an opportunity to review his previous testimony, he retained a copy of that transcript. (Tr. 23; Hughes 1.) Since petitioner Pettus already has obtained a copy of his testimony, and has identified no other documents that he previously provided to Commission staff, his request in the instant petition is moot.

[6] Petitioners are the seven individual veterinarians to whom the subpoenas are addressed. Although it is unclear whether petitioners would invoke Rule 2.9(a) as individuals or as members of MCVMA to obtain copies of statements previously given by other veterinarians, petitioners do not argue that MCVMA has standing to petition to quash the subpoenas issued to individual veterinarians.

entitled, under Rule 16 of the Federal Rules of Criminal Procedure, to statements of codefendants and co-conspirators previously given, pursuant to subpoena, to the Securities and Exchange Commission).

Second, petitioners concede that the documents and transcripts of testimony that they wish to obtain were provided voluntarily, not under compulsion, to Commission staff. (Tr. 6.). Rule 2.9(a), on its face, applies only to testimony and documents the production of which was compelled by the Commission. Since the documents and transcripts of testimony petitioners seek were not provided to the Commission pursuant to compulsory process, 16 CFR 2.9(a) does not apply.

Petitioners argue that the Commission should construe Rule 2.9(a) to apply to statements and documents voluntarily provided to Commission staff. Petitioners cite no authority interpreting either Rule 2.9(a) or any similar agency rule or statute in this fashion. Their argument is essentially two-fold. First, petitioners claim that staff's position would effectively reward witnesses who insist on receiving subpoenas before testifying, at the expense of witnesses who voluntarily cooperate with government investigators. Second, petitioners maintain that staff's refusal to provide witnesses with copies of transcripts or other materials they voluntarily submitted to the Commission staff would be inconsistent with a presumption of access to such materials grounded in the First Amendment and the common law.

Federal courts have rejected efforts by witness to invoke similar provisions of law to obtain copies of materials voluntarily provided in the course of agency investigations. Section 6(c) of the Administrative Procedure Act (APA), 5 U.S.C. 555(c) (1988), for example, provides in pertinent part:

> A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

The similarity between this statute and the Commission's Rule is compelling. Thus, we look to cases that interpret this provision of the APA for guidance in construing Rule 2.9(a).

In *United States v. Murray*, 297 F.2d 812 (2d. Cir.), *cert. denied*, 369 U.S. 828 (1962), the Second Circuit affirmed defendant's income tax evasion conviction, rejecting his argument that the trial court

erred in denying his pretrial demand for inspection of transactions of statements that he gave voluntarily to representatives of the Internal Revenue Service. The court noted that Section 6(b) of the original APA, 5 U.S.C. 1005(b)[7]—now codified as amended at 5 U.S.C. 555(c)—by its terms applied only to persons "compelled to submit data or evidence" and that defendant's appearances were not pursuant to a summons issued under the Internal Revenue Code. Thus, the court held former Section 6(b) inapplicable to defendant's earlier voluntary statements.

Similar arguments were rejected in *United States v. Van Allen, supra.* There, 20 defendants and 28 co-conspirators were indicted for mail and wire fraud in connection with the sale of unregistered securities. Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, one defendant requested the transcript of his own testimony and that of all co-defendants and co-conspirators in an investigation conducted by the Securities and Exchange Commission. The government offered to make available only the defendant's prior testimony if given pursuant to a subpoena. Rejecting claims that the defendant was entitled to a transcript of his previous testimony "whether or not he was subpoenaed and that the government is drawing a distinction without meaning," the court responded: "[a]lbeit, but it is a distinction which Congress has written into law. 5 U.S.C.A. 1005(b)." *Id.* at 334.

Petitioners' arguments based on First Amendment or common law presumptions of access are misplaced. None of the cases petitioners cite support their claim of First Amendment access rights to nonpublic investigational records prior to the commencement of judicial or administrative adjudicatory proceedings. *See Press-Enterprise Co. v. Superior Court of California,* 478 U.S. 1 (1986) (First Amendment right of access applies to preliminary hearing in California criminal matter); *Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501 (1984) (presumption of openness inures to voire dire examination of potential jurors in criminal trial); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 596 (1983) (First Amendment right of

[7] As originally enacted, the language of APA Section 6(b) was substantially similar to Section 6(c) in its present form and provided in pertinent part:

> Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully proscribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

Administrative Procedure Act, ch. 324, Section 6, 60 Stat 240 (1946), (originally codified at 5 U.S.C. 1005(b); codified as amended at 5 U.S.C. 555(c)).

access to criminal trials); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982) (Massachusetts statute requiring exclusion of press and public from courtroom during testimony of minor victim in sex-offense trial violates First Amendment).

The Commission is conducting a nonpublic investigation—the existence of which has become public by virtue of the filing of the petitions to quash—to determine whether MCVMA or others have engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act. Neither judicial nor administrative adjudicatory proceedings are presently underway, and the authorities relied upon by petitioners are wholly inapposite until such time that the Commission initiates such proceedings. *See, e.g., Standard Oil Company v. Federal Trade Commission,* 475 F. Supp. 1261 (N.D. Ind. 1979).[8] A right of access to investigatory files such as those in issue here would effectively invalidate Exemption 7 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7), which grants federal agencies substantial latitude to withhold certain investigational records compiled for law enforcement purposes. Similar state laws have withstood First Amendment scrutiny. *See Black Panther Party v. Kehoe,* 114 Cal. Rptr. 725, 39 Cal. App. 3d 900 (1974) (rejecting First Amendment challenge to exemption from California Public Records Act for investigative files compiled for law enforcement purposes). Thus, we reject petitioners' contention that the First Amendment requires access to the transcripts and documents in issue.

Equally misguided is petitioners' reliance on cases defining the scope of common law or rule created access rights to post-complaint pretrial judicial proceedings. *See, e.g., In re San Juan Star Company v. Barcelo,* 662 F.2d 108 (1st Cir. 1981) (striking down protective order prohibiting plaintiffs' counsel from disclosing deposition materials to plaintiff);[9] *Avirgan v. Hull,* 118 F.R.D. 252, 257 (D.D.C. 1987) (denying third-party deponent's motion for protective order to exclude

[8] The court in *Standard Oil* made clear that due process requires that respondents in an administrative adjudicatory proceeding be provided "appropriate discovery in time to reasonably and adequately prepare themselves and their defenses before facing the charges in the administrative 'trial'." 475 F. Supp. 1275. The court held that due process precluded the Administrative Law Judge from refusing to rule upon any of respondents' discovery requests pending their response to the government's outstanding discovery requests. The case does not stand for the proposition that discovery must be afforded a potential respondent prior to the issuance of an administrative complaint.

[9] In *San Juan Star,* the First Circuit held that the appropriate measure of First Amendment limitations on protective orders is found in a "standard of 'good cause' that incorporates a 'heightened' sensitivity to the First Amendment concerns at stake." 662 F.2d at 116. The Supreme Court disagreed with this approach in *Seattle Times Company v. Rhinehart,* 467 U.S. 20, 33 (1984), holding that the good cause standard of Rule 26(c), Fed. R. Civ. P., is sufficient without "heightened scrutiny" to balance First Amendment concerns against the government's interest in issuing protective orders.

press from attending his deposition "in advance of a good cause showing" pursuant to Rule 26, Fed. R. Civ. P.); *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation,* 101 F.R.D. 34 (C.D. CA. 1984) (discussing weight or presumption of access to pretrial briefs, summary judgment materials, motions for judgment on the pleadings, and exhibits cited therein). Petitioners point to no authority extending these rights to documents and transcripts of testimony gathered by an administrative agency in the course of conducting a lawful investigation.[10]

B. *Objection Based Upon the Adequacy of the Purpose and Scope of the Subpoenas*

Petitioners challenge the subpoenas on the ground that they do not contain "an appropriate specification of the purpose and scope of the investigation;" thus, petitioners assert they have been deprived of an opportunity to "prepare adequately" for the depositions. These assertions are without merit.

Rule 2.6 of the Commission's Rules of Practice provides that "[a]ny person under investigation compelled or requested to furnish information or documentary evidence shall 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." 16 CFR 2.6 (1989).

The subpoenas comport with the requirements of this Rule. Attached to each subpoena is a copy of the Commission's "Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation." The resolution states that the purpose and scope of the investigation is to determine whether MCVMA, its members or any persons, partnerships, or corporations in Madison County, Alabama, or surrounding areas "have engaged or are engaging in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, by participating in unlawful concerted

[10] Assuming arguendo that Rule 2.9(a) applies to documents and transcripts of testimony voluntarily provided to Commission staff, petitioners and staff join issue over whether "good cause" exists within the meaning of Rule 2.9(a) to limit the rights of witnesses to inspect transcripts of their testimony. (Tr. 18.) Since staff's alleged failure to comply with Rule 2.9(a), if true, would not excuse petitioners from complying with the subpoenas, we do not reach the question of whether joint representation by one attorney of various members of a possible conspiracy, and the attendant manner in which such representation may facilitate coordination of testimony of witnesses, is sufficient to establish "good cause." Moreover, any ruling on whether there is "good cause" to restrict access to copies of the transcripts of the depositions to be taken pursuant to the outstanding subpoenas would be premature. *See Securities and Exchange Commission v. Sprecher,* 594 F.2d 317, 319 (2d Cir. 1979) (construing the "good cause" standards of the APA Section 5(c) and the analogous provision of the Securities and Exchange Commission Rules Relating to Investigations, 17 CFR 203.6.).

activities with respect to the sale or offering for sale of veterinary goods or services." Resolution, January 9, 1990. Courts have held that similarly broad language in process resolutions provides adequate notice of the nature and scope of a Commission investigation. *See, e.g., FTC v. Texaco, Inc.*, 555 F.2d 862, 874 n.26 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977) (FTC "was not required to articulate its purpose with greater specificity."); *FTC v. Green*, 252 F. Supp. 153, 156 (S.D.N.Y. 1966). Accordingly, the subpoenas will not be quashed on this basis.

C. *Objections Based Upon Vagueness, Overbreadth, and Burden*

Paragraph 4 of each petition asserts that each subpoena "is vague, ambiguous and overbroad, thereby causing such matters [apparently those referred to in paragraphs 1 through 3 of the petitions] to be burdensome and expensive to the petitioner." This fourth ground for quashing the subpoenas is little more than an effort to bootstrap the arguments in paragraphs 1-3 of each petition into a catch-all argument that the subpoenas are fatally defective. This catch-all argument is nothing more than the sum of the three arguments rejected above and, therefore, also fails. Without benefit of the catch-all approach, petitioners' naked assertions of vagueness, ambiguity, and overbreadth are without foundation.

Petitioners assert that Specification Nos. 1 and 5 are "clearly overbroad and need to be limited in scope." (Hughes 6.) These assertions, like petitioners' conclusory claims that compliance with the subpoenas would be "burdensome and expensive," are without merit. A recipient of a Commission subpoena bears a heavy burden of proof to sustain an objection that a subpoena is unduly burdensome. The applicable standard was stated in *FTC v. Texaco, Inc.*, 555 F.2d at 882.

> We emphasize 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 of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.

Petitioners have failed to meet this standard. Petitioners have provided no evidence, affidavits or testimony to support these objections other than their conclusory allegations. There is no evidence

that compliance with Specification No. 1, which requests "all documents prepared by or for or received from MCVMA," is likely to impose an undue burden on petitioners. The subpoenas are not directed to MCVMA itself, but to individual veterinarians. Indeed, at the hearing petitioners' counsel represented that he does not "think the Association itself handles that many documents." (Tr. 12.) Even more conclusory are petitioners' assertions that Specification No. 5 is "clearly overbroad." (Hughes 6). Specification No. 5 seeks documents "referring to or reflecting promotion or advertisement" of the veterinary services of the subpoena recipients or of other veterinarians in Madison County, Alabama. Moreover, there is no evidence in the record of how many documents responsive to Specification Nos. 1 and 5—limited by Instruction F to documents "prepared, used or received" between January 1, 1987 and the present—might be in petitioners' possession, custody, or control. In the absence of such evidence, the petitions are denied.[11]

III. Conclusion

For the foregoing reasons, the Petitions to Limit or Quash Subpoenas Duces Tecum filed by Donald R. Popejoy, DVM, Charles Smith, DVM, Jim Chancellor, DVM, Robert N. Cole, DVM, Sam Eidt, DVM, David Hertha, DVM, and Joseph Atkins Pettus, III, DVM are denied. Petitioners are directed to comply with the subpoenas within 10 days of the date that this ruling is served, or at such other time as authorized pursuant to Rule 2.7(d)(3).

By direction of the Commission.

Re: Petition to Quash CID
Griffin Systems, Inc., File No. 892-3180

May 18, 1990

Dear Mr. Boughton:

This is to advise you of the Federal Trade Commission's response to the Petition to Quash (Petition), which you filed on behalf of Griffin Systems, Inc. ("Griffin" or "petitioner"), in the above matter.

[11] Petitioners do not allege that the instant subpoenas seek information which is not relevant to the instant allegations. They do, however, pray that any subpoenas issued in this matter in the future "be limited in scope to matters which are relevant and material to the current investigation being conducted by the Commission." To the extent this language in the petitions may be construed as an attack on the relevance of any material sought by the subpoenas, however, the Commission finds that petitioners' arguments are wholly conclusory and fall well-short of the mark necessary to successfully challenge the subpoenas on the basis of relevance. *See e.g., FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977).

The ruling set forth herein has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). *See* 49 Fed. Reg. 6089 (Feb. 17, 1984). Pursuant to Rule 2.7(f), within three days after service of this decision, petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

The petition is denied for the reasons stated below.

I. Background

On April 16, 1990 the Commission issued a resolution authorizing the use of compulsory process in its investigation of Griffin. The resolution states that the purpose of the investigation is to determine whether Griffin or others "have been engaged or are now engaging in unfair methods of competition or unfair or deceptive acts or practices" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. In particular, the Resolution states that such acts or practices might include, but would not be limited to, "a systematic breach of contractual obligations under, and misrepresentations of the terms and conditions of, any vehicle protection plan, service contract, or other agreement to pay or reimburse the purchaser or others for service relating to the maintenance or repair of a motorized vehicle." The Resolution also states that a purpose of the investigation is to determine whether Griffin or others are engaged in the business of insurance in advertising, promotion, sale, administration, underwriting or financing of such plans, and if so, whether they are effectively regulated by state law. Finally, the Resolution states that a purpose of the investigation is to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest. *See* Resolution, April 16, 1990. The civil investigative demands ("CID"), one calling for documents and the other for responses to interrogatories, were issued on April 19, 1990, and set a date for response of May 29, 1990. Petitioner was served on or about April 25, 1990.

On May 10, Griffin mailed its Petition, which was received May 17, 1990. The Petition requests that "the Demand" be quashed, apparently referring to both CIDs. The grounds asserted are that "the majority of the information, if not all, was furnished" to the Commission in 1989, and that the demand is "harassment" because the respondent "has ceased doing business for over a year."

Commissioner Calvani has carefully reviewed the Petition. Petitioner's objections to the subpoena are discussed below.

II. Specific Objections

A. *Burden*

Respondent's objections are essentially that the CIDs are unreasonably burdensome. A recipient of a Commission subpoena or CID bears a heavy burden of proof to sustain an objection that a subpoena is unduly burdensome. The applicable standard was stated in *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977):

> We emphasize 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 of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.

The Commission finds that petitioner has failed to meet this standard. Petitioner has provided no evidence, affidavits or testimony to support its objections other than its conclusory statement quoted above. Accordingly, the CIDs will not be quashed on the grounds that they impose an undue burden.

B. *Compliance with Commission Rule 2.7(d)(2)*

The Petition discloses no effort to comply with Commission Rule 2.7(d)(2). There is neither the signed statement that the Rule requires, describing good faith efforts to confer with Commission counsel to resolve issues raised by the petition, nor any indication whatever that any such effort has been made. The petition to quash is denied for failure to comply with this Rule.

III. Conclusion

For the foregoing reasons, Griffin's Petition to Quash is denied. Griffin is directed to comply with the CIDs on or before May 29, 1990.

Pursuant to Rule 2.7(f), within three days after service of this ruling, the petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b)

(1987). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise specifies.

By direction of the Commission.

Re: Petition to Quash Subpoenas
Dominican Santa Cruz Hospital,
File No. 901-0069

September 17, 1990

Dear Mr. Singer:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash Investigational Subpoenas Ad Testificandum and Duces Tecum ("Petition" or "Pet."), which you filed on behalf of your clients, Dominican Santa Cruz Hospital ("Dominican") and Michael Mahoney[1] (collectively "Petitioner"), in the above-referenced matter.

The ruling set forth herein has been made by Commissioner Deborah Owen pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). Pursuant to Rule 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

The petition is denied for the reasons stated below.

I. Background

This investigation was opened on March 14, 1990, approximately one week after Dominican's acquisition of AMI-Community Hospital of Santa Cruz, California ("Community Hospital"). Dominican and Community Hospital were the only two hospitals in Santa Cruz, California. The acquisition was not subject to the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Section 7A of the Clayton Act, 15 U.S.C. 18A.

On March 23, 1990, staff of the San Francisco Regional Office, assigned to this investigation (the "staff"), sent access letters, requesting the production of documents, to Dominican, its parent Catholic Healthcare West, and Community Hospital's former parent

[1] While the Petition itself was filed by Dominican alone, you indicated at the hearing on this matter that the law firm of Jones, Day, Reavis & Pogue is also representing Mr. Mahoney. Accordingly, the Commission will treat the Petition as if it had been filed on behalf of Mr. Mahoney as well, and the same arguments made on his behalf.

American Medical International. Over the next four months, the parties complied with the staff requests.

In May 1990, counsel for Petitioner stated a desire to make a presentation to the staff, following the production of the information sought in the March 23 access letter. Counsel for Petitioner represented that the presentation would explain why the acquisition would not lessen competition. Pet. at 2-3.

On July 19, 1990, the Commission approved a resolution authorizing the use of compulsory process in its investigation of the acquisition of Community Hospital. The resolution states that the purpose of the investigation is to determine whether Dominican, Catholic Healthcare West, or others may have acquired the whole or any part of the assets of another corporation in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, or may have engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

During the months that the parties were complying with the access letters, staff indicated to Petitioner's counsel a desire to depose at least two individuals: John Petersdorf, Dominican's Chief Financial Officer, and Michael Mahoney, Dominican's former Chief Operating Officer. At the request of Petitioner, staff agreed to hold the depositions after Petitioner made its presentation, so as to free Mr. Petersdorf to assist in preparation of the presentation, and minimize the time and expense to Petitioner and Petitioner's counsel in attending and traveling to and from the depositions.

Throughout the months of the investigation, Dominican continued the consolidation of the Community Hospital operations and programs with its own. During the summer, the cooperation between the staff and Dominican broke down. The apparent causes were the inability to set firm dates for the Petitioner's presentation and the depositions, and the Commission staff's concerns over continued consolidation of the hospital facilities.

On August 1, 1990, staff sent a letter to counsel for Dominican, stating in part:

> . . . we [the staff] conclude that there is reason to believe that the acquisition of Community constitutes a violation of law. Accordingly, we are prepared to recommend that the Commission issue a Part III complaint charging a violation of Section 7 of the Clayton Act.

Pet., Attach. 1. The recommendation was not immediately forwarded to the Bureau of Competition, but staff anticipated doing so at a

subsequent time.

Upon receipt of that letter, counsel for Petitioner advised the staff:

> We do not believe it is appropriate for you to continue your investigation at the same time as you are either negotiating a consent agreement or preparing a complaint recommendation. Accordingly, we do not intend to go forward with the requested interview and deposition or to submit additional documents until such time as the statute of your investigation has been clarified.

Pet., Attach. 2 at 4.

However, counsel for Petitioner and staff continued to negotiate on dates for the Petitioner to make its presentation to staff, and for staff to take the depositions. Counsel for Petitioner resisted the depositions, asserting such discovery no longer made sense since the staff had made up its mind. Dates for the presentation and depositions were negotiated for late August, and then finally rejected by the Petitioner.

Pursuant to the Commission's Resolution of July 19, 1990, subpoenas were issued to Mr. Petersdorf and Mr. Mahoney on August 16, 1990; counsel for Petitioner was served on August 21, 1990. The dates specified on the subpoenas for the depositions were August 30 and August 31, respectively. The subpoena to Mr. Mahoney also required the production of certain documents. Staff granted a short extension for the filing of a Petition to Quash, pursuant to Commission Rule 2.7(d)(3).

On August 31, 1990, Dominican filed the instant Petition, which advanced four arguments: (1) the subpoenas were inappropriate because the staff had completed its investigation; (2) the Commission lacks authority to investigate and challenge the transaction between Dominican and Community Hospital; (3) the investigational hearings should be held at a time that was not inconvenient for the witnesses; and (4) Specification 6 of the subpoena to Mr. Mahoney is irrelevant. Based on these objections, Dominion asks the Commission to quash the subpoenas; or, if the Commission decides not to quash the subpoenas in their entirety, to quash Specification 6 of the subpoena to Mr. Mahoney.

Commissioner Owen has carefully reviewed the Petition and the accompanying exhibits. She has also considered the oral presentation on the Petition conducted on September 10, 1990. Petitioner's objections to the subpoenas are discussed below.

II. Specific Objections

A. *The Subpoenas Were Inappropriate Because Staff Had Completed Its Investigation.*

Petitioner argues that the August 1, 1990 letter from staff indicates that the staff had concluded their investigation, and that it would therefore be improper for them to proceed to take additional depositions under Part II of the Commission rules covering nonadjudicative procedures. Petitioner offers two alternative arguments to reach this conclusion. First Petitioner argues that the Commission's ability to gather information is circumscribed by the goal of determining whether a violation of the law has occurred. Accordingly, where staff has concluded that such a violation has taken place, the *sine qua non* of the investigation no longer exists, and further investigation is unwarranted under the cited case law. Pet. at 5-6. Second, Petitioner argues that it would be unfair to allow the staff to take further depositions to bolster their case, given that they have already made up their minds. Petitioner asserts that staff would essentially be conducting Part III discovery, without the protections that would be afforded Petitioner in those proceedings.

Petitioner's arguments are without merit. Pursuant to Commission rules, once an investigation is opened and compulsory process authorized, only the Commission itself can initiate adjudication, and the Commission rules do not permit staff to close an investigation. As Petitioner correctly notes (Pet. at 7), the Commission's Part III rules do not apply until the Commission has issued an administrative complaint. In this instance, the Commission has not issued an administrative complaint, nor have the procedures to close the investigation begun. Thus, the investigation is still governed by Part II of the Commission's rules, and the subpoenas satisfy the requirements of those rules.

Nor can it be said that because staff attorneys have decided, tentatively or otherwise, that there is reason to believe that the activities under investigation constitute a violation of the law, the Commission should be barred from having the staff continue the investigation. The case law cited by Petitioner makes clear that investigations are authorized for the purpose of informing the Commission in its ultimate determination of whether there is reason to believe that a violation of law has taken place. In order for the Commission to make that decision, it must obtain the information it

deems essential, whether or not the staff has decided on its recommendation. There seems no doubt that Messrs. Petersdorf and Mahoney have information that may be very relevant to the ultimate question facing the Commission of whether there is reason to believe the transaction would lead to substantially lessened competition.

With respect to the unfairness argument, the Commission has some sympathy for the position of the Petitioner. Dominican and the staff were negotiating with respect to two questions: first, when Dominican would be prepared to make a presentation to staff concerning the competitive impact of the transaction; and second, when staff would be able to depose Messrs. Petersdorf and Mahoney. At one time, staff had apparently acquiesced in a schedule that called sequentially for completion of documentary production, the presentation by Dominican, and then depositions of Messrs. Petersdorf and Mahoney. However, after a significant passage of time, staff understandably became concerned by the delay on Petitioner's part in scheduling the foregoing events, and by a perceived acceleration of consolidation plans for the two hospitals. Rather than continuing the dialogue with counsel for Dominican, staff chose to announce that it had reason to believe that the acquisition was a violation of the law, prior to taking the depositions.

Petitioner was now faced with a staff that it perceived as openly hostile to the position Petitioner wished to present. Dominican could feel, with some justification, that staff reached its conclusion without all of the relevant facts before it. The evidence that Petitioner said it would bring forward, concerning the efficiencies arising from the acquisition, would certainly be highly relevant to a determination whether there was reason to believe that the acquisition violated the law.

That having been said, the staff's behavior in this case provides no basis for quashing the subpoenas. While the timing of the staff's announcement is arguably questionable in terms of preserving the appearance of fairness in Commission investigations, staff's actions violated no Commission rules or other law.

At the hearing conducted on September 10, 1990, staff emphasized its willingness to revise or reverse its tentative conclusions, based on subsequent evidence received from the parties and their presentation. Furthermore, irrespective of any conclusions reached by staff, or its timing, such recommendations and the supporting evidence will be independently reviewed by the Bureau of Competition and Bureau of

Economics management, and ultimately by the Commission itself. Accordingly, the ballgame is far from over for Dominican, and it should have every incentive to come forward with evidence it deems supportive of its position.

B. *The Commission Lacks Authority to Investigate and Challenge the Transaction Between Dominican and Community Hospital.*

Dominican asserts that it is a nonprofit organization, and as such, does not fall within the jurisdiction of the Commission under the FTC Act. Dominican notes that Section 4 of the Act states that for purposes of the Act, "corporation" is an entity "organized to carry on business for its own profit or that of its members." Dominican also argues that the Commission lacks authority to challenge the acquisition under the Clayton Act. It asserts that the acquisition of Community Hospital was an asset acquisition and that in the case of asset acquisitions, as opposed to stock acquisitions, Section 7 of the Act applies only if the acquiring corporation is "subject to the jurisdiction of the FTC. . . ." Dominican further asserts that Sections 3, 6, 9, and 10 of the FTC Act, 15 U.S.C. 43, 46, 49, and 50, pursuant to which the subpoenas were issued, do not provide authority for their issuance.

There is established Commission precedent for rejecting the Petitioner's jurisdictional arguments as the basis for quashing these subpoenas. In *Adventist Health Systems/West,* File No. 881-0122, a hospital claimed that the Commission lacked jurisdiction because of the hospital's nonprofit status, and on that basis sought to have an investigatory subpoena quashed. By letter of March 15, 1989, the Commission concluded that a substantial argument could be made that the Commission did in fact have jurisdiction, which was determined to be sufficient for the Commission to exercise its investigative powers and deny the petition. *See Adventist Health Systems/West,* Letter to Thomas Campbell from Donald S. Clark, (Mar. 15, 1989) ("Campbell Letter"). There, as here, the Petitioner failed to demonstrate that the Commission's exercise of jurisdiction was clearly improper.[2]

The only new legal development that Petitioner cites as a reason not

[2] Congress intended that the FTC Act reach at least some activities by otherwise not-for-profit entities. *See Adventist Health Systems/West,* Campbell Letter, at 3, n. 2 and cases cited therein. Until the investigation is complete, the Commission cannot rule out the possibility that an acquisition involving a not-for-profit entity might violate Section 5 of the FTC Act.

to follow Commission precedent is the decision of the administrative law judge in the subsequent administrative proceeding, wherein he ruled that the Commission lacked jurisdiction over the acquisition. *Adventist Health System/West,* Docket No. 9234 (August 2, 1990) (Initial Decision). Although Petitioner correctly recognizes that this decision is not controlling here, Petitioner asks that the Commission follow it nonetheless. The Commission declines to do so, because a petition to quash a subpoena is not an appropriate vehicle for the Commission to make a final determination of its jurisdiction over acquisitions involving nonprofit hospitals. It is sufficient for the purposes of this Petition that there is a substantial argument that the Commission does have jurisdiction.

C. *Investigational Hearings Should Not Be Held at a Time Inconvenient for the Witnesses.*

Petitioner is relying on Mr. Petersdorf to assist the preparation of the presentation for the staff. Accordingly, Petitioner argues it would be unnecessarily burdensome to require Mr. Petersdorf to attend (and presumably prepare for) a deposition during that period. Petitioner's latest prediction is that its presentation will be ready by mid-September. Because the filing of this Petition has effectively postponed the depositions of Messrs. Petersdorf and Mahoney until the last week in September, this concern is now moot.

In addition, Petitioner expects that staff will wish to depose Mr. Petersdorf after the presentation, based on the substance of the material presented there, whether or not staff has already taken his deposition. Petitioner asserts that it would be burdensome to allow staff to depose Mr. Petersdorf prior to the presentation, then seek to depose him again. The time to determine whether a second deposition would be unduly burdensome, however, is if and when the staff attempts to take a second deposition. Counsel for Petitioner has made staff aware that Mr. Petersdorf is working on the presentation. Where, as here, the time of the presentation is in the hands of Dominican, the staff must be given the choice of whether to wait to depose Mr. Petersdorf until after the presentation. To do otherwise would cripple the staff's ability to control their investigation. If there are questions of burden raised by an attempt at a second deposition, those questions are properly addressed at that time.

D. *Specification 6 of Mr. Mahoney's Subpoena Is Irrelevant to the Investigation.*

The first five specifications of the subpoena to Mr. Mahoney call for documents relating to the acquisition. Specification 6 of the subpoena calls for "all documents relating to [Mr. Mahoney's] resignation or termination as an employee of Dominican, including but not limited to any agreement regarding severance pay or other consideration or benefits." Counsel for Petitioner claim that any document that both relates to Mr. Mahoney's termination of employment and to the transaction between Dominican and Community Hospital will be produced under one of the other specifications to the subpoena. Therefore, counsel argues, this specification cannot call for information reasonably relevant to the specific inquiry authorized by the Commission.

The staff does not deny that documents relating both to Mr. Mahoney's termination and specifically to the acquisition, will be obtained under other specifications. Staff argues instead that the circumstances of the departure of a high-level exemployee are relevant to the credibility of that individual as a witness. Mr. Mahoney, Dominican's former Chief Operating Officer, was apparently involved in both the planning of the acquisition of Community Hospital and the consolidation of Community Hospital with Dominican. Under these circumstances, the staff has identified a sufficient nexus between Mr. Mahoney's credibility and the documents in question to require Mr. Mahoney to bring them to his deposition. Counsel may certainly negotiate with staff steps to minimize any intrusions on Mr. Mahoney's privacy that will not impede the investigation.

III. Conclusion

For the foregoing reasons, the Petition to Quash Investigational Subpoenas Ad Testificandum and Duces Tecum is denied. Mr. Petersdorf and Mr. Mahoney are directed to comply with the subpoenas. Pursuant to Rule 2.7(e), Mr. Petersdorf is directed to comply with the subpoena issued to him on September 25, and Mr. Mahoney is directed to comply with the subpoena issued to him on September 26.

Pursuant to Rule 2.7(f), within three days after service of this ruling, Petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. Commission Rule

of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. *See* 16 CFR 4.4(b). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise directs.

By direction of the Commission.

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