Re: Petition of HTI/ORHS South Seminole Joint Venture to Quash or Limit Civil Investigative Demand. File No. 922-3278.

August 12, 1994

Dear Mr. Jones:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash or Limit Civil Investigative Demand ("Petition") which you filed on behalf of your client, HTI/ORHS South Seminole Joint Venture ("South Seminole" or "Petitioner"), in the above-captioned 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 ruling, Petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

Commissioner Owen has carefully reviewed the Petition and accompanying exhibits. She has also considered the oral presentation on the Petition conducted on July 28, 1994, and the affidavits offered by Petitioner at that time. The Petition is denied in part, and granted in part. Petitioner's obligations under the Civil Investigative Demand ("CID") are modified as set forth below.

I. Background

On February 24, 1994, the Federal Trade Commission approved a Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation, thereby authorizing the use of compulsory process in an investigation to determine:

> whether Columbia/HCA Healthcare Corporation, any of its direct or indirect subsidiaries, any affiliated companies, any acquired corporations including but not limited to HCA-Hospital Corporation of America and any of its direct or indirect subsidiaries, any purchaser of any hospital of any such companies including but not limited to Behavioral Healthcare Corporation, any successors or assigns of any such companies, or others, may be engaging in or may have engaged in unfair or deceptive acts or practices in connection with the advertising, promotion or marketing of

mental health care or substance abuse services or treatment in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

One area of inquiry involves School Respond, a telephone counseling and referral program that served students, parents, and others in the Seminole County, Florida area. School Respond was operated by West Lake Hospital, a for-profit psychiatric hospital. Among the questions being investigated by the staff of the Bureau of Consumer Protection are whether Westlock Hospital (i) misrepresented the nature of the School Respond service and the credentials of School Respond personnel, and (ii) used unfair or deceptive means to recruit adolescents for admission to inpatient programs at Westlock Hospital. Westlock Hospital was owned by Hospital Corporation of America until December 1992. The facility was subsequently acquired by Petitioner, and renamed South Seminole Community Hospital.

On June 21, 1994, as part of this investigation, a CID was issued to South Seminole. On June 27, 1994, a copy of the CID was served upon South Seminole. By letter dated June 28, 1994, pursuant to Rules 2.7(c) and 2.7(d)(3), the Associate Director of the Bureau of Consumer Protection extended until July 15, 1994 the time to produce documents and file a motion to quash.

The CID requires, *inter alia*, the production of documents sufficient to show the identity (name, address, telephone number, and social security number) of each person who contacted School Respond for counseling or referral services, the persons or organizations to which each caller was referred by School Respond staff, and certain other information about the callers recorded by School Respond personnel. The CID specifically instructs South Seminole to redact any information "that would reveal the specific nature of the psychiatric or chemical abuse problem for which any person contacted or was referred to School Respond, or the specific nature of the treatment sought or obtained by any such person."

On July 15, 1994, South Seminole filed this Petition, requesting that the Commission quash or limit the CID "insofar as it calls for the production of information identifying individuals" who called the School Respond hot line.[1] Petitioner states that such patient-

[1] Motion of HTI/ORHS South Seminole Joint Venture to Quash or Limit Civil Investigative Demand at 1.

identifying information is privileged, and that Petitioner does not intend to disclose such information except pursuant to a court order.[2]

II. Analysis

A. Psychotherapist-Patient Privilege

South Seminole contends that all documents identifying the individuals who called School Respond (the "callers") are protected from disclosure by the psychotherapist-patient privilege codified in Florida Statute Section 90.503. In support of this claim, South Seminole has submitted affidavits from two psychiatrists urging that Commission staff not contact the callers and ask them questions about the School Respond program, because in their view, such action could be severely detrimental to the callers' mental health. As discussed below, South Seminole's claim of privilege is not supported by law or precedent.

The purpose of this Commission investigation is to determine whether there has been a violation of a federal statute, specifically Section 5 of the Federal Trade Commission Act. The CID was issued and, if necessary, will be enforced in federal district court under another provision of the same statute, Section 20 of the Federal Trade Commission Act. The law is clear that a claim of privilege asserted against a federal agency conducting an investigation into possible violations of federal law is governed by the principles of federal common law; the existence of a privilege in state law does not control. *See e.g., Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993); *Gilbreath v. Guadalupe Hosp. Found. Inc.*, 5 F.3d 785, 791 (5th Cir. 1993); *General Motors Corp. v. Director of Nat'l Inst. for Occupational Safety & Health,* 636 F.2d 163, 165 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981); *FTC v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980).

The holdings of various federal appeals courts as to the existence and scope of the federal psychotherapist-patient privilege are not entirely consistent. One line of cases holds that under the federal common law, there is no such privilege. *See, e.g., Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992); *In re Grand Jury Proceedings*,

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[2] *Id.* at 10.

867 F.2d 562 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989); *Alexander v. Herbert*, 150 F.R.D. 690, 695 (M.D. Fla. 1993). A second line of cases has recognized a narrow privilege applicable to confidential communications between a psychotherapist and a patient made for the purpose of diagnosis or treatment of a mental condition. *See, e.g., In re Zuniga*, 714 F.2d 632, 639-40 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983); *In re the August, 1993 Regular Grand Jury*, 1993 U.S. Dist. LEXIS 20065 (S.D. Ind. 1993); *In re Grand Jury Subpoenas Duces Tecum*, 638 F. Supp. 794, 799 (D. Me. 1986). However, even this limited privilege does not preclude the disclosure of the identity of a patient or the fact of treatment:

> The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure. Mere disclosure of the patient's identity does not negate this element. Thus, the Court concludes that, as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege.

In re Zuniga, 714 F.2d at 640.[3]

South Seminole finds support for its privilege claim in only one case, *National Transportation Safety Board v. Hollywood Memorial Hosp.*, 735 F. Supp. 423 (S.D. Fla. 1990). This authority is inapplicable for two reasons. First, the Hollywood Memorial court, after noting that it was ruling on an issue that was (then) unsettled in the Eleventh Circuit, recognized a privilege in federal question civil litigation only as to the substance of communications between a psychotherapist and a patient. Second, this holding was implicitly overruled by the Court of Appeals for the Eleventh Circuit in *Hancock v. Hobbs*, where the court stated: "Federal common law does not recognize a psychiatrist-patient privilege." 967 F.2d at 466. We conclude therefore that South Seminole's privilege claim is without merit.

B. Burden

In his discussion of the psychotherapist-patient privilege, counsel for Petitioner urged the Commission to follow the precedent of

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[3] Counsel for Petitioner points out that this Petition is designed to protect the privacy interests of third parties (the School Respond callers) who have not had an opportunity to be heard. Contrary to counsel's suggestion, these factors are not unique to this case. *See In re Zuniga*, 714 F.2d at 640.

Hollywood Memorial, and consider whether the injury to the therapist-patient relationship incurred by disclosure is greater than the benefit gained in the correct resolution of this investigation, and any subsequent litigation. 735 F. Supp. at 424-25.[4] In this connection, Petitioner offered expert affidavits discussing the effects of disclosure, and raising serious concerns about potential damage to the patients involved and the psychotherapist-patient relationship generally. Because we have determined that the analysis and holding of Hollywood Memorial are not applicable here, we do not address this balancing test in connection with the privilege issue.

However, this is not to say that the important concerns raised by Petitioner are not relevant to the Commission. Recipients of Commission CIDs have often raised analogous concerns about the burdens of compliance. For example, we have heard and ruled on the assertion that staff contacts with customers may damage the relationship between those customers and the firm under investigation. *See* Brana Publishing, Inc., Federal Trade Commission Letter Ruling Re: Petition to Limit or Quash Civil Investigative Demand, File No. 872-3209 (March 26, 1992); *see also* Hang-Ups Art Enterprises. Inc., Letter Ruling to David Steiner at 10-11 (March 31, 1992). We will therefore consider Petitioner's arguments as an objection to compliance with the CID on grounds of burden, even though they are not styled as such.

The concerns raised by Petitioner here are more acute than the customer concerns raised in previous cases. However, the test is basically the same: "whether the demand in unduly burdensome . . ." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1978), *cert. denied*, 431 U.S. 974 (1977) (emphasis in original). The legitimate interests of the School Respond callers must be weighed against the Commission's obligation to conduct investigations.

Further, we are cognizant of our obligation to promote the public interest, and to minimize any burden or adverse impact of the Commission's investigation on innocent third parties, even where that harm cannot be eliminated altogether. The CID has been narrowly drawn to protect from disclosure the specific nature of the psychiatric or chemical abuse problem that may have motivated a caller to contact School Respond. Staff's intention is to contact some number of callers and to inquire whether the caller would be willing, voluntarily,

[4] Tr. at 12-14, 24-26; Petition at 7 n.3.

to cooperate with this investigation. No one will be compelled to reveal the content of a School Respond conversation, the nature of any personal or psychiatric problem, or the nature of any treatment.

South Seminole has provided affidavits arguing that even these precautions may not be sufficient to avoid all harm. First, the affidavits suggest that a caller may consider that his privacy has been infringed when his identity as a School Respond caller is (without his consent) revealed to the Commission. In order to accommodate this concern, staff proposed at the outset that South Seminole itself contact the School Respond callers and inquire whether they would consent to the release of their identities to the Commission. South Seminole could then redact from responsive documents the names of callers who did not wish to have their identities disclosed. The Commission will make no attempt to compel South Seminole to cooperate with staff's investigation in the manner described; nonetheless, this appears to be a reasonable accommodation of the first privacy concern raised by Petitioner.[5]

Second, the affidavits suggest that contacting a School Response caller and inquiring about the conduct and communications of School Respond personnel may be harmful to the caller's emotional well-being: "A reactivation of 'old wounds,' conflicts, and painful events that have already been put to rest could occur as a result of such a call."[6] The Commission must, however, balance the potential that its investigation may cause injury against the potential that its investigation may enable the Commission to uncover and remedy what are alleged to have been very serious violations of Section 5 of the Federal Trade Commission Act. The documents at issue here are critical to this investigation only by communicating with the callers can staff determine whether or not School Respond representatives made unfair or deceptive representations during telephone calls or other oral conversations with callers. We recognize that the relationship between a patient and a psychotherapist is extremely sensitive and private. But it is an unfortunate fact of life that people are sometimes betrayed by those in whom they place their deepest trust. Further, this CID is directed at determining whether School Respond functioned as a marketing tool, rather than strictly as a

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[5] During the hearing on this Petition, counsel for Petitioner indicated that he did not know whether, if a court ultimately rejects South Seminole's privilege claim, this compromise would be acceptable to South Seminole. Tr. at 17-18.

[6] Quinones Aff. paragraph 6, Supplement to Petition (July 28, 1994).

therapeutic program. We would be doing no favor to patients by declaring that the conduct of hospitals in attracting the patronage of patients is immune from the scrutiny of the Federal Trade Commission and other law enforcement authorities. To bar the Commission from learning the identity of all psychotherapy patients would eliminate an irreplaceable source of information, with the practical effect of creating just such an immunity.[7]

Finally, the affidavits raise a concern that someone other than the addressee (*e.g.*, a parent) may open an inquiry letter from the Commission and thus inadvertently learn that the addressee had contacted School Respond. After the hearing on this Petition, staff proposed a strategy to minimize this risk: Staff's initial letter to the callers will invite their cooperation, but will not mention that the addressee had contacted School Respond, or that the staff obtained the addressee's name from South Seminole.[8] We believe that staff's proposal strikes an appropriate balance between the legitimate concerns raised by Petitioner and the Commission's investigative needs, and we direct staff to proceed in this manner. In order to permit staff to send such a general letter to the callers, some technical

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[7] In *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) paragraph 69,338 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992, *cert. denied*, 113 S.Ct. 1993), the United States District Court for the District of Columbia refused to block the Commission's access to customer lists, notwithstanding Invention Submission's claim that staff contacts with customers might damage the company's relationship with its customers. The court concluded:

> If this court were to acknowledge [Invention Submission's] highly speculative fears of damage to corporate reputation as adequate to defeat the agency's information requests, the FTC's subpoena power would be rendered powerless and serious investigation of corporate behavior would be a futile exercise.

1991-1 Trade Cas. (CCH) paragraph 69,338 at 65,353. While the court did not restrict the staff's use of information gained through compulsory process, it acknowledged that the FTC had indicated that various protective measures would be taken, including limiting the number of customers contacted and informing those customers that the contact was part of an industry-wide investigation. Furthermore, the Commission did direct staff in that case to "take care to avoid undue harm to the company's legitimate business interests." File No. 882-3060 (Commission Letter Ruling to Edward B. Friedman, Sept. 25, 1989 at 5). *See also* Letter Ruling to Edward B. Friedman, Oct. 4, 1991 at 15 n.18 ("Absent specific evidence to the contrary, we assume that to be staff's standard operating procedure.").

[8] More specifically, staff intends to send a letter to the callers explaining that the Federal Trade Commission is investigating the School Respond program and would like to speak with former Seminole County, Florida school students and others who might have relevant information from any source. Again, the letter will not mention that the addressees had contacted School Respond or that staff obtained their names from South Seminole. The letter will include a reply form to be returned by those callers who are willing to speak to Commission staff. This letter will be the only contact between Commission staff and any callers who do not wish to speak to staff.

modifications to the CID are required. Accordingly, the modifications ordered by this letter are set forth in Attachment "A" hereto.[9]

On balance, although Petitioner raises several privacy-related concerns, we believe that the Commission's responsibility to protect vulnerable consumers, together with the unavoidable need for the information being sought in this matter, justify the disclosure of documents identifying individuals who called the School Respond hot line, under the conditions outlined in this opinion. As detailed herein, the method by which staff is directed to contact the School Respond callers should minimize any risk of discomfort, embarrassment, or emotional harm.[10]

III. Conclusion

For the foregoing reasons, the Petition to Quash or Limit Civil Investigative Demand is denied in part, and granted in part. South Seminole is directed to comply with the Civil Investigative Demand, as modified herein, on or before 5:00 p.m. on August 26, 1994.

ATTACHMENT A

Modifications to CID

Instruction 8:	Delete the phrase, "until after a court order has been obtained pursuant to the above-referenced regulations"
Instruction 9:	Insert the following after the paragraph beginning with the phrase "Information to be Redacted": "The CID shall not require the submission of the name, address, telephone number and social

[9] The primary modification to the CID is to require the deletion by Petitioner of identifying information concerning any persons who could be identified as drug or alcohol abusers. This modification is necessary to implement the plan to send a "neutral" letter to callers. Federal regulations would require detailed notice to any callers identified as drug or alcohol abusers of the agency's compliance with applicable federal regulations, and, necessarily, the contact with School Respond that occasioned the inquiry. *See* 42 CFR 261 *et seq.*

[10] We note that the disclosure sought here is a restricted one. Because the documents are to be provided to the Commission pursuant to compulsory process in a law enforcement investigation, they will be subject to the statutory custodial protections and restrictions on disclosure provided by Section 21(b) of the FTC Act, 15 U.S.C. 57b-2(b). *See also* Subsection 21(f) of the same section (15 U.S.C. 57b-2(f)), which provides an exemption from mandatory disclosure under the FOIA for such documents, and Section 10 of the FTC Act (15 U.S.C. 50), which provides criminal fines and penalties for unauthorized public disclosure of such information.

security number of any person who could be identified as a drug or alcohol abuser by any information relating to the persons or organizations to which School Respond referred such person, and South Seminole shall redact such information from any responsive documents. The CID also shall not require the submission of the name, address, telephone number and social security number of the parent of any person who could be identified as a drug or alcohol abuser by any information relating to the persons or organizations to which School Respond referred such person, and South Seminole shall redact such information from any responsive documents."

Delete the phrase "(even after a court order has been obtained pursuant to 42 CFR 2.1 *et seq.*)"

Specification 1: Insert the following at the end of the specification: "Provided, however, that South Seminole shall redact from documents responsive to this specification any information required to be redacted by Instructions 8-9."

Specification 2: Insert the following at the end of the specification: "Provided, however, that South Seminole shall redact from documents responsive to this specification any information required to be redacted by Instructions 8-9."

Specification 3: Delete the following: "(even after a court order has been obtained pursuant to 42 CFR 2.1 *et seq.*)"

Delete the following at the end of the specification: ", and The Company shall redact such information from any responsive documents"

Insert the following at the end of the specification: "South Seminole shall redact from documents responsive to this specification any information required to be redacted by Instructions 8-9."

Re: Petition of Mortgage Credit Reports, Inc. to Quash Four Civil Investigative Demands. File No. 922-3339.

August 26, 1994

Dear Mr. Blanton:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash Civil Investigative Demands ("CIDs"), which you filed on behalf of your client, Mortgage Credit Reports, Inc. ("MCR" or "Petitioner").

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).[1] Although Rule 2.7(f) provides that, within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review, the Commission has determined to extend the period within which Petitioner must file a request for full Commission review, should Petitioner desire to make such a request.[2] In light of the recent unexpected hospitalization of Petitioner's counsel and his on-going convalescence, the Commission has determined that Petitioner may file a request for review, pursuant to Rule 2.7(f), within seven days after service of this decision. Whatever briefs or other material the Petitioner wishes the Commission to consider in reviewing this decision must accompany any such request in order to be considered as timely filed. The timely filing of such a request shall not stay the return date set forth in this ruling, unless the Commission otherwise specifies.

Commissioner Owen has carefully reviewed the Petition and accompanying exhibits. She has also considered the oral presentation on the Petition conducted on August 18, 1994. The Petition is denied in its entirety for the reasons stated below.

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[1] 16 CFR 2.7(d)(4) (1994). The Commission's Rules of Practice are published at Title 16 of the Code of Federal Regulations, Parts 0 - 5.

[2] Commissioner Owen requested that the full Commission authorize an extension of time, from three to seven days, within which Petitioner may file a request for full Commission review. On August 26, 1994, the Commission authorized this extension of time.

I. Background

These CIDs arise in the context of the Commission's investigation of certain business practices of consumer reporting agencies to determine whether they are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 *et seq.* MCR is a company that provides consumer credit reports on mortgage applicants to mortgage lenders, also known as a credit reporting agency. *See* 15 U.S.C. 168la(f).

On June 27, 1990, the Commission approved a resolution authorizing the use of compulsory process in its investigation of unnamed consumer credit reporting agencies. Commission staff issued its initial access letter to MCR on August 27, 1992. MCR submitted a letter responding to the access request on September 25, 1992. Commission staff was permitted to visit MCR's offices on March 9, 1993 to review documentary materials. Because staff sought documents which MCR was unwilling to produce without compulsory process,[3] on July 8, 1994 the Commission issued to MCR the four civil investigative demands at issue in this Petition. The CIDs in this matter seek: (1) documents relating to a sample of consumer disputes filed with MCR, including related consumer reports prepared by MCR; (2) documents and information relating to consumer reports furnished in response to applications for mortgages of less than $50,000; (3) the identity of the MCR employees most knowledgeable about MCR's computer records; and (4) the oral testimony of the Vice President and the Profit and Loss Supervisor of MCR. The CIDs specified varying return dates.[4]

Petitioner objected to producing information sought under the CIDs. On July 13, 1994, Petitioner's counsel and the Commission's investigating staff discussed MCR's concerns, which were later memorialized in writing. *See* Letter from Edward Blanton, Jr. to Ronald G. Isaac, FTC Division of Credit Practices (July 14, 1994).

MCR advances several arguments in support of its Petition: (1) MCR has cooperated fully with staff in its investigation to date; (2) almost all of the information sought in the CIDs is information which

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[3] [Redacted]

[4] The CID for documentary material indicated a return date of August 11, 1994, while the CID for written interrogatories specified a July 28, 1994 return date. The two CIDs for oral testimony included a September 8, 1994 return date.

MCR does not maintain in the ordinary course of its business; (3) Commission staff has misled MCR about the reasons for this investigation; (4) one Commission staff member is pursuing this investigation as a personal vendetta against MCR in retaliation for "minor inconveniences" caused by MCR's preparation of an inaccurate credit report on him; and (5) MCR is entitled to know what complaints are being investigated, and what evidence suggests that violations may have occurred, before it provides any further information to the FTC. At the August 18 hearing on its Petition, MCR raised a variation on the fifth argument in support of its Petition, contending that it has a constitutional right to confront its accusers whose complaints underlie this investigation.

Petitioner's objections to the CIDs are discussed below.

II. Petitioner's Objections

A. Petitioner has cooperated fully in staff's investigation to date.

Petitioner contends that it has been cooperative with Commission staff throughout the last two years and that its cooperation has been premised upon its understanding that this investigation is being conducted as part of the Commission's general oversight authority in enforcing the FCRA. Petitioner argues that it first learned that staff had complaints against the company during the July 13 discussion between staff and Petitioner's counsel, following issuance of the CIDs. Having learned of these complaints, Petitioner now refuses to comply with the CIDs until staff discloses what complaints are being investigated, and what evidence in staff's possession suggests that violations of the FCRA may have occurred.[5]

Petitioner agreed to respond to staff's August 27, 1992 initial access letter and provided voluntarily, in lieu of compulsory process, information and documents.[6] *See* 15 U.S.C. 52b-2(f). [Redacted][7]

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[5] The argument that Petitioner is entitled to such information from Commission staff is discussed, *infra*, at Section II.E.

[6] As previously noted, MCR sent a letter responding to staff's initial access request on September 25, 1992. MCR also permitted two Commission staff members to visit the company's offices and meet with certain MCR personnel and review documentary materials approximately six months later in March 1993.

[7] Staff sought, *inter alia*, files in connection with consumers who had disputed the accuracy or completeness of information that MCR had reported about them.

[Redacted][8] Following telephone discussions with Commission staff, MCR agreed to permit Commission staff to inspect, *inter alia*, consumer files, including dispute files; however, MCR refused to supply staff with copies of consumer credit reports[9] found within the files staff inspected, unless staff obtained an "administrative subpoena" for such documents.[10] Staff sought process to compel production of this and other information within MCR's files.

The foregoing facts belie Petitioner's assertion that it has been fully cooperative with Commission staff in this investigation. To the extent that MCR has in its possession, custody, or control any consumer report covered by the CIDs, MCR's refusal to produce has no legal basis. The FTC has the authority to obtain consumer credit reports from consumer reporting agencies for enforcement purposes without regard to the Act's restrictions on the purposes for which such agencies may otherwise furnish consumer reports.[11] Petitioner

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[8] [Redacted] More recently, MCR has taken the position that credit reports prepared by the Petitioner are not retained in the company's consumer files. *See* MCR Petition to Quash Hearing Transcript at 17. [Redacted] We note that the CIDs expressly require MCR to produce all responsive materials, including computer records that are retained on magnetic media. *See* Civil Investigative Demand for Documentary Material, Instruction 5. In addition, two specifications in the CID for document material specify that MCR shall "produce all documents, including computer records." To the extent that any documentary materials are responsive to the CID specifications and are within MCR's possession, custody or control, as defined in the CID, MCR must produce them, whether in hard copy or electronic format.

[9] The term "consumer report" refers to any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in determining the consumer's eligibility for, *inter alia*, credit. 15 U.S.C. 1681a(d).

[10] [Redacted]

[11] The FCRA states, in pertinent part, that:

> The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title.

15 U.S.C. 1681s (Emphasis added). The FTC Act further provides that, for purposes of the FTC Act, the Commission:

> [S]hall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have 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 . . . .

15 U.S.C. 49. Courts have construed these statutory provisions to mean that the Commission need not obtain a court order or permission of affected consumers in order to compel disclosure of consumer reports from credit reporting agencies in view of the Commission's role as enforcer of the FCRA. *FTC v. Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988, 997 (D.C. Cir. 1975).

asserted at the August 18 hearing, [Redacted].[12] To the extent that Petitioner does not have such a document, in any form, in its possession, custody, or control, it, of course, has no obligation to produce such a document. *See* File No. 912-3071 (Commission Ruling in Petition of Yarnell Enterprises, Inc. to Quash Specification of Civil Investigative Demand, October 25, 1991). However, to the extent that any computer files would be covered by the CID, Petitioner is obligated to produce these in accordance with the CID's instructions.

Any cooperation that Petitioner previously may have extended toward the Commission, provides no basis on which to challenge compulsory process. A firm might be ninety-five percent cooperative with staff's requests for information, for example, but even such a high degree of cooperation would not serve as a basis to withhold the remaining five percent of materials sought via compulsory process. Petitioner's cooperation is peripheral; the salient issues before the Commission in its consideration of a Petition to Quash are burden and relevance, issues that have not been raised here. Accordingly, Petitioner's objection to complying with the CIDs on grounds that it has been cooperative with staff's investigation is hereby denied.

B. Information specified in the CIDs is not maintained in the ordinary course of business.

Petitioner seeks to quash the CIDs because they seek materials that are not retained in MCR's files. Petitioner refers specifically to consumer credit reports for mortgages in amounts less than $50,000.[13] At the hearing on MCRs Petition, [Redacted].[14] The fact that twenty-one of the twenty-eight consumer files produced by MCR following staff's on-site visit contain the consumer's loan application which specified the loan amount sought by the consumer applicant suggests that this information is available with respect to some consumers. Accordingly, to the extent such documents exist and are covered by the CIDs, they must be produced. Documents not within MCR's possession, custody or control are not within the scope of the Commission's compulsory process. 15 U.S.C. 57b-l(c)(1). Simply put, MCR is not required to manufacture materials in responding to the

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[12] [Redacted] MCR Petition to Quash Hearing Transcript at 28.

[13] *See* Petition paragraph 9.

[14] MCR Petition to Quash Hearing Transcript at 25.

CIDs, however, to the extent that responsive materials are within the company's possession, custody or control, it must produce them. Hence, Petitioner's objection to the CIDs on this basis is denied.

C. *MCR was misled about the reasons for this investigation.*

Both in its Petition and at the oral hearing, MCR has argued that Commission staff initially represented that its investigation was based on the Commission's general FCRA oversight and enforcement authority, and that, more recently, staff has indicated that the investigation is also based upon complaints against the company. Commission staff denies that it has misled MCR in any way in connection with the basis for this investigation. For the reasons set forth below, we find it unnecessary to resolve the factual dispute between Petitioner and Commission staff. Petitioner implicitly draws a legal distinction between Commission investigations that are prompted by consumer complaints versus those that are initiated solely on the basis of the agency's general statutory enforcement authority. We find this to be a distinction without any legal significance, and note that Petitioner has cited no legal authority to the contrary.

As set forth below, staff's August 1992 access letter clearly complies with Commission Rule 2.6, which provides that:

> Any 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.

Staff's initial access letter to MCR succinctly stated the reasons for this investigation and the authority for staff's inquiry:

> The Federal Trade Commission is responsible for enforcement of the Fair Credit Reporting Act . . . This office is currently conducting an inquiry to determine whether the practices of Mortgage Credit Reports, Inc. . . . violate the FCRA, including Section 607(b) of the Act . . . or other statutes enforced by the Federal Trade Commission.[15]

[15] Letter from Ronald G. Isaac to Edward L. Blanton, Jr., (August 27, 1992) at 1. Here, the explicit reference to Section 607(b) of the FCRA, a statute that governs very specific types of conduct, satisfies both the requirement that the agency advise persons under investigation of the nature of the conduct constituting the alleged violation under investigation, as well as the requirement that the provisions of law applicable to such violation be specified. As one court has stated, "an agency will be deemed to have given adequate notice of the purposes of an investigation by reciting its statutory duties when the statutes themselves alert the parties to the purposes of the investigation." *FTC v. Carter*, 636 F.2d 781, 787 (D.C. Cir. 1980).

At the oral hearing on its Petition, MCR's counsel contended that the term "inquiry" in this letter was unclear and that he was not aware, on the basis of this letter, that Commission staff was conducting an investigation of his client.[16] We fail to perceive any distinction between an inquiry and an investigation.[17] [Redacted].[18]

In addition to staff's explanation of the purpose and nature of this investigation as described in its initial access letter, the Commission has also adequately advised MCR of the purpose and nature of this investigation, *viz.*, "[t]o determine whether unnamed consumer reporting agencies or others are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act . . . and of the Fair Credit Reporting Act . . . ."[19] We conclude that this statement, in conjunction with the quoted excerpt from staff's initial access letter, clearly advises Petitioner of the scope of this investigation. Petitioner has failed to supply any authority to support its assertion that it has a right to know, in addition to the nature and scope of the investigation, the circumstances that prompted it, *i.e.*, whether staff's investigation is based on the Commission's general oversight authority of the FCRA or based upon consumer complaints against the company. Accordingly, we conclude that Petitioner has been adequately advised of the purpose and basis for this investigation and hereby deny its objection to the CIDs on grounds that it has been misled with respect to the basis for this investigation.

D. Investigation is retaliatory.

Petitioner argues that this investigation was initiated and is being conducted as a "personal vendetta" by a Commission staff member. We find that Petitioner's mere assertions fail to satisfy the threshold requirement established by applicable case law to demonstrate

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[16] MCR Petition to Quash Hearing Transcript at 8.

[17] Moreover, staff's access letter explicitly referred to "a law enforcement investigation" in a later reference to Section 21(f) of the Federal Trade Commission Act, 15 U.S.C. 57b-2(f), which provides that all documents and information provided voluntarily in lieu of compulsory process in a law enforcement investigation will be exempt from public disclosure under the Freedom of Information Act. *See* Letter from Ronald G. Isaac to Edward L. Blanton, Jr., (August 27, 1992) at 7.

[18] Letter from Edward L. Blanton, Jr. to Ronald G. Isaac, (September 25, 1992) at 1.

[19] Resolution Directing Use of Compulsory Process in Nonpublic Investigation, File No. 902-3267 (June 27, 1990). This resolution accompanied the CIDs issued to MCR in July 1994.

agency misconduct.[20] The facts indicate that the staff member, having applied for a mortgage, learned that his credit report prepared by MCR contained inaccuracies. Aside from this complaint, however, staff has learned of other consumer complaints against MCR. Accordingly, Petitioner is incorrect in attributing this investigation to any one complaint, and its objection to the CIDs based on Commission staff misconduct is denied.[21]

E. MCR is entitled to know what complaints are being investigated.

The fundamental argument underlying MCR's Petition is that the company is entitled to know what complaints are being investigated and what evidence suggests that violations may have occurred before it provides further information to Commission staff. Petitioner cites no legal authority for this argument in its papers and cited none when specifically asked during the oral hearing on its Petition.[22] In effect, Petitioner seeks to conduct discovery to learn what information staff

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[20] *See* File No. 831-0085 (Commission Ruling on Petition of Diamond Dealers Club, Inc. to Quash Subpoenas, Letter to Hyman Bravin, Esquire, August 27, 1984 (finding that "bare bones" allegations of agency misconduct were "purely speculative"). In Diamond Dealers Club, Inc., the petitioner alleged that Commission staff had exercised improper conduct and sought, on this basis, deposition discovery from staff attorneys. In its letter ruling, the Commission concluded that petitioners' speculative allegations failed to satisfy the threshold requirement established by applicable case law for permitting discovery from the Commission's staff attorneys. *Cf. United States v. Litton Indus., Inc.*, 462 F.2d 14, 17 (9th Cir. 1972) (stating that courts do not normally consider assertions of administrative prejudice prior to completion of an adjudicative proceeding and holding that Litton's allegations were "purely speculative" and did not rise to the level to warrant interruption of the adjudicative hearing).

[21] We note that it is the responsibility of Commission staff to pursue indications of possible law violations. When an investigation is conducted at least in part on the basis of a complaint of a Commission employee -- particularly a member of Commission staff with possible direct involvement in the investigative process -- staff customarily exercises the utmost caution to avoid the appearance of impropriety.

[22] COMMISSIONER OWEN: Can I ask you, Mr. Blanton, do you have some precedent at the investigative stage for refusing to turn over relevant information in light of an inability to know the identity of particular complainants? Do you have federal court precedents on that point?

MR. BLANTON: No, and in fact I have not looked. I'm relying on my general understanding of what the common law of England and the United States has been since 1215.

COMMISSIONER OWEN: Is that true with respect to the investigative stage as opposed to the trial stage?

MR. BLANTON: We're taking the position that we in the investigative stage do not wish to produce any evidence until we know what the charges are and the complaints are.

MCR Petition to Quash Hearing Transcript at 11-12.

Although Petitioner's counsel offered to provide a supplemental submission discussing the law on this point, such information has not been provided. We note that Petitioner was required to submit all supporting materials at the time its Petition was filed. *See* Commission Rule 2.7(d) (requiring that a timely filed petition "shall set forth all assertions of privilege or other factual and legal objections to the subpoena or civil investigative demand, including all appropriate arguments, affidavits and other supporting documentation") (Emphasis added).

has obtained during its investigation. Petitioner again fails to cite any authority to support its argument, which runs contrary to Supreme Court precedent:

> [The Commission's] rules draw a clear distinction between adjudicative proceedings and investigative proceedings. Although the latter are frequently initiated by complaints from undisclosed informants and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of 'the purpose and scope of the investigation,' and while they may have the advice of counsel, 'counsel may not, as a matter of right, otherwise participate in the investigation.'

Hannah v. Larche, 363 U.S. 420, 446 (1960) (citations omitted); *see also* File No. 761-0083 (Commission Ruling in Motion of General Motors Corp., et al. to Quash Proceedings, Letter to Thomas A. Gottschalk, Esquire, Sept. 26, 1979).

Though not raised specifically in its Petition, at the hearing counsel proffered another variation on its argument: that Petitioner is resisting compliance with the CIDs because it has a constitutional right to confront its accusers -- referring to individuals that have lodged complaints against the company. We hold that Petitioner's reliance on the Sixth Amendment's Confrontation Clause[23] is inappropriate in this instance. The Sixth Amendment expressly states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[24]

Petitioner's argument is misplaced as it does not apply to the investigative activities of a law enforcement agency with solely civil jurisdiction. This point is well established in the case law. *See generally, SEC v. Jerry T. O'Brien, Inc.,* 467 U.S. 735, 742 (1984); *United States v. Ward*, 448 U.S. 242, 248 (1980) (stating that "the protections provided by the Sixth Amendment are available only in 'criminal prosecutions'"); *Austin v. United States,* 113 S.Ct. 2801, 2804 (1973). Moreover, even in the criminal setting, "the right to confrontation is basically a trial right." *Barber v. Page*, 390 U.S. 719, 725 (1968). Accordingly, Petitioner's objection to the CIDs on grounds that it is entitled to confront its accusers is denied.

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[23] Although Petitioner's counsel did not specify which constitutional provision was allegedly being abridged in this instance, we assume that counsel was referring to the Sixth Amendment to the U.S. Constitution.

[24] U.S. Const. amend. VI.

We conclude that Commission staff has no obligation to advise MCR of the information that it may possess concerning potential law violations at this stage of the investigation. The requested information sought by the Commission is only required to be reasonably relevant (and not unduly burdensome) to its investigation, the boundary of which may be drawn "quite generally," in large part because at the investigative stage of a proceeding, the Commission need only have a "suspicion that the law is being violated in some way."[25] Hence, Petitioner's objection to the CIDs on grounds that it has a right to obtain the identities of individuals who have lodged complaints against it is hereby denied.

III. Conclusion

For the foregoing reasons, the Petition to Quash four Civil Investigative Demands filed by Mortgage Credit Reports, Inc. is denied in its entirety. Pursuant to Rule 2.7(e), MCR is directed to comply with the CIDs as follows: (1) CID for documentary material - by 5:00 p.m. on September 30, 1994; (2) CID for written interrogatories and report - by 5:00 p.m. on September 15, 1994; (3) CIDs for oral testimony of Josephine Ore and Laura Anderson Gillen - as scheduled by Commission staff, but not to occur earlier than October 24, 1994.

Within seven 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.

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[25] *See FTC v. Invention Submission Corp.*,, 965 F.2d 1086,1090 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 1255 (1993).

Re: Petition of Michael DiMattina, M.D. to Limit or Quash Civil Investigative Demands.
File No. 932-3314.

October 21, 1994

Dear Mr. Eaton:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Limit or Quash Civil Investigative Demands ("Petition") which you filed in the above-captioned matter on behalf of your client, Michael DiMattina, M.D. ("Petitioner").

The ruling set forth herein has been made by Commissioner Roscoe B. Starek, III, 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 ruling, Petitioner may file with the Secretary of the Commission a request that the full Commission review the ruling. The timely filing of such a request shall not stay the return date with regard to these CIDs, unless the Commission otherwise specifies.

Commissioner Starek has reviewed the Petition and accompanying exhibits. He also has considered the oral presentation on the Petition made on September 26, 1994, and the letter submission made by Petitioner on September 28, 1994. The Petition is denied.

I. Background

Petitioner, through Michael DiMattina, M.D., P.C. and Dominion Fertility & Endocrinology ("DF"), offers infertility services to the public. In 1992 and 1993, Petitioner held seminars at which infertility services were discussed. Staff is investigating, among other questions, whether Petitioner or DF (i) misrepresented the success rates of fertility procedures he offers and (ii) misrepresented, or made a material omission regarding, the side-effects of certain prescription drugs utilized during these procedures.

On August 3, 1994, the Federal Trade Commission approved a Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation, thereby authorizing the use of compulsory process in an investigation:

To determine whether Michael DiMattina, M.D., Michael DiMattina, M.D., P.C., Dominion Fertility & Endocrinology Institute, or others, engaged in providing infertility services to consumers through the use of assisted reproductive technologies, have engaged in or are engaging in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in connection with the advertising or marketing of said services, including but not limited to false and unsubstantiated representations concerning patients' success in achieving live births and the side effects of using fertility drugs. This investigation is also to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

On August 23, 1994, as part of this investigation, a CID for Written Interrogatories and a CID for Documents were issued to Petitioner. On September 19, 1994, Petitioner submitted a "Petition of Michael DiMattina, M.D. To Limit or Quash Civil Investigative Demands."

II. Analysis

A. Patient Names, Addresses, and Telephone Numbers

Petitioner requests that the Commission quash or limit Specification 3 of the CID for interrogatories and Specification 2 of the CID for documents. Specification 3 of the CID for interrogatories directs Petitioner to:

Provide the names, home addresses, and home telephone numbers of each person who attended [Petitioner's] "Fertility Seminar -- ART" given in March, June and December of 1992, and April and June of 1993, including those for each anonymous "affiant" included in [Petitioner's] submission to the Federal Trade Commission dated June 14, 1994.[1]

Similarly, Petitioner objects to Specification 2 of the CID for documents, which demands:

All reservation sign-up sheets or lists for [Petitioner's] "Fertility Seminar - Assisted Reproductive Technologies" for seminars conducted in [sic] March, 1992 to the present.

[1] In an effort to respond to staff's desire to obtain information regarding representations made at the seminars, Petitioner submitted affidavits from persons who had attended the events. These affiants, however, were identified only by initials.

Staff seeks this information with the intention of contacting individuals who attended the seminars, in order to determine what representations were made there. Petitioner asserts that compliance with these requests would violate the constitutional right of privacy of the persons so identified, and would violate his obligation under the Hippocratic Oath and state law to maintain confidentiality of patient information. Petitioner requests that the specifications be quashed or, in the alternative, limited to avoid unnecessarily burdening his patients and irreparably damaging his reputation and business.

i. Constitutional Right of Privacy[2]

Petitioner argues that compelled provision of the identities of the seminar attendees to staff, so that staff may contact them, would violate the attendees' right of privacy. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court indicated, without deciding, that individuals may have a constitutionally protected privacy interest in records reflecting their medical histories. Subsequently, lower courts have recognized the existence of a privacy interest in medical information. *E.g., In re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3d Cir. 1987); *U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

Nonetheless, "even material which is subject to protection must be produced or disclosed upon a showing of proper governmental interest." *Westinghouse*, 638 F.2d at 577. The following factors are pertinent to a determination to require disclosure of personally sensitive information: the type of record requested; the information it does or might contain; the potential for harm in any subsequent nonconsensual disclosure; the injury from disclosure to the relationship in which the record was generated; the adequacy of safeguards to prevent unauthorized disclosure; the degree of need for access; and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating in favor of access. *Westinghouse*, 638 F.2d at 578.

In Westinghouse, for example, the court was faced with a request of the National Institute for Occupational Safety and Health to obtain employee medical records expected to reveal whether exposure to a

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[2] For the purposes of this ruling we assume, without deciding, that Petitioner has standing to assert privacy rights on behalf of his patients. *See Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *In re Search Warrant (Sealed)*, 810 F.2d 67, 69 (3d Cir. 1987).

particular substance was associated with occupational asthma. It ruled that medical records containing primarily routine test results were private, but not sensitive, and that disclosure of this information was not likely to inhibit the employees from undergoing the required subsequent periodic examinations. The court ordered Westinghouse to permit access to the medical records after determining that there existed sufficient statutory and regulatory safeguards against further unauthorized disclosure, in order to facilitate the strong public interest in conducting research regarding occupational safety.

The information sought by the CIDs in the present case would result in only a minimal disclosure of the personal matters which citizens have an interest in protecting from disclosure. Staff desires to interview attendees about the representations made by Petitioner; staff does not intend to question the attendees about their own medical histories. Although the disclosure that an individual attended one of Petitioner's seminars constitutes an implied disclosure that a particular couple may be suffering a fertility problem, the attendance of each person at these seminars is already known to the other persons who attended the seminar.[3] Finally, it is unlikely that disclosure of this information to Commission staff for the limited purpose of enquiring into Petitioner's representations will dissuade other couples from seeking information about fertility procedures. Thus, this information is no more sensitive than that at issue in Whalen, *supra* (identifying patients who have utilized legitimate but dangerous narcotics) and Westinghouse, *supra* (entire medical files).

Moreover, the risk that there will be further unauthorized disclosure is very slim. Because the documents are to be provided to the Commission pursuant to compulsory process in a law enforcement investigation, they will be subject to significant protections: 1) the statutory custodial protections and restrictions on disclosure provided by Section 21(b) of the FTC Act ("the Act"), 15 U.S.C. 57b-2(b); 2) Section 21(f) of the Act, 15 U.S.C. 57b-2(f), which provides an exemption from mandatory disclosure under the Freedom of Information Act for documents produced pursuant to compulsory process; and 3) Section 10 of the Act, 15 U.S.C. 50, which provides

[3] In addition, the implication that a couple may be suffering from a fertility problem does not of itself reveal what specific problems have been encountered; whether the problem resides in the male, the female, or both; or whether the couple has determined to engage in any procedures to remedy the problem.

criminal fines and penalties for unauthorized public disclosure of such information.

Finally, the information sought by the CIDs is needed to allow staff to discover what representations were made to persons who attended Petitioner's seminars, so that staff may determine whether there has been a violation of Section 5 or 12 of the FTC Act, 15 U.S.C. 45, 52.[4] These sections charge the Commission with protecting consumers from unfair or deceptive acts or practices, and from false advertising of drugs. This statutory authority and the public interest in preventing false or unsubstantiated representations about the success of infertility services and the side effects of using fertility drugs militate in favor of allowing Commission staff access to the information sought by the CIDs.

Accordingly, the Commission's legitimate interest in detecting deceptive practices warrants requiring disclosure of this information, despite the colorable privacy concerns posed by that disclosure.

ii. Patient-Physician Privilege

Petitioner also asserts that the requested information is protected from disclosure by Virginia law and the Hippocratic Oath. Assuming for the purposes of argument that the seminar attendees were Petitioner's patients, state law does not appear to protect patient names and addresses.[5]

Moreover, Virginia's privilege statute authorizes disclosure of otherwise privileged information where "necessary . . . in order to comply with state or federal law." Va. Code Ann. Section 8.01-399.F (Mitchie 1994 Cum. Supp.). As the challenged CIDs are issued pursuant to Sections 6, 9, 10 and 20 of the FTC Act, 15 U.S.C. 46, 49, 50 and 57b-1, compliance with these CIDs is necessary to comply

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[4] Anonymous affidavits obtained by Petitioner are not sufficiently reliable evidence of Petitioner's representations.

[5] Petitioner cites a section of the Virginia Code that generally prohibits a practitioner of the healing arts from conducting his practice in a manner contrary to the standards of ethics of his branch of the healing arts. Va. Code Ann. 54.12914(9) (Mitchie 1950). The Hippocratic Oath prohibits a physician from divulging matters "which should not be published abroad."

The Virginia privilege statute, not cited by Petitioner, is more specific. It prohibits a practitioner of any branch of the healing arts from disclosing "information . . . acquired in attending, examining or treating the patient in a professional capacity." Va. Code Ann. 8.01.399 (Mitchie 1994 Cum. Supp.). This section appears designed to prevent disclosure of information regarding a patient's physical condition, rather than his or her name and address.

with federal law and thus, even if Virginia law applies, is permitted under the Virginia privilege statute.

In any case, any privilege protection accorded by state law is not binding upon the Commission. The purpose of this investigation is to determine whether there has been a violation of a federal statute. A claim of privilege asserted against a federal agency conducting an investigation into possible violations of federal law is guided by the principles of federal common law. *E.g., Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993); *Gilbreath v. Guadalupe Hosp. Found, Inc.*, 5 F.3d 785, 791 (5th Cir. 1993); *General Motors v. NIOSH,* 636 F.2d 163, 165 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981). It is well-established that there exists no physician-patient evidentiary privilege under federal law. *Gilbreath v. Guadalupe,* 5 F.3d at 791; *Hancock v. Dodson,* 958 F.2d 1367, 1373 (6th Cir. 1991); *In re Grand Jury Proceedings,* 801 F.2d 1164, 1169 (9th Cir. 1986); *see Whalen v. Roe,* 429 U.S. 589, 602 n.28 (1977). Accordingly, Petitioner's privilege assertion is unavailing.

iii. Burden

In the event the Commission does not quash the CIDs as requested, Petitioner asks that the Commission: 1) impose limits upon the number of seminar attendees staff may contact; 2) require that Petitioner disclose only the names of those seminar attendees who authorize Petitioner to do so; and 3) rule that the sole contact between staff and seminar attendees be in the form of a deposition where Petitioner, as well as staff, may pose questions. Petitioner asserts that these limitations are necessary to "avoid unnecessarily burdening Petitioner's patients and irreparably damaging Petitioner's reputation and business."

The Commission need limit a CID only if the demand is "unduly burdensome or unreasonably broad." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc)(emphasis in original), *cert. denied*, 431 U.S. 974 (1977). The Texaco court noted:

> Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. . . . Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

Id. Moreover, this agency has previously required that allegations of harm to a petitioner's business be supported by a reasonable estimate of the cost of compliance and its relationship to the petitioner's ongoing business operations; speculative assertions are insufficient. *E.g.*, Brana Publishing Inc., Federal Trade Commission Letter Ruling Re: Petition to Quash Civil Investigative Demand, File No. 872 3209 (March 26, 1992) at 4-5; Hang-Ups Art Enterprises, Inc., Federal Trade Commission Letter Ruling Re: Petition to Limit or Quash Civil Investigative Demand, File No. 872 3209 (March 31, 1992) at 9. This requirement is based upon the recognition that the Commission's use of compulsory process would be vitiated if it were to acknowledge speculative fears of damage to corporate reputation. *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) 969,338 at 65,353 (D.D.C. 1991), *aff'd,* 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993).

Petitioner has submitted no information which would justify the conclusion that compliance with this request will unreasonably burden his business or damage his reputation. To the extent that Petitioner fears staff's mere contact with his clients, this burden is consistent with that "expected and . . . necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Texaco, supra.* To the extent that Petitioner fears the manner in which staff may contact his clients, it in the Commission's policy that staff should take care to avoid undue harm to a company's legitimate business interests; absent specific evidence to the contrary, it is assumed that staff will act in a manner consistent with this policy. HTI/ORHS South Seminole Joint Venture, Federal Trade Commission Letter Ruling Re: Petition to Quash or Limit Civil Investigative Demand, File No. 922 3278 (August 12, 1994) at 7 n.7.

We have also considered the interests of the persons to be identified pursuant to the CIDs. As we noted in HTI/ORHS South Seminole, the Commission is "cognizant of our obligation to promote the public interest, and to minimize any burden or adverse impact of the Commission's investigation on innocent third parties, even where that harm cannot be eliminated altogether." *Id.* at 5. As in that investigation, however, we conclude here that the Commission's interest in conducting a legitimate inquiry mandates disclosure of the identities of all of the seminar attendees. Unless staff is provided with the names of all persons who attended the seminars, it cannot

select an appropriate sample of patients to contact, in order to determine what representations were made at the various seminars. *Id.* at 6; *see FTC v. Invention Submission*, 1991-1 Trade Cas. at 65,352 n.24 (where representations to clients are at issue, full client lists are needed to allow agency to poll a statistically valid sample).

Nor do we consider it appropriate or necessary to impose the requested limitations on the manner in which the contacts are initiated. In HTI/ORHS South Seminole, we found that there was a need to preserve the privacy interests of minors who had contacted a psychiatric hot-line. The Commission was aware that some of those children had called to report parental abuse, and others had called to discuss drug abuse (a matter subject to special statutory protections). Accordingly, the Commission's ruling required that staff initiate contact with the minors via a general letter accompanied by a reply form, and permitted staff to contact only those persons who returned the reply form indicating consent to being contacted. *Id.* at 7 n.8. The instant investigation simply does not raise the sensitivities presented in HTI/ORHS South Seminole, and we decline to limit the manner in which staff contacts the seminar attendees.

Petitioner also seeks to require that staff conduct full-scale investigational hearings, including live testimony, of any patient contacted. There is no precedent to support such an approach, which would unnecessarily burden potential witnesses and hamstring staff's ability to conduct a proper and expeditious investigation.

B. Informed Consent Forms

Petitioner finally requests that the Commission quash or limit Specification 1 of the CID for documents. This Specification seeks:

> All of petitioner's informed consent forms, whether titled "Treatment Agreement" or otherwise, provided to patients or potential patients from March, 1992 to the present.

Petitioner asserts that the FTC has no jurisdiction to seek documents that pertain to Petitioner's advertising about the side effects of using prescription fertility drugs. In this regard, Petitioner asserts that Section 502(n) of the Federal Food Drug & Cosmetic Act ("FFDCA"), 21 U.S.C. 352(n), wholly divests the FTC of statutory

authority to regulate any statements in prescription drug advertising concerning side effects.

Section 502(n) of the FFDCA grants the Food and Drug Administration ("FDA") jurisdiction over certain prescription drug advertising. It provides that a drug or device is misbranded unless the manufacturer, packer, or distributor thereof includes certain information in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer, or distributor. That section goes on to state that:

> [N]o advertisement of a prescription drug, published after the effective date of regulations issued under this section applicable to advertisements of prescription drugs, shall with respect to the matters specified in this subsection or covered by such regulations, be subject to the provisions of Sections 52 to 57 of Title 15 [*i.e.*, Sections 12 to 17 of the FTC Act].

Considered in context, the stated exemption from jurisdiction under FTC Act Sections 12 through 17 applies only to those advertisements over which the FDA has jurisdiction, that is, those issued by a manufacturer, packer or distributor.[6] The exemption from FTC jurisdiction therefore does not apply to representations of a physician, such as an informed consent form.[7] Accordingly, the FTC retains jurisdiction to seek the documents described by Specification 1, even assuming they contain advertising by Petitioner about the side effects of using prescription drugs.

III. Conclusion

For the foregoing reasons, the Petition to Limit or Quash Civil Investigative Demands is denied in its entirety. Petitioner is directed to comply with the Civil Investigative Demands on or before 5:00 p.m. on November 4, 1994.

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[6] The FDA's regulations implementing this section of the FFDCA apply only to advertisements issued or caused to be issued by the manufacturer, packer or distributor of the drug promoted by the ad. 21 CFR 202.1(k).

[7] Petitioner asserts that *United States v. Evers*, 643 F.2d 1043 (5th Cir. 1981), supports the conclusion that doctors can be, considered "distributors" under 21 U.S.C. 352(n). This decision interprets a different section of the FFDCA and is inapplicable. Moreover, the legislative history of 21 U.S.C. 352(n) indicates an intention to "prevent physicians from being misled by deceptive advertising," because "when a doctor is misled his patient's health is endangered." S. Rep. No. 1744 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2884, 2900, 2903. Accordingly, it seems highly unlikely that Congress intended the term "distributor," as used in 21 U.S.C. 352(n), to include physicians.

Re: Request of Mortgage Credit Reports, Inc. for Review by Full Commission of Letter Ruling Denying the Petition to Quash Four Civil Investigative Demands. File No. 922-3339.

November 7, 1994

Dear Mr. Blanton:

The Commission has considered (a) the Petition to Quash Civil Investigative Demands ("Petition"), which you filed on behalf of your client, Mortgage Credit Reports, Inc. ("Petitioner") on July 28, 1994; (b) the letter ruling dated August 26, 1994, denying the Petition; and (c) the Petition for Commission Review filed by Petitioner on September 9, 1994 ("Review Petition").

The letter ruling denied the Petition in its entirety for the reasons stated therein. To the extent that the Review Petition raises some of the same issues as the Petition by contesting the letter ruling's factual statements regarding the degree of Petitioner's cooperation with the Commission staff and by claiming a right to confront persons that have made complaints against the Petitioner, the Petition was properly denied for the reasons stated in the August 26 letter ruling. The Review Petition contends that the Petitioner cannot be required or compelled to be a witness against itself and that this right is available because of the criminal penalties imposed by sections 168lq and 168lr of the Fair Credit Reporting Act ("FCRA").

The Commission is not required to, and normally would not, consider new arguments raised on appeal. *See* 16 CFR 2.7(d). In light of the unexpected hospitalization and ongoing convalescence of Petitioner's counsel, however, the letter ruling allowed Petitioner to file additional material for the Commission to consider with any request for Commission review of the ruling. Accordingly, the Commission has considered Petitioner's Fifth Amendment self-incrimination objection to the civil investigative demands ("CIDs").

The Fifth Amendment right against self-incrimination provides no basis for Petitioner's blanket refusal to respond to the CIDs. It is well-established that the right against self-incrimination does not apply to corporations. *Braswell v. United States*, 487 U.S. 99, 110 (1988) (custodian of corporate records was not entitled to resist

subpoena on grounds of self-incrimination, because the custodian's production of documents is an act of the corporation, which has no such privilege). *See also Thomas v. Tyler*, 841 F. Supp. 1119, 1127-28 (D. Kan. 1993) (under "collective entity doctrine," an individual cannot invoke the Fifth Amendment to avoid producing documents of a corporation or other collective entity in his custody, even if the act of production might be personally incriminating). Moreover, the Fifth Amendment privilege against self-incrimination applies only to compelled testimonial communications, not to pre-existing documents voluntarily created in the course of business. *Fisher v. United States*, 425 U.S. 391, 408-09 (1976); *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir. 1993).

An assertion that the mere act of producing requested documents or that the testimony of the Petitioner's corporate Vice President or Profit and Loss Supervisor may incriminate a person entitled to assert the privilege must be supported by a showing that there is a real -- not remote or speculative -- danger of self-incrimination. *Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649 (2d Cir. 1990). The person asserting the privilege must show the incriminating nature of the particular information sought and an objectively reasonable fear of criminal prosecution. *United States v. Sharp*, 920 F.2d 1167, 1170-71 (4th Cir. 1990). *See also United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th. Cir. 1991) (requiring that assertion of privilege be supported with respect to each particular response or document withheld).

No such showing has been made here. The criminal penalties cited by Petitioner do not apply to the provision of information to the Commission in its investigation. Instead, the FCRA authorizes the Commission to require the production of documents and the testimony of witnesses relating to the Commission's investigation of possible law violations. *See* 15 U.S.C. 49, 1681s; *FTC v. Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988 (D.C. Cir. 1975) (Commission need not obtain order or permission of affected consumers to compel disclosure of consumer reports from consumer reporting agencies).

Accordingly, for the reasons set forth above, the full Conmission denies the Review Petition in its entirety and concurs in, and hereby adopts, the August 26 letter ruling in this matter. The filing of the Review Petition did not stay the return dates set forth in the letter ruling. 16 CFR 2.7(f). Because the return dates for the CIDs for docu-

mentary materials and written interrogatories have expired, the Commission directs Petitioner to comply immediately with those CIDs and to comply as specified by the letter ruling with the CIDs for oral testimony.

Commissioner Varney not participating.

TABLE OF COMMODITIES*

DECISIONS AND ORDERS

* Commodities involved in dismissing or vacating orders have *italiciized* page references.

Page

Page

INDEX*

DECISIONS AND ORDERS

* Covering practices and matters involved in Commission orders. References to matters involved in vacating or dismissing orders are indicated by ***italics***.

Page

Page

Page

Page

Page

ISBN 0-16-049299-8
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9 780160 492990