

INTERLOCUTORY, MODIFYING,
VACATING, AND MISCELLANEOUS
ORDERS

IN THE MATTER OF

**TOPS MARKETS LLC,
MORGAN STANLEY CAPITAL PARTNERS V
U.S. HOLDCO LLC,
AND
THE PENN TRAFFIC COMPANY**

Docket No. C-4295. Order, January 4, 2012

Letter approving the divestiture of the Penn Traffic Supermarket Business Assets to Moran Foods, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Matthew S. Morris
The Food Partners, LLC

Re: *In the Matter of Tops Markets LLC, Morgan Stanley
Capital Partners V U.S. Holdco LLC, and The Penn
Traffic Company; File No. 101-0074, Docket No. C-4295*

Dear Mr. Morris:

This letter responds to the *Petition of Divestiture Trustee for Approval of Proposed Divestiture to Moran Foods, Inc.* (“Petition”) filed by you as the Divestiture Trustee, on November 7, 2011, pursuant to the Decision and Order in this matter. In the Petition, you request that the Commission approve your proposed divestiture to Moran Foods, Inc. of the Penn Traffic Supermarket Business Assets at the following location: No. 3115, 404 West Morris Street in Bath, New York. The Petition was placed on the public record for comments until December 19, 2011, and no comments were received.

After consideration of the proposed divestiture as set forth in the Petition and supplemental documents, as well as other

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available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with the Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

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IN THE MATTER OF

PROMEDICA HEALTH SYSTEM, INC.

Docket No. 9346. Order, January 11, 2012

Order granting a Joint Motion for Scheduling of Oral Argument.

ORDER SCHEDULING ORAL ARGUMENT

Both the Respondent and Counsel for the Complaint have filed Appeal Briefs perfecting appeals from the Initial Decision in this matter, and on January 9, 2012, they filed a Joint Motion for Scheduling of Oral Argument. Consistent with both the Commission Rules and the request in the Joint Motion, the Commission has determined to conduct the Oral Argument in this matter on Monday, February 6, 2012, at 2 p.m. in Hearing Room 532-H of the Headquarters Building of the Federal Trade Commission, located at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Each side will be allotted thirty minutes to present its argument. Respondent will have the opportunity to open and close the argument, and will be permitted to reserve up to five minutes for rebuttal. If either side wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the Oral Argument, any such compilation may contain only public information that is already in the record of the proceeding, and copies must be filed with the Secretary of the Commission and provided to opposing counsel no later than Thursday, February 2, 2012, at 5 p.m.

By the Commission.

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IN THE MATTER OF

**ALAN B. MILLER,
UNIVERSAL HEALTH SERVICES, INC.,
AND
PSYCHIATRIC SOLUTIONS, INC.**

Docket No. C-4309. Order, January 19, 2012

Letter approving the divestiture of the Puerto Rico Divestiture Assets to Donald R. Dizney and David A. Dizney through two companies, Capestrano Realty Company, Inc., and San Juan CP Hospital, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Peter T. Barbur, Esquire
Christopher D. Belelieu, Esquire
Cravath, Swaine & Moore LLP

Re: *In the Matter of Universal Health Services, Inc.,
Docket No. C-4309*

Dear Mr. Barbur and Mr. Belelieu:

This letter responds to the Application for Approval of Divestiture of the Puerto Rico Divestiture Assets filed by Universal Health Services, Inc., on October 13, 2011. The Application requests that the Commission approve, pursuant to the order in this matter, Universal's proposed divestiture of the Puerto Rico Divestiture Assets to Donald R. Dizney and David A. Dizney through two companies, Capestrano Realty Company, Inc., and San Juan CP Hospital, Inc. The application was placed on the public record for comments until November 14, 2011, and no comments were received.

After consideration of the proposed divestiture as set forth in Universal's Application and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and

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representations made in connection with Universal's Application and has assumed them to be accurate and complete.

By direction of the Commission.

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IN THE MATTER OF

**THE NORTH CAROLINA BOARD OF DENTAL
EXAMINERS**

Docket No. 9343. Order, February 10, 2012

Order granting respondent's motion for Stay of Order Pending Review by the U.S. Court of Appeals.

**ORDER ON RESPONDENT'S APPLICATION FOR STAY OF ORDER
PENDING REVIEW BY U.S. COURT OF APPEALS**

On January 13, 2012, Respondent North Carolina State Board of Dental Examiners filed an Application for Stay of Order Pending Review by the U.S. Court of Appeals. Complaint Counsel opposes the motion. For the reasons described below, the Commission grants Respondent's motion and stays the Final Order entered on December 2, 2011 until disposition of Respondent's appeal.

On December 2, 2011, the Commission issued an Opinion and Final Order against Respondent. The Commission held that Respondent excluded non-dentist providers from the market for teeth whitening services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission's Final Order prohibited the Board from directing non-dentist teeth whitening providers to cease providing teeth whitening products or services. In its Application, Respondent asserts that it intends to seek review of the Commission's Opinion and Final Order in the Court of Appeals for the Fourth Circuit. (Petition at 1, 2.)

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by ... the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(a). A party seeking a stay must first apply for such relief to the Commission, as Respondent has done here. *See* 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(b); Fed. R. App. P. 18(a)(1). If, "within the 30-day period

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beginning on the date the application was received by the Commission,” the Commission either denies the application or does not act on the application, the petitioner may seek a stay in the court of appeals where a petition for review of the final order is pending. 15 U.S.C. § 45(g)(2)(B); *see also* 16 C.F.R. § 3.56(b).

Pursuant to Rule 3.56(c) of the Commission’s Rules of Practice, an application for a stay is evaluated on four factors: (1) the likelihood of the applicant’s success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. 16 C.F.R. § 3.56(c); *Toys “R” Us, Inc.*, 126 F.T.C. 695, 696 (1998). If the balance of the equities (i.e., the last three factors) is not heavily tilted in the petitioner’s favor, the petitioner must make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal. *California Dental Ass’n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996); *see also North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006) (the required likelihood of success “is inversely proportional to the amount of irreparable injury suffered absent the stay”).

Likelihood of Respondent’s Success on Appeal – Respondent asserts that it is likely to succeed in its appeal because the Commission’s decisions contravene the U.S. Constitution, federal law, and state law. (Petition at 2-5.) Respondent’s argument focuses on the Commission’s February 8, 2011 decision, which held that financially-interested governmental bodies must meet the active supervision prong of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine. Respondent asserts that the Commission’s holding conflicts with *Midcal* itself, as well as several decisions of the Court of Appeals. (*Id.* at 3-4 (listing cases).)

The Commission harbors no doubts about its February 8, 2011 decision. As we noted in that decision, there is “ample” judicial precedent supporting the Commission’s Opinion—including from the Fourth Circuit—as well as leading antitrust commentary and the policies underlying the state action doctrine. *North Carolina Board of Dental Examiners*, 151 F.T.C. 607, 617-28 (2011)

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(citing *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959)).

Nevertheless, the Supreme Court has yet to rule on the applicability of the active supervision prong to regulatory bodies controlled by private market participants. In addition, we have acknowledged that “the courts of appeals have been less than consistent on this issue.” *Id.* at 620. Given that a difficult legal question can be sufficient to establish a substantial showing of a likelihood of success on the merits, *North Texas Specialty Physicians*, 141 F.T.C. at 457; *California Dental*, 1996 FTC LEXIS 277 at *10, we conclude that Respondent has made a sufficient showing to warrant consideration of the equities. *Cf. Florida v. HHS*, 780 F. Supp. 2d 1307, 1317-20 (N.D. Fla. 2011) (granting stay pending appeal in part because of split in authority); *Pokorny v. Quixtar Inc.*, No. 07-00201, 2008 U.S. Dist. LEXIS 91951, at *4 (N.D. Cal. Apr. 17, 2008) (finding that a serious question was raised due to an apparent split among the federal courts); *In re Westwood Plaza Apts.*, 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993) (granting stay pending appeal because the “Fifth Circuit has yet to address this question and the circuits which have are split”).

Irreparable Injury to Respondent Absent a Stay – Respondent bears the burden of demonstrating that denial of a stay will cause irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. *See Toys “R” Us*, 126 F.T.C. at 698; *California Dental*, 1996 FTC LEXIS 277, at *7. A party seeking a stay must show, with particularity, that the alleged injury is substantial and likely to occur absent a stay. *See Toys “R” Us*, 126 F.T.C. at 698; *California Dental*, 1996 FTC LEXIS 277, at *7.

In a declaration submitted in support of its Application, the Dental Board’s Chief Operating Officer asserts that the Commission’s Final Order will cause “significant irreparable harm to the State Board and the consuming public.” (White Declaration ¶ 3.) Specifically, he asserts that the Final Order will prevent the Board from enforcing the Dental Practice Act (*id.* ¶ 6), will limit the Board’s remedies for violations of the Dental Practice Act to seeking judicial relief (*id.* ¶ 5), will force the

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Board to adopt a particular interpretation of the Dental Practice Act (*id.* ¶ 4), and will force the Board to provide administrative hearings to non-licensees (*id.* ¶ 8). As explained in Section VII of the Commission's December 2, 2011 Opinion, each of these assertions is without merit and reflects a serious misreading of the Commission's Final Order.

Nevertheless, it does appear that at least certain portions of the Final Order, when implemented, may cause harm to the Board and have the potential to cause confusion if reversed by the Court of Appeals. In particular, Section III of the Final Order requires the Board to send corrective disclosures to each person to whom the Board previously sent a cease and desist letter or similar communication. If the Commission's decision were overturned on appeal, these persons could once again be subject to the Board's cease and desist letters. This repeated change in policy could create significant confusion about the law—not only for recipients of the notifications, but also for dentists, non-dentist teeth whiteners, and consumers. The Commission has held that where compliance with an order could cause confusion or require costly notification if reversed on appeal, a party may be irreparably injured. *See, e.g., Novartis Corp.*, 128 F.T.C. 233, 235-36 (1999); *California Dental*, 1996 FTC LEXIS 277, at *7. Accordingly, this factor weighs in favor of a stay, at least with respect to Section III of the Final Order.

Harm to Others and the Public Interest – The final remaining questions are whether a stay would harm other parties and whether it is in the public interest. *California Dental*, 1996 FTC LEXIS 277, at *7-8. These two factors are stated separately, but the FTC considers them together because Complaint Counsel is responsible for representing the public interest by enforcing the law. *See id.* at *8.

Respondent argues that a stay would not harm any party because it has stopped the challenged conduct: “Over the past two years, the State Board has sent no letters stating North Carolina law to non-dentist providers or to their commercial real estate landlords.” (Petition at 8; *see also* Reply at 13 (“The State Board has sent no communications to non-licensees regarding

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stain removal in the past two years.”)) Even if true,¹ this would not eliminate the potential for ongoing harm to consumers during the pendency of the appeal. For example, many non-dentist teeth whitening providers that had received cease and desist letters would continue to remain off the market, and potential entrants could be deterred from entering by the Board’s past conduct. Nevertheless, the Board’s apparent cessation of the conduct that led to this action substantially diminishes the potential for ongoing consumer harm during the appeal.

Conclusion – Although this motion presents a close call, we conclude that Respondent has satisfied the requirements for a stay pending appeal. On the one hand, there is some potential for ongoing harm to consumers in North Carolina during the pendency of the appeal. On the other hand, this case presents an important unresolved legal question, Respondent has represented that it has stopped the challenged conduct, and there is a potential for consumer confusion if the Commission’s Opinion and Final Order were overturned. We reiterate that the grant of stay pending appeal neither states nor implies doubt on our part as to the soundness of the Commission’s resolution of this matter. *See Novartis*, 128 F.T.C. at 234-35; *California Dental*, 1996 LEXIS 227, at *10.

Accordingly,

IT IS ORDERED THAT enforcement of the Commission’s Final Order of December 2, 2011 be stayed upon the filing of a timely petition for review of the Commission’s order in an appropriate Court of Appeals until issuance of the Court of Appeals’ mandate.

By the Commission, Commissioner Ramirez dissenting and Commissioner Brill recused.

¹ This assertion in Respondent’s brief is not supported by “affidavits or other sworn statements,” as required by Commission Rule 3.56(c), 16 C.F.R. § 3.56(c). Nevertheless, this assertion is consistent with the ALJ’s findings (IDF 208-218), and is not challenged by Complaint Counsel (Opposition at 7).

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Dissenting Statement of Commissioner Edith Ramirez

I respectfully dissent from the Commission's decision to grant Respondent North Carolina State Board of Dental Examiners' Application for a Stay of Order Pending Review by the U.S. Court of Appeals. In my view, the Board has not shown that it is likely to succeed on appeal or that, absent a stay, it will suffer irreparable harm. This, together with the harm to competition the Commission has identified and sought to remedy, leads me to conclude that the public interest would be best served by immediate enforcement of our order.

The Board's request for a stay centers on the claim that the Commission's order improperly interferes with the Board's legitimate enforcement activities, resulting in irreparable harm to the Board and the citizens of North Carolina. The claim does not withstand scrutiny. In addressing the first factor of the applicable test, likelihood of success on appeal, the Board relies on arguments the Commission has already twice considered and rejected, as reflected in our February 8, 2011 decision denying the Board's motion to dismiss the complaint on state action grounds and December 2, 2011 ruling that the Board violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. As the majority makes clear, none of the Board's renewed arguments gives us pause about our decision.

Whether a case is especially complex or poses a difficult legal question is, however, relevant to the likelihood of success factor. *See North Texas Specialty Physicians ("NTSP")*, 141 F.T.C. 456, 457 (2006). According to the Board, with its decision, the Commission "has constructed a novel legal argument unfounded in case law . . . to prevent a state agency from enforcing a state law." Respondent's Reply at 4. While it is certainly true that the Supreme Court has yet to address the applicability of the active supervision prong to financially-interested regulatory boards and that the courts of appeals have not adopted a uniform approach to this issue, the Board's characterization is far from accurate. The Commission's determination that the Board's exclusionary acts are not immune from the antitrust laws as conduct of the state is well supported by judicial precedent, including that in the Fourth Circuit where the Board's appeal will be heard, and fully

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consistent with the policies underlying the state action doctrine. In light of the balance of equities discussed below, the absence of direct Supreme Court precedent and lack of unity in the courts of appeals on the core issue the Commission decided are not enough to justify a stay. See *In re California Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996) (noting that “the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury suffered absent the stay”).

Turning to the equities, the Board must show that its alleged irreparable injury “is both substantial and likely to occur absent a stay” in order to satisfy its burden. *NTSP*, 141 F.T.C. at 460. But rather than address the impact of the Commission’s order as it actually reads, the Board instead maintains that the order contains “conflicting statements” and “would have the effect of prohibiting the State Board from fulfilling its state-mandated responsibility to prevent the unlicensed practice of dentistry.” Respondent’s Reply at 7. In fact, the relief fashioned by the Commission, carefully and narrowly tailored as it is to forbid only the Board’s exclusionary conduct, would do no such thing. By its express terms, the order permits the Board to enforce the North Carolina Dental Practice Act in the manner specified by the North Carolina legislature. The Board may investigate suspected violations of the Act, institute court actions for alleged violations, and pursue available administrative remedies. Final Order at 4. The order even makes clear that the Board may notify third parties of its “belief or opinion” regarding suspected violations. *Id.* The Board is only prohibited from conduct it claims it has not engaged in for at least the last two years: “directing” non-dentists to stop providing teeth whitening services and conveying to potential entrants or lessors of commercial property that non-dentist teeth whitening is illegal. *Id.* § 2; Respondent’s Application at 8.

The majority acknowledges that the Board’s assertion of irreparable injury is “without merit” and based on “a serious misreading of the Commission’s Final Order.” Order on Respondent’s Application at 3. The majority nonetheless makes a finding of irreparable injury citing a concern the Board never even raised: the potential for confusion arising from the remedial portion of the Commission’s order if the ruling were overturned.

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While the potential for confusion may suffice to show irreparable injury in some circumstances, I do not agree that this case rises to that level.

For instance, in *California Dental*, on which the majority relies, the association sought a narrow stay of the portion of the Commission's order requiring, among other things, the dissemination of information about the Commission's decision to all 19,000 of the association's members, the review of past disciplinary actions, and reinstatement of members who had been improperly expelled. 1996 FTC LEXIS 277, at *7-8. Recognizing that a reversal would require re-notification to all association members and could subject reinstated members to renewed expulsion, thereby inflicting significant costs on the association and creating a significant potential for confusion about the law, the Commission granted a limited stay. *Id.* In *Novartis*, also cited by the majority, the Commission granted a partial stay after respondent showed it would needlessly incur substantial financial costs and reputational harm if there were a reversal of the re-labeling of product and corrective advertising ordered by the Commission. *In re Novartis Corp.*, 233 F.T.C. 235, 235-36 (1999). There is no comparable cost or potential for harm here. Not only is the number of affected persons who received the Board's unlawful cease and desist letters and would be due a corrective disclosure dramatically smaller (approximately 60), but the corrective disclosure ordered by the Commission merely clarifies that the Board's prior communications did not constitute a "legal determination," a fact that is undisputed. *See* Final Order, Section III and Appendices A-C; *NTSP*, 141 F.T.C. at 465-66 (rejecting argument that notifying 400 member physicians and a limited number of payors of the Commission's decision would cause irreparable injury).

On the other hand, a stay will cause substantial harm to competition and consumers. The harm resulting from the Board's exclusionary conduct will continue if the order is not enforced. The non-dentist providers who exited the market after receiving cease and desist letters from the Board will likely remain out of the market unless corrective action is taken, thereby depriving consumers of access to less expensive services. I also believe that delaying enforcement of the order until the Board's appeal is

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resolved, a process that could take years, will undermine the effectiveness of the corrective notices the Commission has ordered. Finally, in the absence of an enforceable order, there is nothing to prevent the Board from resuming its anticompetitive campaign of sending cease and desist letters to potential new entrants or returning firms.

The Board therefore has not shown that the equities weigh in its favor or that a stay is otherwise warranted. In my view, the public interest calls for enforcement of the order without delay.

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IN THE MATTER OF

THE DOW CHEMICAL COMPANY

Docket No. C-4243. Order, February 23, 2012

Letter approving the divestiture of the real property related to the Torrance Facility to Hager Pacific Properties.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

George S. Cary, Esq.
Cleary Gottlieb Steen & Hamilton LLP

*Re: In the Matter of The Dow Chemical Company, Docket No.
C-4243*

Dear Mr. Cary:

Pursuant to Rule 2.41(f) of the Commission's Rules of Practice, the Commission has determined to approve the Petition of The Dow Chemical Company For Approval of the Proposed Divestiture of the Real Property Related to the Torrance Facility to Hager Pacific.

In according its approval to Dow's Petition, the Commission has relied upon the information submitted by Dow and the acquiring entities, and the representations made by Dow, in the course of the Commission staff's review of Dow's Petition. The Commission has assumed the information and representations to be accurate and complete. The manner of divestiture considered by the Commission is that set forth in the Real Estate Purchase and Sale Agreement filed with the Petition.

By direction of the Commission.

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IN THE MATTER OF

**MCWANE, INC.,
AND
STAR PIPE PRODUCTS, LTD.**

Docket No. 9351. Order, February 23, 2012

Order granting the joint motion of Complaint Counsel and Respondent Star Pipe Products, Ltd. to withdraw this matter from adjudication in order to enable the Commission to consider a proposed Consent Agreement

**ORDER WITHDRAWING MATTER FROM ADJUDICATION AS TO
RESPONDENT STAR PIPE PRODUCTS, LTD. FOR THE PURPOSE OF
CONSIDERING A CONSENT AGREEMENT**

Complaint Counsel and Respondent Star Pipe Products, Ltd. (“Respondent Star”) having jointly moved for Respondent Star to be withdrawn from adjudication in this matter in order to enable the Commission to consider a proposed Consent Agreement; and

Complaint Counsel and Respondent Star having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by Respondent Star and by Complaint Counsel and approved by the Director of the Bureau of Competition that, if accepted by the Commission, would resolve the claims against Respondent Star in their entirety;

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(c), that all claims against Respondent Star, as set forth in the First Violation Alleged and the Second Violation Alleged in the Complaint, be, and they hereby are, withdrawn in their entirety from adjudication until 12:01 a.m. on March 31, 2012, and that all proceedings against Respondent Star before the Administrative Law Judge be, and they hereby are, stayed pending a determination by the Commission with respect to the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C.F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the

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proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission; and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(e) of the Commission Rules of Practice, 16 C.F.R. § 3.25(e), that this matter shall remain in an adjudicative status as to Respondent McWane, Inc. (“Respondent McWane”), and all claims against Respondent McWane in the Complaint, including but not limited to those set forth in the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Violations Alleged in the Complaint, shall remain in an adjudicative status.

By the Commission.

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IN THE MATTER OF

**GRACO INC.,
ILLINOIS TOOL WORKS INC.,
AND
ITW FINISHING LLC**

Docket No. 9350. Order, March 13, 2012

Order granting a joint motion to withdraw this matter from adjudication to enable the Commission to consider a proposed Consent Agreement.

**ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE
PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT**

Complaint Counsel and Counsel for the Respondents having filed a joint motion to withdraw this matter from adjudication to enable the Commission to consider a proposed Consent Agreement; and

Complaint Counsel and Counsel for the Respondents having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by the Respondents and by Complaint Counsel and approved by the Director of the Bureau of Competition which, if accepted by the Commission, would resolve this matter in its entirety;

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(c), that this matter in its entirety be, and it hereby is, withdrawn from adjudication, and that all proceedings before the Administrative Law Judge are hereby stayed as the Commission evaluates the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C.F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

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IN THE MATTER OF

**HEALTHCARE TECHNOLOGY HOLDINGS,
INC.***Docket No. C-4340. Order, March 15, 2012*

Letter approving the divestiture of the SDI Audits Business to inVentiv Health, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

David I. Gelfand, Esquire
Cleary, Gottlieb, Steen & Hamilton

*Re: In the Matter of Healthcare Technology Holdings, Inc.
FTC File No. 111-0097, Docket No. C-4340*

Dear Mr. Gelfand:

This letter responds to the *Petition of Healthcare Technology, Inc. for Approval of Proposed Divestiture* (“Petition”) filed by Healthcare Technology, Inc. (“Healthcare Technology”) on January 12, 2012, requesting that the Commission approve Healthcare Technology Inc.’s proposed divestiture of the SDI Audits Business to inVentiv Health, Inc. (“inVentiv”) pursuant to the Decision and Order in this matter. The Petition was placed on the public record for comments until February 27, 2012 and no comments were received.

After consideration of the proposed divestiture as set forth in the Petition and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with the Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

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IN THE MATTER OF

**GRACO INC.,
ILLINOIS TOOL WORKS INC.,
AND
ITW FINISHING LLC**

Docket No. 9350. Order, March 26, 2012

Order to Hold Separate and Maintain Assets while the Commission considers a proposed Consent Agreement.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having heretofore issued its administrative Complaint charging Respondents Graco Inc. (“Graco”), Illinois Tool Works Inc., and ITW Finishing LLC (“ITW”), hereinafter referred to as Respondents, with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Respondents having been served with a copy of the Complaint, together with a notice of contemplated relief, and the Respondents having answered the Complaint denying said charges; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and the executed Consent Agreement, now in further conformity with

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the procedure described in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets (“Hold Separate”):

1. Respondent Graco Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 88-11th Avenue Northeast, Minneapolis, Minnesota 55413.
2. Respondent Illinois Tool Works Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3600 West Lake Avenue, Glenview, Illinois 60026.
3. Respondent ITW Finishing LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3600 West Lake Avenue, Glenview, Illinois 60026. ITW Finishing LLC is indirectly wholly-owned by Illinois Tool Works Inc.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate, the following definitions, and all other definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), shall apply:

- A. “Acquisition” means the proposed acquisition described in the Asset Purchase Agreement by and among Graco Inc., Graco Holdings Inc., Graco Minnesota Inc., Illinois Tool Works Inc., and ITW

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Finishing LLC, dated April 14, 2011 (the “Asset Purchase Agreement”).

- B. “Acquisition Date” means the date the Acquisition is consummated.
- C. “Commission-approved Acquirer” means any Person that receives the prior approval of the Commission to acquire the Liquid Finishing Business Assets pursuant to the Decision and Order.
- D. “Confidential Business Information” means competitively sensitive, proprietary and all other business information of any kind, except for any information that Respondents demonstrate (i) was or becomes generally available to the public other than as a result of a disclosure by Respondents, or (ii) was available, or becomes available, to Respondents on a non-confidential basis, but only if, to the knowledge of Respondents, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.
- E. “Decision and Order” means (i) the proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and (ii) the final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission.
- F. “Divestiture Date” means the date on which Respondent Graco (or the Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to divest, license, assign, grant, transfer, deliver and otherwise convey the Liquid Finishing Business Assets completely and as required by Paragraph II. (or Paragraph V.) of Decision and Order.
- G. “Gema Powder Finishing Business” means the worldwide business of developing, assembling,

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manufacturing, distributing, selling, or servicing powder finishing systems and products conducted prior to the Acquisition by Respondent ITW, including all business activities relating to the development, manufacture, and sale of products under the brand name Gema. “Gema Powder Finishing Business” does not include the Liquid Finishing Business.

- H. “Hold Separate” means this Order to Hold Separate and Maintain Assets.
- I. “Hold Separate Business” means the (i) Liquid Finishing Business Assets and (ii) Liquid Finishing Business.
- J. “Hold Separate Business Employees” means the Liquid Finishing Business Employees, the Hold Separate Gema Employees, and the Hold Separate Gema Shared Employees.
- K. “Hold Separate Gema Employees” means employees located in the United Kingdom, Germany, France, Italy, Australia, Japan, and Mexico in facilities shared with the Liquid Finishing Business or Liquid Finishing Business Assets whose job responsibilities relate exclusively to Gema powder finishing products.
- L. “Hold Separate Gema Shared Employees” means employees located in the United Kingdom, Germany, France, Italy, Australia, Japan, and Mexico in facilities shared with the Liquid Finishing Business or Liquid Finishing Business Assets whose job responsibilities relate to both the liquid finishing and powder finishing businesses.
- M. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the date this Hold Separate becomes a final and effective order, which shall occur on or prior to the Acquisition Date, and terminate pursuant to Paragraph V. of this Hold Separate.

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- N. “Hold Separate Manager(s)” means the Person(s) appointed pursuant to Paragraph II.C.2. of this Hold Separate.
- O. “Hold Separate Trustee” means the Person appointed pursuant to Paragraph II.C.1. of this Hold Separate.
- P. “Liquid Finishing Business” means the worldwide business of developing, assembling, manufacturing, distributing, selling, or servicing liquid finishing systems and products conducted prior to the Acquisition by Respondent ITW, including all business activities relating to the development, manufacture, and sale of products under the brand names Binks, DeVilbiss, Ransburg, and BGK. “Liquid Finishing Business” does not include the Gema Powder Finishing Business.
- Q. “Liquid Finishing Business Assets” means all rights, title, and interest in and to all property and assets, tangible and intangible, of every kind and description, wherever located, and any improvements or additions thereto, relating to the Liquid Finishing Business.
- R. “Liquid Finishing Business Employees” means any full-time, part-time, or contract employee(s) of the Liquid Finishing Business, including the Hold Separate Gema Shared Employees, immediately prior to the Acquisition.
- S. “Orders” means the Decision and Order and this Hold Separate.
- T. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other business entity.
- U. “Prospective Acquirer” means a Person that Graco (or a Divestiture Trustee appointed under the Decision and Order) intends to submit as a Commission-approved Acquirer to the Commission for its prior approval pursuant to the Decision and Order.

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II.

IT IS FURTHER ORDERED that:

- A. During the Hold Separate Period, Respondent Graco shall:
1. Hold the Hold Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business.
 2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, the Hold Separate Trustee, or the Hold Separate Managers, except to the extent that Respondent Graco must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate, the Consent Agreement, the Decision and Order, and all applicable laws. Nothing herein shall limit taking such action as may be required to ensure compliance with financial reporting requirements, with all applicable laws, regulations, and other legal requirements, or with policies and standards concerning health, safety, and environmental aspects of the Hold Separate Business or with the integrity of the Hold Separate Business financial controls.
 3. Take such actions as are necessary to maintain and assure the continued viability, marketability, and competitiveness of the Hold Separate Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, and shall not sell, transfer, encumber, or otherwise impair the Hold Separate Business (except as required by the Decision and Order).

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- B. From the time Respondents execute the Consent Agreement until the Acquisition Date, Respondent ITW shall take such actions as are necessary to maintain and assure the continued maintenance of the full economic viability, marketability, and competitiveness of the Hold Separate Business, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.
- C. Respondent Graco shall hold the Hold Separate Business separate, apart, and independent of Respondent Graco on the following terms and conditions:
 - 1. At any time after the Respondents sign the Consent Agreement, the Commission may appoint a Hold Separate Trustee to monitor the operations of the Hold Separate Business and to ensure that the Respondents comply with their obligations as required by this Hold Separate and the Decision and Order. The Hold Separate Trustee shall serve as Hold Separate Trustee pursuant to the agreement executed by the Hold Separate Trustee and Respondent Graco (“Hold Separate Trustee Agreement”).
 - a. The Commission shall select the Hold Separate Trustee, subject to the consent of Respondent Graco, which consent shall not be unreasonably withheld. If Respondent Graco has not opposed, in writing, including the reasons for opposing, the selection of the proposed Hold Separate Trustee within ten (10) days after notice by the staff of the Commission to Respondent Graco of the identity of the proposed Hold Separate Trustee, Respondent Graco shall be deemed to have consented to the selection of the proposed Hold Separate Trustee.

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- b. The Hold Separate Trustee shall have the responsibility for monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by the Hold Separate Managers; maintaining the independence of the Hold Separate Business; and monitoring Respondents' compliance with their respective obligations pursuant to the Orders, including, without limitation, maintaining the viability, marketability, and competitiveness of the Hold Separate Business pending divestiture.
- c. No later than one (1) day after the appointment of the Hold Separate Trustee, Respondent Graco shall enter into an agreement ("Hold Separate Trustee Agreement") that, subject to the prior approval of the Commission, transfers to and confers upon the Hold Separate Trustee all rights, powers, and authority necessary to permit the Hold Separate Trustee to perform his or her duties and responsibilities pursuant to this Hold Separate, in a manner consistent with the purposes of the Orders and in consultation with Commission staff, and shall require that the Hold Separate Trustee shall act in a fiduciary capacity for the benefit of the Commission.
- d. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents, and facilities of the Hold Separate Business, and to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial or other information as the Hold Separate Trustee

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may reasonably request and shall cooperate with the Hold Separate Trustee.

- e. Respondents shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondents' compliance with this Hold Separate, the Consent Agreement, or the Decision and Order, or otherwise to perform his or her duties and responsibilities consistent with the terms of this Hold Separate.
- f. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent Graco, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.
- g. The Commission may require the Hold Separate Trustee and each of the Hold Separate Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Trustee's duties.
- h. Respondents may require the Hold Separate Trustee and each of the Hold Separate Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, such agreement shall not restrict the Hold Separate Trustee from providing any information to the Commission.
- i. Thirty (30) days after the Acquisition Date, and every thirty (30) days thereafter until the Hold Separate terminates, the Hold Separate Trustee

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shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate and Respondents' compliance with their obligations under the Hold Separate and the Decision and Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising the Hold Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections, or any other regularly prepared financial statements.

- j. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this Hold Separate, subject to the consent of Respondent Graco, which consent shall not be unreasonably withheld. If Respondent Graco has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within ten (10) days after notice by the staff of the Commission to Respondent Graco of the identity of any substitute Hold Separate Trustee, Respondent Graco shall be deemed to have consented to the selection of the proposed substitute Hold Separate Trustee. Respondent Graco and the substitute Hold Separate Trustee shall execute a Hold Separate Trustee Agreement, subject to the approval of the Commission, consistent with this paragraph.
- k. The Hold Separate Trustee shall serve until the day after the Divestiture Date; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

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2. No later than five (5) days after the Acquisition Date, Respondent Graco shall appoint one or more Hold Separate Managers (collectively the “Hold Separate Managers”), subject to the approval of the Hold Separate Trustee in consultation with Commission staff, to manage and maintain the Hold Separate Business in the regular and ordinary course of business and in accordance with past practice.
 - a. The Hold Separate Managers shall be responsible for the operation of the Hold Separate Business and shall report directly and exclusively to the Hold Separate Trustee, and shall manage the Hold Separate Business independently of the management of Respondent Graco. The Hold Separate Managers shall not be involved, in any way, in the operations of the other businesses of Respondent Graco during the term of this Hold Separate.
 - b. No later than three (3) days after appointment of the Hold Separate Manager(s), Respondent Graco shall enter into a management agreement with each such manager that, subject to the prior approval of the Hold Separate Trustee, in consultation with the Commission staff, transfers all rights, powers, and authority necessary to permit each such Hold Separate Manager to perform his or her duties and responsibilities pursuant to this Hold Separate, in a manner consistent with the purposes of the Orders.
 - c. Respondents shall provide the Hold Separate Managers with reasonable financial incentives to undertake this position. Such incentives shall include employee benefits, including regularly scheduled raises, bonuses, vesting of retirement benefits (as permitted by law) on the same basis as provided for under the Asset

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Purchase Agreement for other employees hired by Respondent Graco, and additional incentives as may be necessary to assure the continuation and prevent any diminution of the Hold Separate Business's viability, marketability, and competitiveness until the end of the Hold Separate Period, and as may otherwise be necessary to achieve the purposes of this Hold Separate.

- d. The Hold Separate Managers shall make no material changes in the ongoing operations of the Hold Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission staff.
- e. The Hold Separate Managers shall have the authority, with the approval of the Hold Separate Trustee, to remove Hold Separate Business Employees and replace them with others of similar experience or skills. If any Person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Hold Separate Managers, in consultation with the Hold Separate Trustee, may request Respondent Graco to, and Respondent Graco shall, appoint a substitute Person, which Person the respective manager shall have the right to approve.
- f. In addition to Hold Separate Business Employees, the Hold Separate Managers may, with the approval of the Hold Separate Trustee and at the cost and expense of Respondent Graco, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to assist the respective manager in managing the Hold Separate Business and in carrying out the manager's duties and responsibilities. Nothing contained herein shall preclude a Hold Separate Manager from contacting or communicating

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directly with the staff of the Commission, either at the request of the staff of the Commission or in the discretion of the manager.

- g. The Hold Separate Trustee shall be permitted, in consultation with the Commission staff, to remove any Hold Separate Manager for cause. Within three (3) days after such removal, Respondent Graco shall appoint a replacement manager, subject to the approval of the Hold Separate Trustee in consultation with Commission staff, on the same terms and conditions as provided in this paragraph.
3. The Hold Separate Trustee and the Hold Separate Managers shall serve, without bond or other security, at the cost and expense of Respondent Graco, on reasonable and customary terms commensurate with the person's experience and responsibilities.
4. Respondent Graco shall indemnify the Hold Separate Trustee and Hold Separate Managers and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the Hold Separate Managers' duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Hold Separate Trustee or the Hold Separate Managers.
5. The Hold Separate Business shall be staffed with sufficient employees (including any full-time, part-time, or contract employee of the Hold Separate Business) to maintain the viability and competitiveness of the Hold Separate Business. To

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the extent that such employees leave or have left the Hold Separate Business prior to the Divestiture Date, the Hold Separate Managers, with the approval of the Hold Separate Trustee, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.

6. In connection with support services or products not included within the Hold Separate Business, Respondent Graco shall continue to provide, or offer to provide, the same support services to the Hold Separate Business as customarily have been or were being provided to such businesses by ITW prior to the Acquisition Date. For any services or products that Respondents may provide to the Hold Separate Business, Respondents may charge no more than the same price they charge others for the same services or products (or a commercially reasonable rate if ITW had not previously charged for such services). Respondents' personnel providing such services or products must retain and maintain all Confidential Business Information of or pertaining to the Hold Separate Business on a confidential basis, and, except as is permitted by this Hold Separate, such persons shall be prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondents' businesses, other than the Hold Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information of the Hold Separate Business.
 - a. Respondent Graco shall offer to the Hold Separate Business, directly or through Respondent ITW, any services and products that Respondent ITW provided, in the ordinary course of business directly or through third

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party contracts to the business constituting the Hold Separate Business at any time since December 31, 2011, or such services that Respondent ITW is obligated to provide under Schedule 1.2 of the Asset Purchase Agreement. Respondent ITW shall treat the Hold Separate Business as a Graco Subsidiary, as that term is defined in the Asset Purchase Agreement. Subject to the foregoing, the services and products that Respondent Graco shall offer the Hold Separate Business shall include, but shall not be limited to, the following:

- i. human resources and administrative services, including but not limited to payroll processing, labor relations support, retirement administration, and procurement and administration of employee benefits, including health benefits;
- ii. federal and state regulatory compliance and policy development services;
- iii. environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
- iv. financial accounting services;
- v. preparation of tax returns;
- vi. audit services;
- vii. information technology support services;
- viii. processing of accounts payable and accounts receivable;
- ix. technical support;
- x. procurement of supplies;

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- xi. maintenance and repair of facilities;
 - xii. procurement of goods and services utilized in the ordinary course of business by the Hold Separate Business;
 - xiii. legal services; and
 - xiv. cash management services in the ordinary course of business, including cash sweeps, consistent with the cash management services provided by Respondent ITW prior to the Acquisition Date.
- b. The Hold Separate Business shall have, at the option of the Hold Separate Managers with the approval of the Hold Separate Trustee, the ability to acquire services and products from third parties (including Respondent ITW) unaffiliated with Respondent Graco.
7. Respondent Graco shall provide the Hold Separate Business with sufficient financial and other resources:
- a. as are appropriate in the judgment of the Hold Separate Trustee to operate the Hold Separate Business as it is currently operated (including efforts to generate new business) consistent with the practices of the Hold Separate Business in place prior to the Acquisition;
 - b. to perform all maintenance to, and replacements of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice and current plans;
 - c. to carry on during the Hold Separate Period such capital projects, physical plant improvements, and business plans as are already underway for which all necessary

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regulatory and legal approvals have been obtained, including but not limited to existing or planned renovation or expansion projects; and

- d. to maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Such financial resources to be provided to the Hold Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however,* that, consistent with the purposes of the Decision and Order and in consultation with the Hold Separate Trustee: (i) the Hold Separate Managers may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost; and (ii) to the extent that the Hold Separate Business generates financial funds in excess of financial resource needs, Respondent Graco shall have availability to such excess funds consistent with practices in place for the Hold Separate Business prior to the Acquisition.

8. Respondent Graco shall cause the following individuals that have access to Confidential Business Information of or pertaining to the Hold Separate Business to submit to the Hold Separate Trustee, or Commission staff as appropriate, a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate: (i) the Hold Separate Trustee, (ii) the Hold Separate Managers, (iii) each of Respondent Graco's employees not subject to the Hold Separate, (iv) the Hold Separate Gema Employees, (v) the Hold Separate Gema Shared Employees, and (vi) such additional Persons that the Hold Separate Trustee, in consultation with Commission staff, may identify. These individuals must retain and maintain all

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Confidential Business Information of, or pertaining to, the Hold Separate Business on a confidential basis and, except as is permitted by this Hold Separate, such Persons shall be prohibited from disclosing, providing, discussing; exchanging, circulating, or otherwise furnishing any such information to or with any other Person whose employment involves any of Respondents' businesses or activities other than the Hold Separate Business.

9. Except for the Hold Separate Managers, Hold Separate Business Employees, and support services employees involved in providing services to the Hold Separate Business pursuant to this Hold Separate, and except to the extent provided in this Hold Separate, Respondent Graco shall not permit any other of its employees, officers, or directors to be involved in the operations of the Hold Separate Business.
10. Respondents' employees (other than the Liquid Finishing Business Employees, the Hold Separate Gema Shared Employees, and Graco employees involved in providing support services to the Hold Separate Business pursuant to Paragraph II.C.6.) shall not receive, or have access to, or use or continue to use any Confidential Business Information of the Hold Separate Business except:
 - a. as required by law; and
 - b. to the extent that necessary information is exchanged:
 - i. in the course of consummating the Acquisition in compliance with the terms of the Asset Purchase Agreement;
 - ii. as necessary to effect the divestiture of the Hold Separate Business, including in connection with the marketing of the

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divested assets pursuant to the Consent Agreement, in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;

- iii. in complying with this Hold Separate or the Consent Agreement;
- iv. in overseeing compliance with policies and standards concerning the safety, health, and environmental aspects of the operations of the Hold Separate Business and the integrity of the financial controls of the Hold Separate Business;
- v. in defending legal claims, investigations, or enforcement actions threatened or brought against or related to the Hold Separate Business;
- vi. to lenders and auditors; or
- vii. in obtaining legal advice.

Nor shall the Hold Separate Managers or any Hold Separate Business Employees receive or have access to, or use or continue to use, any Confidential Business Information about Respondents and relating to Respondents' businesses, except such information as is necessary to maintain and operate the Hold Separate Business.

In addition to the foregoing, Respondent Graco may receive aggregate financial and operational information relating to the Hold Separate Business to the extent necessary to allow Respondent Graco to comply with the requirements and obligations of the laws of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, payroll and benefits information, and personnel reports, and to

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comply with this Hold Separate. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

11. Subject to all other provisions in this Hold Separate, the:

- a. Hold Separate Gema Employees (i) may receive or have access to, use or continue to use, or disclose any Confidential Business Information pertaining to the Gema Powder Finishing Business; (ii) shall not seek, receive, have access to, or disclose any Confidential Business Information pertaining to the Liquid Finishing Business; and (iii) shall provide the signed confidentiality statement required by Paragraph II.C.8. of this Hold Separate.
- b. Hold Separate Gema Shared Employees (i) may receive or have access to, use or continue to use, or disclose any Confidential Business Information pertaining to the Gema Powder Finishing Business and to the Liquid Finishing Business; (ii) shall not disclose, provide, discuss, exchange, circulate, or otherwise furnish any such information pertaining to the Liquid Finishing Business to or with any other Person whose employment involves any of Respondent Graco's competing liquid finishing businesses; and (iii) shall provide the signed confidentiality statement required by Paragraph II.C.8. of this Hold Separate.

12. Respondent Graco and the Hold Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Confidential Business Information of the Hold Separate Business, including, but not limited to, the opportunity by the

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Hold Separate Trustee, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate.

13. No later than five (5) days after the Acquisition Date, Respondent Graco shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate.
 14. No later than five (5) days after the date this Hold Separate becomes final, Respondent Graco shall circulate to persons who are employed in Respondent Graco's businesses that compete with the Hold Separate Business, and shall circulate on the Acquisition Date to employees of the Hold Separate Business, a notice of this Hold Separate, in a form approved by the Hold Separate Trustee in consultation with Commission staff.
- D. Until the Divestiture Date, Respondent Graco shall provide each Hold Separate Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Liquid Finishing Business and the Liquid Finishing Business Assets pending divestiture. Such incentives shall include employee benefits, including regularly scheduled raises, bonuses, vesting of retirement benefits (as permitted by law) on the same basis as provided for under the Asset Purchase Agreement for other employees hired by Respondent Graco, and additional incentives as may be necessary to assure the continuation and prevent any diminution of the viability, marketability, and competitiveness of the Liquid Finishing Business Assets until the Divestiture Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate.

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- E. From the date the Respondents execute the Consent Agreement until this Hold Separate terminates, Respondent Graco shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Hold Separate Employee for a position of employment with Respondent Graco. A Prospective Acquirer or the Commission-approved Acquirer shall have the option of offering employment to any Hold Separate Employee. Respondent Graco shall not interfere with the employment by a Prospective Acquirer or the Commission-approved Acquirer of such employee; shall not offer any incentive to such employee to decline employment with a Prospective Acquirer or the Commission-Acquirer or to accept other employment with the Respondent Graco; and shall remove any impediments that may deter such employee from accepting employment with a Prospective Acquirer or the Commission-approved Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employee to be employed by a Prospective Acquirer or the Commission-approved Acquirer.
- F. Respondent Graco shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Hold Separate Employee who has accepted an offer of employment with a Prospective Acquirer or the Commission-approved Acquirer to terminate his or her employment relationship with such Person; *provided, however,* Respondent Graco may:
1. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, so long as these actions are not targeted specifically at any Hold Separate Business Employees; and
 2. hire Hold Separate Business Employees who apply for employment with Respondent Graco, so long as such individuals were not solicited by the Respondent Graco in violation of this paragraph;

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provided further, that this sub-Paragraph shall not prohibit Respondent Graco from making offers of employment to or employing any Hold Separate Business Employees if a Prospective Acquirer or the Commission-approved Acquirer has notified Respondent Graco in writing that a Prospective Acquirer or the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the individual's employment has been terminated by a Prospective Acquirer or the Commission-approved Acquirer.

- G. The purpose of this Hold Separate is to: (1) preserve the assets and businesses within the Hold Separate Business as viable, competitive, and ongoing businesses independent of Respondent Graco until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between the Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) maintain the full economic viability, marketability, and competitiveness of the Hold Separate Business, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets or businesses within the Hold Separate Business except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that Respondent Graco shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent Graco;
- B. Any proposed acquisition, merger, or consolidation of Respondent Graco; or

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- C. Any other change in Respondent Graco, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

IV.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to the relevant Respondent, relating to compliance with this Hold Separate, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the relevant Respondent(s) and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the relevant Respondent(s) related to compliance with the Consent Agreement and/or the Orders, which copying services shall be provided by such Respondent(s) at the request of the authorized representative(s) of the Commission and at the expense of such Respondent(s); and
- B. Without restraint or interference from such Respondent(s), to interview officers, directors, or employees of such Respondent(s), who may have counsel present.

V.

IT IS FURTHER ORDERED that this Hold Separate shall terminate at the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 3.25(f), 16 C.F.R. § 3.25(f); or

Statement of the Commission

- B. The day after the Divestiture Date of the Hold Separate Assets required to be divested pursuant to the Decision and Order.

By the Commission.

Statement of the Federal Trade Commission

On December 15, 2011, the Commission issued an administrative complaint challenging Graco Inc.'s ("Graco") proposed acquisition of the industrial finishing equipment businesses of ITW Finishing LLC and Illinois Tool Works Inc. (collectively "ITW"). The Commission also authorized its staff to file a separate complaint seeking a temporary restraining order and preliminary injunction in federal district court. That federal court proceeding is pending in the United States District Court for the District of Minnesota.

The matter has now been withdrawn from administrative adjudication, and the Commission has voted unanimously to issue an Order to Hold Separate and Maintain Assets ("Hold Separate") to Respondents Graco and ITW, pending consideration of a proposed Agreement Containing Consent Orders ("Consent Agreement") that has been entered into by and among the Respondents and Complaint Counsel supporting the administrative complaint. This will allow Graco to complete the challenged acquisition, subject to and in compliance with the requirements of the Hold Separate issued today.

The Hold Separate applies to all ITW liquid finishing businesses and assets worldwide that Graco is acquiring in the acquisition (collectively, the "Liquid Finishing Business Assets"), including business activities related to the development, manufacture, and sale of products under the Binks, DeVilbiss, Ransburg, and BGK brand names.

Statement of the Commission

The purpose of the Hold Separate is to allow the Commission staff sufficient time fully to review and consider the appropriate scope of divestiture and other relief needed to remedy the anticompetitive effects of Graco's acquisition of the Liquid Finishing Business Assets as alleged in the administrative complaint. During the hold separate period, Graco and ITW have committed to cooperate fully and in good faith with staff's review.

The Commission is not voting to accept or reject the proposed Consent Agreement for public comment at this time. After staff completes its review and submits to the Commission any additional recommendations regarding the proposed Consent Agreement, the Commission may take such action as it deems appropriate, including accepting the Consent Agreement, either as proposed or with modifications, for public comment.

The Commission is able to accept the Hold Separate under conditions that will allow the parties to complete their planned acquisition because both sides appear to be moving closer to a solution that will benefit consumers.

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IN THE MATTER OF

**MCWANE, INC.,
AND
STAR PIPE PRODUCTS, LTD.**

Docket No. 9351. Order, March 29, 2012

Order extending the withdrawal of Respondent Star Pipe Products from adjudication in this matter to facilitate further consideration of a proposed consent agreement.

ORDER

On February 23, 2012, all claims in this matter against Respondent Star Pipe Products, Ltd. (“Respondent Star”) were by order withdrawn from adjudication for the purpose of considering a proposed consent agreement. Under the February 23, 2012 Order, all proceedings in this matter as they pertain to Respondent Star are scheduled to revert to Part 3 adjudicative status at 12:01 a.m. on Saturday, March 31, 2012. To facilitate further consideration of a proposed consent agreement, the Commission has decided to further extend the withdrawal of Respondent Star from adjudication in this matter. Accordingly,

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(c), that all claims against Respondent Star, as set forth in the First Violation Alleged and the Second Violation Alleged in the Complaint will remain withdrawn in their entirety from adjudication until 12:01 a.m. on June 1, 2012, at which time Respondent Star will return to adjudicative status under Part 3 of the Commission Rules of Practice.

By the Commission.

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IN THE MATTER OF

PROMEDICA HEALTH SYSTEM, INC.*Docket No. 9346. Order, April 17, 2012*

Order giving notice of the Commission's intent to disclose *in camera* information served on Complaint Counsel, Counsel for the Defendant, and eight non-party participants. This Notice was served via ten individual Orders, which were identical except for the identity of the individual participant.

NOTICE OF INTENT TO DISCLOSE IN CAMERA INFORMATION

This notice advises counsel for the parties and [] in this matter that, consistent with Section 21(d)(2) of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 57b-2(d)(2), and FTC Rule of Practice 3.45, 16 C.F.R. § 3.45, the Commission intends to place on the public record the information described in the attachment to this notice as part of the Commission's Opinion and Final Order in the above-captioned matter. (Except for notice to Complaint Counsel and to Counsel for Respondent, the attachment to this notice describes only information submitted by the recipient of this notice, and does not describe information submitted by others, who are being served with their own notices and attachments.)

In determining to release information for which [] has requested *in camera* treatment in the course of an adjudicative proceeding, the Commission balances the potential harm [] of disclosure against the substantial interest in making publicly available the key facts and background underlying a Commission decision. *Orkin Exterminating Co.*, 108 F.T.C. 147 (1986). Public knowledge of such information both permits improved evaluation of the fairness and wisdom of a given Commission decision and provides clearer guidance to affected parties. *Id.* See also *RSR Corp.*, 88 F.T.C. 206 (1976); *id.*, 88 F.T.C. 734, 735 (1976). Accordingly, the *in camera* standard requires that there be a "clearly defined, serious injury" [] sufficient to outweigh the public interest in disclosure. See *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). As noted in its *in camera* rule, the Commission reserves the authority to disclose *in camera* material to the extent

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necessary for the proper disposition of the proceeding. 16 C.F.R. § 3.45(a).

The Commission does not believe that public disclosure of the information in question will clearly cause Aetna the kind of substantial competitive harm that would be sufficient to meet the high *in camera* standard. The information to be disclosed is either so minimal in amount, piecemeal in nature, or dated that it would appear to be of little, if any, meaningful, current use to a competitor. Moreover, some of the disclosures constitute general references or statements based on the content of confidential materials, rather than any direct disclosure of such material, which the *in camera* procedures expressly permit. See 16 C.F.R. § 3.45(d). Additionally, some of the information is already disclosed in other publicly available materials. The Commission believes that the potential harm resulting from the limited disclosures described above is outweighed by the value of making public to the greatest extent possible the factual evidence underlying the Commission's Opinion and Order. Such disclosures are directly relevant and material to an understanding of the factual basis for the decision reached in this matter. 15 U.S.C. § 57b-2(d)(2); *Orkin Exterminating*, 108 F.T.C. at 147.

For these reasons, the Commission does not believe that the disclosure of the information at issue would provide sufficient knowledge to competitors so that its release would impose any clearly defined, serious injury [] that would outweigh the public interest in such disclosure. See *Orkin Exterminating Co.*, 108 F.T.C. at 147; *General Foods Corp.*, 95 F.T.C. at 355. The Commission further notes that these disclosures will not affect the ongoing *in camera* status, if any, of the underlying *in camera* exhibits or other protected filings that may be cited in the Commission's Opinion and Order, except for the portions of exhibits or filings disclosed therein. Accordingly, the Commission intends to place its Opinion and Order on the public record, including information described in the attachment to this notice, no sooner than ten days following service of this notice.

By direction of the Commission, Commissioner Ohlhausen not participating.

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IN THE MATTER OF

CARDINAL HEALTH, INC.

Docket No. C-4339. Order, April 18, 2012

Letter approving the divestiture of three former Cardinal nuclear pharmacies to Patient Care Infusion, LLC.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

David P. Wales, Esquire
Jones Day

*Re: In the Matter of Cardinal Health, Inc.,
FTC File No. 091-0136; Docket No. C-4339*

Dear Mr. Wales:

This letter responds to the *Petition of Cardinal Health, Inc. for Approval of Proposed Divestiture* (“Petition”) filed by Cardinal Health, Inc. (“Cardinal”) on February 17, 2012, requesting that the Commission approve Cardinal’s proposed divestiture of three former Cardinal nuclear pharmacies to Patient Care Infusion, LLC (“PCI”) pursuant to the Decision and Order in this matter. The Petition was placed on the public record for comments until March 26, 2012 and one comment was received.

After consideration of the proposed divestiture as set forth in the Petition and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with the Petition, and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Ohlhausen not participating.

Interlocutory Orders, Etc.

IN THE MATTER OF

**MCWANE, INC.,
AND
STAR PIPE PRODUCTS, LTD.**

Docket No. 9351. Order, May 21, 2012

Order permanently withdrawing Respondent Star Pipe Products from adjudication in this matter because the Commission has accorded final approval to the Decision and Order against Respondent Star Pipe Products.

**ORDER WITHDRAWING RESPONDENT STAR PIPE PRODUCTS, LTD.
FROM ADJUDICATION**

On February 23, 2012, all claims in this matter against Respondent Star Pipe Products, Ltd. (“Respondent Star”) were by Commission Order withdrawn from adjudication for the purpose of considering a proposed consent agreement, and that withdrawal was extended until June 1, 2012, by Commission Order dated March 29, 2012. The Commission has now accorded final approval to the Decision and Order against Respondent Star, and has therefore determined to permanently withdraw from adjudication the proceedings in this matter as they pertain to Respondent Star. Accordingly,

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(c), that all claims against Respondent Star, as set forth in the First Violation Alleged and the Second Violation Alleged in the Complaint be, and they hereby are, permanently withdrawn from adjudication; and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(e) of the Commission Rules of Practice, 16 C.F.R. § 3.25(e), that all claims against Respondent McWane, Inc. in this matter will remain in an adjudicative status.

By the Commission, Commissioner Ohlhausen not participating.

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IN THE MATTER OF

**AMERIGAS PROPANE, L.P.,
AMERIGAS PROPANE, INC.,
ENERGY TRANSFER PARTNERS, L.P.,
AND
ENERGY TRANSFER PARTNERS GP, L.P.**

Docket No. C-4346. Order, May 31, 2012

Letter approving the divestiture of Heritage Propane Express to JP Energy Partners, LP.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Dionne C. Lomax
Vinson & Elkins LLP

*Re: AmeriGas Partners, L.P./Energy Transfer Partners L.P.,
Docket No. C-4346*

Dear Ms. Lomax:

This is in reference to the Petition of Energy Transfer Partners, L.P. and Energy Transfer Partners, GP, L.P. for Approval of the Proposed Divestiture of Heritage Propane Express to JP Energy Partners, LP (“the Petition”). Pursuant to the Decision and Order in Docket No. C-4346, Energy Transfer Partners requests prior Commission approval of its proposal to sell its Heritage Propane Express business and related assets to JP Energy Partners.

After consideration of Energy Transfer Partner’s Petition and other available information, the Commission has determined to approve the proposed sale as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by Energy Transfer Partners and JP Energy Partners in connection with Energy Transfer Partner’s Application and has assumed them to be accurate and complete.

Interlocutory Orders, Etc.

By direction of the Commission, Commissioner Ohlhausen
not participating.

RESPONSES TO PETITIONS TO QUASH OR
LIMIT COMPULSORY PROCESS

**WYNDHAM WORLDWIDE CORPORATION,
WYNDHAM HOTEL GROUP, LLC,
WYNDHAM HOTELS & RESORTS, LLC,
AND
WYNDHAM HOTEL MANAGEMENT, INC.**

FTC File No. 102 3142 – Decision, April 11, 2012

RESPONSE TO WYNDHAM HOTELS AND RESORTS, LLC AND
WYNDHAM WORLDWIDE CORPORATION’S PETITION TO QUASH OR
LIMIT CIVIL INVESTIGATIVE DEMAND DATED DECEMBER 8, 2011

Dear Messrs. Silber and Meal:

On January 20, 2012, the Federal Trade Commission (“FTC” or “Commission”) received the petition filed by Wyndham Hotels and Resorts (“WHR”) and its parent company Wyndham Worldwide Corporation (“WWC,” and collectively with WHR, “Wyndham,” or “Petitioners”). This letter advises you of the Commission’s disposition of the petition, effected through this ruling by Commissioner Julie Brill, acting as the Commission’s delegate.¹

For the reasons explained below, the petition is granted as to modifying the definition of personal information and one CID Instruction and denied in all other respects. The documents and information required by the CID must now be produced on or before April 23, 2012, consistent with modifications to the CID definitions and instructions described below. You have the right to request review of this ruling by the full Commission.² Any such request must be filed with the Secretary of the Commission

¹ See 16 C.F.R. § 2.7(d)(4).

² 16 C.F.R. § 2.7(f).

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within three days after service of this letter ruling.³ The timely filing of a request for review of this ruling by the full Commission does not stay the return dates established by this ruling.⁴

I. INTRODUCTION

In early 2010, WHR disclosed that an intruder or intruders had gained access to its computer networks and to networks belonging to independently-owned Wyndham-branded hotels. Later press reports indicated that breaches of its computer network occurred on three occasions between July 2008 and January 2010.⁵ Among the information compromised in these repeated breaches were payment cards for more than 619,000 people.⁶ The exposure of this information can result in harms including identity theft, financial fraud, and the basic inconvenience of replacing stolen card numbers.⁷

In response, on April 8, 2010, FTC staff commenced an investigation and delivered to WHR a voluntary request for information (“Access Letter”) that included both interrogatories and document requests. Though the letter was addressed to an official at WHR, the letter defined “Wyndham” to include not only WHR but also “its parents, subsidiaries, affiliates, franchisees, hotels managed by franchisees that use the Wyndham trade name, and agents.”⁸ After discussions, staff and WHR agreed to limit an initial production to two custodians, although

³ *Id.* This letter ruling is being delivered by e-mail and courier delivery. The e-mail copy is provided as a courtesy, and the deadline by which an appeal to the full Commission would have to be filed should be calculated from the date on which you receive the original letter by courier delivery.

⁴ *Id.*

⁵ Pet., Exh. 3, at 1 n.1.

⁶ See, e.g., Pet. Exh. 5, at 4 (proposed complaint).

⁷ See, e.g., *Data Breaches and Identity Theft: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 3-4, 10 (2005) (statement of Deborah Platt Majoras, Chairman of the Federal Trade Commission).

⁸ Pet., Exh. 3, at 2.

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staff reserved the right to identify additional custodians based on the materials produced. The letter called for a response by May 10, 2010, but WHR did not respond to the interrogatories until July 19, 2010, and did not complete production of documents until October 2010.

Upon review, staff identified deficiencies in the production, most notably that WHR produced a large number of completely irrelevant and nonresponsive materials. WHR also failed to produce information that was obviously relevant to the investigation, such as supporting documents and information referenced in forensic reports that the company did provide.

In November 2010, Commission staff informed WHR of these deficiencies and the need to obtain documents from additional custodians. During these negotiations, WHR expressed an interest in pursuing settlement. The company stated, however, that it could not respond to the Access Letter and negotiate settlement simultaneously, and it asked staff to suspend the document collection. In January 2011, staff agreed to do so, but informed WHR that it reserved the right to demand resumption of document collection and to pursue additional custodians should settlement discussions fail.

Staff pursued settlement discussions with WHR over the next nine months. Staff and WHR were unable to reach settlement terms, and on September 19, 2011, WHR informed staff it would not enter into a settlement on the terms staff proposed.

Accordingly, in September 2011, staff informed WHR that it would resume the investigation. Soon thereafter, WHR agreed to provide a certification as to the completeness of the materials it had produced to date in response to the Access Letter. WHR provided this certification on December 1, 2011.

The FTC issued a CID to WHR on December 8, 2011 pursuant to Resolution P954807, a “blanket resolution” issued by the Commission on January 3, 2008. This Resolution authorizes FTC staff to use compulsory process in investigations

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[t]o determine whether unnamed persons, partnerships, corporations, or others are engaged in, or may have engaged in, deceptive or unfair acts or practices related to consumer privacy and/or data security, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such investigation shall, in addition, determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.⁹

II. ANALYSIS

A. The CID was lawfully issued and Petitioners have sufficient notice of the nature and scope of the investigation.

Petitioners' principal objection, which they restate in various ways, is that the CID and its authorizing resolution are deficient for failing to inform them sufficiently of the nature and scope of the investigation. We find this complaint not credible, coming as it does nearly two years after the investigation commenced. As the petition acknowledges, there have been substantial ongoing communications since FTC staff first contacted Petitioners in April 2010. As Petitioners readily admit, they have already reviewed and produced over one million pages of documents at significant expense; presumably, Petitioners did not do so without some understanding of why those documents had been requested.¹⁰ Moreover, Petitioners admit that the "CID did not come as a surprise[.]" because they undertook to certify their prior productions in anticipation.¹¹ Indeed, staff presented Petitioners with a draft complaint, Petitioners responded with a 60-page "white paper," and both parties have engaged in detailed and lengthy settlement negotiations.¹² In light of these facts, we find

⁹ Pet., Exh. 1.

¹⁰ Pet., at 35.

¹¹ *Id.*, at 10.

¹² *Id.*, at 7-9 and Exh. 7.

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that the nature and scope of the investigation are quite clear to Petitioners and consequently that their claim of insufficient notice is specious.¹³

More important, it is well-established that a CID is proper if it “state[s] the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.”¹⁴ In the present matter, we find that the authorizing resolution adequately delineates the purpose and scope of the investigation: “[t]o determine whether unnamed persons, partnerships; corporations, or others are engaged in, or may have engaged in, deceptive or unfair acts or practices *related to consumer privacy and/or data security*, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended” (emphasis added). The description of the subject matter of the investigation, coupled with a citation to the statutory prohibition on “unfair or deceptive acts or practices” satisfies that requirement.¹⁵ This has put WHR on notice as to the purpose, scope, and legal basis for the Commission’s investigation. There is no need to either state the

¹³ Cf. *Assocs. First Capital Corp.*, 127 F.T.C. 910, 915 (1999) (“In sum, the notice provided in the compulsory process resolutions, CIDs, and other communications with Petitioners more than meets the Commission’s obligation of providing notice of the conduct and the potential statutory violations under investigation.”).

¹⁴ 15 U.S.C. § 57b-1(c)(2). See also 16 C.F.R. § 2.6.

¹⁵ *FTC v. O’Connell Assoc.*, 828 F. Supp. 165, 170-71 (E.D.N.Y. 1993) (quoting *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)); see also *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980). Petitioners attempt to distinguish *O’Connell* on the grounds that the resolution in that case was an omnibus resolution, not a blanket one, and it was used on the basis of a tip to authorize compulsory process to a new recipient as part of an ongoing investigation. The issue of whether a resolution is blanket or omnibus is not relevant because either is an acceptable form of resolution. Furthermore, the resolution upheld in *O’Connell* stated only that the nature and scope of that investigation involved Section 5 and the Fair Credit Reporting Act. *O’Connell*, 828 F. Supp. at 167 & n.1. This description is at least as specific as “consumer privacy and/or data security,” the description at issue here. Finally, just as in *O’Connell*, the CID here was issued as part of a pre-existing, ongoing investigation. In fact, considering the history of the investigation before the CID was issued, Petitioners here had far greater information about what staff was investigating than did *O’Connell Associates*.

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purpose of an investigation with greater specificity, or tie the conduct under investigation to any particular theory of violation.¹⁶

Moreover, contrary to Petitioners' contention, the resolution is not invalid because it is a so-called "blanket resolution." According to Petitioners, Sections 2.4 and 2.7 of the Commission's Rules of Practice, 16 C.F.R. §§ 2.4, 2.7, require resolutions to be tailored to the facts of each investigation.¹⁷ But no such requirement arises under the Commission's Rules. Rule 2.4 states that the Commission "may, in any matter under investigation adopt a resolution authorizing the use of any or all of the compulsory processes provided for by law."¹⁸ That provision does not require a separate investigational resolution for each investigation, as Petitioners seem to suggest.¹⁹ Likewise, Rule 2.7 simply states that the Commission may, pursuant to a resolution, issue compulsory process for documents or testimony.²⁰ This rule does not address the contents or form of

¹⁶ *Invention Submission*, 965 F.2d at 1090; *FTC v. National Claims Serv., Inc.*, No. S 98-283 FCD DAD, 1999 WL 819640, at *2 (E.D. Cal. Feb. 9, 1999) (citing *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 477 (9th Cir. 1988)).

¹⁷ Pet., at 16-18 (citing 16 C.F.R. §§ 2.4, 2.7).

¹⁸ 16 C.F.R. § 2.4.

¹⁹ The narrowly tailored resolution that Petitioners desire is known as a "special resolution," and is one of three possible types suggested for FTC staff in the Commission's Operating Manual. See FTC Operating Manual, Chapter 3.3.6.7.4.1 to 3.3.6.7.4.4. The Commission has repeatedly rejected the proposition that such specificity is required in every investigation. See, e.g., *D. R. Horton, Inc.*, Nos. 102-3050, 102-3051, at 4 (July 12, 2010) ("The Commission is not required to identify to Petitioners the specific acts or practices under investigation"), available at <http://www.ftc.gov/os/quash/100712hortonresponse.pdf>; *Dr. William V. Judy*, No. X000069, at 4-5 (Oct. 11, 2002) (sustaining validity of CIDs issued pursuant to an omnibus resolution), available at <http://www.ftc.gov/os/quash/021011confirmanthonyltr.pdf>; *In re Assocs. First Capital Corp.*, 127 F.T.C. at 914 ("[R]ecitation of statutory authorities provides adequate notice to Petitioner as to [the] purposes of the investigation."). To the extent that courts have considered the issue, they also have rejected the proposition that the Commission is so constrained. *FTC v. National Claims Serv., Inc.*, No. S 98-283 FCD DAD, 1999 WL 819640, at *2; *O'Connell*, 828 F. Supp. at 170-71.

²⁰ 16 C.F.R. § 2.7(a).

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the authorizing resolution. Accordingly, the resolution in this case satisfies the Commission's Rules.²¹

Petitioners also challenge the resolution as insufficiently specific in light of the legislative history of the Federal Trade Commission Improvements Act of 1980, which added a new Section 20 of the FTC Act.²² Petitioners allege that this legislative history shows that Congress intended the FTC to provide more than “a vague description of the general subject matter of the inquiry . . .[.]”²³ and that the resolution here does not meet Congress's expectations.

We reject this argument for the same reason we rejected Petitioners' other arguments: the Commission's resolution satisfies the requirements of the statute.²⁴ It informs Petitioners of the nature of the conduct constituting the alleged violation—unfair or deceptive acts or practices involving consumer privacy and/or data security—and it identifies the applicable provision of law—Section 5 of the FTC Act. Moreover, even as Congress expressed its desire for specific notice, it nonetheless cautioned against reading too much into Section 20: “[T]his requirement is

²¹ Petitioners also contend that the resolution fails to conform to the FTC's Operating Manual. Pet., at 17-18. However, the sufficiency of staff's compliance with the Operating Manual is of no concern to Petitioners because the Operating Manual confers no rights on them. See FTC Operating Manual, Chapter 1.1.1 (“Failure by the staff or the Commission to adhere to procedures outlined by this Operating Manual does not constitute a violation of the Rules of Practice nor does it serve as a basis for nullifying any action of the Commission or the staff.”) See also *FTC v. Nat'l Bus. Consultants, Inc.*, 1990 U.S. Dist. LEXIS 3105, 1990-1 Trade Cas. (CCH) & 68,984, at *29 (E.D. La. 1990) (reading Chapter 1.1.1 to find that the Operating Manual was “not binding”).

²² Pet., at 18, 20-21, 24.

²³ S. Rep. No. 96-500, at 23 (1979).

²⁴ See 15 U.S.C. 57b-1(c)(2) (“Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.”); see also *O'Connell*, 828 F. Supp. at 170-71; *Dr. William V. Judy*, No. X000069, at 4-5 (rejecting a challenge to a resolution based on the legislative history of Section 20), available at <http://www.ftc.gov/os/quash/021011confirmanthonyltr.pdf>.

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not intended to be overly strict so as to defeat the purpose of the act or to breed litigation and encourage the parties investigated to challenge the sufficiency of the notice.”²⁵ We find that the resolution meets all legal requirements.²⁶

Finally, Petitioners claim that the CID exceeded the FTC’s jurisdiction by requesting information about employees, a group it contends is distinct from “consumers” for purposes of Section 5. Pet., at 28-32. We need not entertain this claim because challenges to the FTC’s jurisdiction or regulatory coverage are not properly raised through challenges to investigatory process. See, e.g., *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (citing *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 5 (1st Cir. 1996)). However, we choose to adopt this modification because staff already offered to modify the CID definitions to exclude employee information. Pet., Exh. 11, at 3.

B. The CID is not overbroad, unduly burdensome, or indefinite.

Petitioners also advance a series of arguments about the CID specifications, claiming that the CID is overbroad and asks for information not reasonably related to the investigation, in particular, information related to WHR’s corporate parent WWC and its affiliates.²⁷

An administrative subpoena is valid if the requested information is “reasonably relevant” to the purposes of the investigation.²⁸ Reasonable relevance is defined broadly in agency law enforcement investigations. As the D.C. Circuit has stated, “The standard for judging relevancy in an investigatory

²⁵ S. Rep. No. 96-500, at 23 (1979).

²⁶ *Ken Roberts Co.*, 276 F.3d.

²⁷ Pet., at 33-36.

²⁸ *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1516 (D.C. Cir. 1993) (citing *Invention Submission Corp.*, 965 F.2d at 1089; *FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977)).

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proceeding is more relaxed than in an adjudicatory one The requested material, therefore, need only be relevant to the *investigation*—the boundary of which may be defined quite generally, as it was in the Commission’s resolution here.”²⁹ Courts thus place the burden on Petitioners to show that the Commission’s determination is “obviously wrong” and that the information is irrelevant.³⁰

Here, as Petitioners admit, Commission staff provided an explanation of the relevance of these requests.³¹ More generally, staff’s investigation focuses on a series of breaches of WHR’s data security processes that are managed by other Wyndham entities.³² In light of this, CID specifications that probe the details of the information security systems developed by Petitioners and their affiliates are relevant to this investigation. Petitioners have not met their burden of showing that this information is irrelevant, or that the Commission’s request for it is “obviously wrong.”

Petitioners further claim the CID is unduly burdensome, for the following reasons: (1) they have already spent over \$5 million in responding, including producing over one million pages, and staff should now have enough information; (2) responding to the interrogatories will require six months and significant additional costs; (3) responding to the document requests that ask for “all documents” relating to a given subject will require about 10 weeks and \$1 million to produce documents from an additional three custodians; and (4) responding to the document requests that ask for “documents sufficient to identify” a given subject are “hugely burdensome” and will require 6 months and \$2.75 million to produce documents from the same three custodians. In sum,

²⁹ *Invention Submission Corp.*, 965 F.2d at 1090 (emphasis in original; internal citations omitted) (citing *Carter*, 636 F.2d at 787-88, and *Texaco*, 555 F.2d at 874 & n. 26).

³⁰ *Invention Submission Corp.*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 882) (“The burden of showing that the request is unreasonable is on the subpoenaed party.”); *Texaco*, 555 F.2d at 877 n.32. *Accord FTC v. Church & Dwight Co., Inc.*, 756 F. Supp. 2d 81, 85 (D.D.C. 2010).

³¹ Pet., at 33 (citing Pet., Ex. 11, at 2).

³² Pet., Exh. 11, at 2.

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Petitioners claim that responding to the CID will require an additional \$3.75 million, on top of what they have spent to date, and 1 to 2 years' additional time.³³

Of course, the recipient of a CID must expect to incur some burden in responding to a CID.³⁴ The responsibility of establishing undue burden rests on Petitioners,³⁵ who must show that compliance threatens to seriously impair or unduly disrupt the normal operations of their business.³⁶ Likewise, a CID is not unreasonably broad where the breadth of the inquiry is in large part attributable to the magnitude or complexity of the subject's business operations.³⁷ Petitioners' estimate is not insubstantial, but we find that they have not sustained their burden.

First, Petitioners' estimate is neither specific nor detailed and does not account for factors that may reduce the cost and time of production. For one, Petitioners have not sufficiently addressed the availability of e-discovery technology, such as advanced analytical tools and predictive coding, to enable fast and efficient search, retrieval, and production of electronically stored information (ESI).³⁸ While Petitioners do tally the potential costs

³³ Pet., at 36-39; *see also* Pet., Exh. 4, at 2-4.

³⁴ *See FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *Texaco*, 555 F.2d at 882.

³⁵ *See Texaco*, 555 F.2d at 882; *In re Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998). *See also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 476 (4th Cir. 1986); *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (appellants have the burden to show unreasonableness of the Commission's demand and make a record to show the "measure of their grievance rather than [asking the court] to assume it") (citing *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 217-18 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632, 654 (1950)).

³⁶ *See Shaffner*, 626 F.2d at 38; *Texaco*, 555 F.2d at 882.

³⁷ *See Texaco*, 555 F.2d at 882.

³⁸ *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (Sheindlin, J.) ("Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying."); John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, NEW YORK

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of an ESI production and refer to a vendor, these costs are unsupported by any detailed breakdown or itemization.³⁹

Petitioners' estimate also does not account for the effect of Instruction K, which permits Petitioners to identify, without having to reproduce, documents that were previously provided to the Commission.⁴⁰ To the extent that Petitioners' cost estimate includes production of duplicate materials, Instruction K permits Petitioners to avoid this expense and reduces the potential burden. Though Petitioners respond that staff, and not they, should bear the burden of avoiding duplicative document requests,⁴¹ Petitioners are the ones with the most information about their document collections and productions to date. In fact, Petitioners have already identified the areas of overlap between the Access Letter and the CID.⁴² The Access Letter instructed Petitioners to identify which of the documents produced answered the

TIMES, Mar. 5, 2011, at A1, *available at*, <http://www.nytimes.com/2011/03/05/science/05legal.html>).

³⁹ Pet., Exh. 4, at 2-4. The lack of factual support for the claim of undue burden is underscored by the fact that the estimated costs appear out of proportion to the number of custodians involved. According to the declaration from Korin Neff, WHR spent approximately \$2.5 million *per custodian* for its first production, and now estimates that it will spend approximately another \$3.75 million for three custodians, or \$1.25 million *per custodian*, in response to the CID. *Id.* One explanation for the cost of the production to date may be the fact that WHR produced a large number of irrelevant and nonresponsive materials, including, among others, multiple copies of third party software licenses, in various languages; numerous magazines and newsletters not specific to WHR; and, human resources materials. This may explain why WHR could generate more than one million pages from only two individuals.

⁴⁰ Pet., Exh. 1, at 7 (“K. Documents that may be responsive to more than one specification of this CID need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission.”).

⁴¹ Pet., at 39.

⁴² See Pet., Exh. 2, at Exhs. C, D. As Petitioners point out, WHR has already responded to 42 out of the 89 interrogatories and subparts in the CID, and 25 of the 38 document requests and subparts. Pet., Exh. 2, at 2.

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specifications in the Access Letter.⁴³ It is not unduly burdensome for Petitioners to compare their Access Letter response with the CID to identify duplicates.

Second, Petitioners have not established that this will seriously disrupt their operations. As expressed in *Texaco* and other key cases, some cost to recipients of process is expected, and the burden posed by this cost is evaluated in relation to the size and complexity of a recipient's business operations. In *Texaco*, for instance, the court affirmed enforcement of a subpoena that the company claimed would require 62 work-years and \$4 million for compliance.⁴⁴ As in that case, it appears that the burden here may be a consequence of size—in 2010, Wyndham had an annual revenue of more than \$3.8 billion—as well as the complexity of the corporate structure Wyndham has adopted.⁴⁵ Thus, full compliance with the CID, even if it were to reach the estimates included in the petition, is unlikely to “pose a threat to the normal operation of” Wyndham “considering [its] size.”⁴⁶

Third, Petitioners have claimed that the requests that ask for documents “sufficient to describe” the subject of the request present a “huge cost” and “extreme burden,” particularly because the companies do not keep records in the manner called for.⁴⁷ It is unclear why a request that calls for documents “sufficient to describe” should be more burdensome than a request that calls for “all documents”; by definition, documents “sufficient to describe” should involve fewer than “all documents.” The fact that Petitioners do not keep records in the manner that matches the request is not unusual and by itself does not present a basis for quashing these requests. Because staff often does not know how a

⁴³ See Pet., Exh. 3, at 2 (“Please Bates stamp your response and itemize it according to the numbered paragraphs in this letter.”).

⁴⁴ *Texaco*, 555 F.2d at 922 (Wilkey, J., dissenting).

⁴⁵ Wyndham Worldwide Corp., Annual Report (Form 10-K), at 34 (Feb. 22, 2011).

⁴⁶ *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1970).

⁴⁷ Pet., at 38-39. See also Pet., Exh. 10, at 6.

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CID recipient keeps its records, staff crafts its requests broadly, but provides a recipient flexibility in responding by allowing the recipient to produce those documents “sufficient to describe.”

Fourth, the fact that Petitioners have already produced information to staff does not establish either that staff has sufficient information, or that further requests are unduly burdensome. The obligation is on Petitioners to show that the CID is unduly burdensome, not on staff to show that the CID is necessary.⁴⁸

Fifth, we find that Petitioners have not sufficiently availed themselves of the meet-and-confer process required by the FTC’s Rules of Practice and the CID itself.⁴⁹ As we have previously said, this meet-and-confer requirement “provides a mechanism for discussing adjustment and scheduling issues and resolving disputes in an efficient manner.”⁵⁰ Thus, the meet-and-confer requirements offer a critical opportunity for the recipient of a CID to engage with staff in a meaningful discussion aimed at reducing the burden of compliance. Here, Petitioners did not engage in a good faith exchange with staff intended to identify and discuss issues of burden.⁵¹ Instead, Petitioners raised many of the same arguments found in this petition, often verbatim, and did not respond to legitimate requests from staff for specific proposals for narrowing or limiting the CID’s scope. While staff was apparently willing to compromise on several issues, Petitioners demanded blanket and arbitrary caps on the number of document requests, interrogatories, and custodians. Petitioners cannot claim undue burden when they themselves undertook an inadequate meet-and-confer with staff.

⁴⁸ Cf. *United States v. AT&T, Inc.*, No. 1:11-cv-01560, 2011 WL 5347178, at *6 (D.D.C. Nov. 6, 2011) (“There is no requirement that AT&T demonstrate to Sprint’s satisfaction that the legal theories AT&T wishes to consider require documents beyond those [Sprint previously] supplied to DOJ . . .”).

⁴⁹ 16 C.F.R. § 2.7(d)(2); Pet. Exh. 1, at 5.

⁵⁰ *Firefighters Charitable Found., Inc.*, FTC File No. 102-3023, at 3 (Sept. 23, 2010).

⁵¹ See Pet. Exhs. 9-15.

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Despite Petitioners' failure to carry their burden, we conclude that some modifications to the CID instructions may lessen Petitioners' costs of compliance. Accordingly, we amend the instructions to permit Petitioners to submit documents in lieu of interrogatories. This modification will allow Petitioners to avoid the time and expense of preparing interrogatory responses. In addition, to the extent that a document may be responsive to multiple interrogatories or document requests, Petitioners need not produce multiple copies but, pursuant to Instruction K, discussed above, may produce one copy of a relevant document, and then indicate each specification or interrogatory to which the document is responsive. This should mitigate the costs of compliance.

Finally, Petitioners argue that the CID is indefinite. This claim appears to restate several of Petitioners' other objections, including their claim of a lack of notice of the purpose and scope of the investigation, overbreadth, and burden.⁵² For the reasons discussed above, this claim of indefiniteness is without basis.

C. The CID was not issued for an improper purpose.

Petitioners claim that the size and timing of the CID shows that its true purposes were either to coerce settlement, or to obtain discovery outside of the rules of civil procedure. The facts of the investigation refute this conclusion. Mid-investigation, Petitioners expressed an interest in exploring settlement talks as a means of resolving the matter short of a full-blown investigation and consequent possible law enforcement action. At Petitioners' request, staff voluntarily allowed them to suspend their production, in order to reduce the burden on Petitioners. But staff also advised Petitioners that they would resume their investigation should settlement talks fail. And, as Petitioners admit, when the CID was issued, it was no surprise.⁵³ In light of these circumstances, there is no evidence of improper purpose, either to coerce settlement or to obtain information outside of the information necessary to complete the investigation.

⁵² Pet., at 39-40.

⁵³ *Id.*, at 10.

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III. CONCLUSION AND ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Wyndham Hotels & Resorts and Wyndham Worldwide Corporation to Quash, or Alternatively, Limit Civil Investigative Demand be, and it hereby is, **DENIED IN PART AND GRANTED IN PART.**

IT IS FURTHER ORDERED THAT the Definition T, “Personal information,” be amended to exclude employee information as follows:

“**Personal information**” shall mean individually identifiable from or about an individual consumer, including, but not limited to: (1) first and last name; (2) home or other physical address, including street name and name of city or town; (3) e-mail address or other online contact information, such as instant messenger user identifier or a screen name; (4) telephone number; (5) date of birth; (6) government-issued identification number, such as a driver’s license, military identification, passport, or Social Security number, or other personal identification number; (7) financial information, including but not limited to: investment account information; income tax information; insurance policy information; checking account information; and **payment card** or check-cashing card information, including card number, expiration date, security number (such as card verification value), information stored on the magnetic stripe of the card, and personal identification number; (8) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual consumer; or (9) any information from or about an individual consumer that is combined with any of (1) through (8) above.

IT IS FURTHER ORDERED THAT the CID Instructions be modified to include the following instruction:

“**Q. Submission of Documents in lieu of Interrogatory Answers:** Previously existing documents

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that contain the information requested in any written Interrogatory may be submitted as an answer to the Interrogatory. In lieu of identifying documents as requested in any Interrogatory, you may, at your option, submit true copies of the documents responsive to the Interrogatory, provided that you clearly indicate the specific Interrogatory to which such documents are responsive.”

IT IS FURTHER ORDERED THAT all other responses to the specifications in the Civil Investigative Demand to Wyndham Hotels & Resorts and Wyndham Worldwide Corporation must now be produced on or before April 23, 2012.

By direction of the Commission.

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LABMD, INC.*FTC File No. 102 3099 – Decision, April 20, 2012*RESPONSE TO LABMD, INC.'S AND ITS PRESIDENT, MICHAEL J.
DAUGHERTY'S PETITIONS TO LIMIT OR QUASH THE CIVIL
INVESTIGATIVE DEMANDS DATED DECEMBER 21, 2011

Dear Ms. Callaway, Ms. Grigorian, and Mr. Dayal:

On January 10, 2012, the Federal Trade Commission (“FTC” or “Commission”) received the above Petitions filed by LabMD, Inc. (“LabMD”) and its President, Michael J. Daugherty (collectively, “Petitioners”). This letter advises you of the Commission’s disposition of the Petitions, effected through this ruling by Commissioner Julie Brill, acting as the Commission’s delegate.¹

For the reasons explained below, the Petitions are denied. You may request review of this ruling by the full Commission.² Any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling.³ The timely filing of a request for review by the full Commission shall not stay the return dates established by this ruling.⁴

I. INTRODUCTION

The FTC commenced its investigation into the adequacy of LabMD’s information security practices in January 2010, after a LabMD file had been discovered on a peer-to-peer (“P2P”) file

¹ See 16 C.F.R. § 2.7(d)(4).

² 16 C.F.R. § 2.7(f).

³ *Id.* This ruling is being delivered by e-mail and courier delivery. The e-mail copy is provided as a courtesy, and the deadline by which an appeal to the full Commission would have to be filed should be calculated from the date on which you receive the original letter by courier delivery.

⁴ *Id.*

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sharing network.⁵ The file, which Petitioners call the “1,718 File” because it is 1,718 pages long, is a spreadsheet of health insurance billing information for uropathology and microbiology medical tests of around 9,000 patients. It contains highly sensitive information about these consumers, including:

- Name;
- Social Security Number;
- Date of birth;
- Health insurance provider and policy number; and
- Standardized medical treatment codes.⁶

Such information can be misused to harm consumers.

The purpose of the investigation is to determine whether Petitioners violated the FTC Act by engaging in deceptive or unfair acts or practices relating to privacy or information security. The inquiry is authorized by Resolution File No. P954807, which provides for the use of compulsory process in investigations of potential Section 5 violations involving “consumer privacy and/or data security.”

The investigation began with voluntary information requests for documents and information about LabMD’s information security policies, procedures, practices, and training generally, as well as information about security incidents, including, but not limited to, the discovery of the 1,718 File on P2P networks. In response, LabMD produced hundreds of pages of documents, including supplements and responses to follow-up questions. To complete the investigation, staff requested issuance of CIDs to LabMD and Michael J. Daugherty, LabMD’s President.

⁵ P2P programs allow users to form networks with others using the same or a compatible P2P program. Such programs allow users to locate and retrieve files of interest to them that are stored on computers of other users on the networks.

⁶ LabMD Pet., Ex. C, at Fig. 4. Because the LabMD and Daugherty Petitions make the same arguments (the Petitions differ only in details about the submitter), we generally cite only to LabMD’s Petition.

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The Commission issued the CIDs on December 21, 2011. Both require testimony relating to information security policies, practices, training, and procedures. They also include a limited number of interrogatories that require Petitioners to identify documents used by the witnesses to prepare for their testimony.⁷ The LabMD CID also includes a single document request asking for only those documents that were both identified in response to the CID's interrogatories and had not been previously produced to staff.⁸

Petitioners seek to quash or limit the CIDs because, they claim, the CIDs "appear to be premised on" the download of the 1,718 File (hereinafter, the "File disclosure").⁹ Their principal objection relates to the merits of the investigation. In particular, they contend (without citing any authority) that the Commission must have a "justifiable" belief that a law violation has occurred before it can issue CIDs, and that the File disclosure cannot support such a belief. They claim that the File disclosure occurred not because LabMD failed to implement reasonable and appropriate security measures, but because the company was the victim of an illegal intrusion conducted by Tiversa (a P2P information technology and investigation services company) and Dartmouth College faculty using Tiversa's powerful P2P searching technology.¹⁰ Further, Petitioners argue that no actual harm to consumers resulted from the File disclosure.¹¹ Accordingly, they contend that investigating either the File disclosure or the adequacy of LabMD's security practices is

⁷ LabMD Pet., Ex. A.

⁸ LabMD Pet., Ex. A.

⁹ LabMD Pet., at 1.

¹⁰ Petitioners claim that in the course of a Department of Homeland Security-funded research project, Professor M. Eric Johnson of Dartmouth College's Tuck School of Business and Tiversa used Tiversa's P2P searching technology to search for and then download the file. LabMD Pet., at 3-4, 7, & Ex. F, at 10-12.

¹¹ The Petitions claim that there is no allegation of actual consumer injury from the File disclosure. LabMD Pet., at 7.

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improper because no law violation can have occurred, and that the CIDs therefore should be quashed.¹²

As discussed below, these arguments are undermined by: (1) the obvious point that an investigation necessarily must precede assessment of whether there is reason to believe a law violation may have occurred (in any matter); (2) the scope of the authorizing resolution; and (3) the language of the FTC Act. The resolution authorizes use of compulsory process in an investigation to determine whether Petitioners engaged in deceptive or unfair practices related to privacy or security. Petitioners' focus on the File disclosure is misplaced – it may bear on the adequacy of LabMD's security practices under the FTC Act but does not establish the investigation's scope under the resolution.¹³ Further, in such an investigation Section 5 directs the Commission to consider whether security practices are unfair because they create a sufficient risk of harm, even if no harm has been reported.

Petitioners make two additional arguments in support of their Petitions. First, they argue that the resolution authorizing the CIDs did not provide them with sufficient notice of the purpose and scope of the investigation. Second, they argue that the FTC is without jurisdiction to pursue this investigation. Both of these additional arguments are equally without merit.

II. ANALYSIS

A. The applicable legal standards.

Compulsory process such as a CID is proper if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant to the

¹² LabMD Pet., at 7-8.

¹³ See, e.g., *CVS Caremark Corp.*, No. 072-3119, at 4 (Dec. 3, 2008) (confirming that the scope of an investigation authorized by Resolution P954807 properly included all of CVS' "consumer privacy and data security practices" (including its computer security practices) and could not be limited (as the company argued) to just known incidents of unauthorized disposal of paper documents in dumpsters).

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inquiry, as that inquiry is defined by the investigatory resolution.¹⁴ Agencies have wide latitude to determine what information is relevant to their law enforcement investigations and are not required to have “a justifiable belief that wrongdoing has actually occurred,” as Petitioners claim.¹⁵ As the D.C. Circuit has stated, “The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally, as it was in the Commission’s resolution here.”¹⁶ Agencies thus have “extreme breadth” in conducting their investigations,¹⁷ and “in light of [this] broad deference . . . , it is essentially the respondent’s burden to show that the information is irrelevant.”¹⁸

B. The CIDs satisfy the foregoing standards.

Petitioners argue that the CIDs are improper for several reasons. In particular, they claim no law violation could have occurred, by arguing that: (1) not even “perfect” security measures (let alone the reasonable security measure standard the

¹⁴ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

¹⁵ LabMD Pet., at 6. *See, e.g., Morton Salt*, 338 U.S. at 642-43 (“[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants an assurance that it is not.”).

¹⁶ *Invention Submission*, 965 F.2d at 1090 (emphasis in original, internal citations omitted) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980), and *Texaco*, 555 F.2d at 874 & n.26).

¹⁷ *Linde Thomsen Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1517 (D.C. Cir. 1993) (citing *Texaco*, 555 F.2d at 882).

¹⁸ *Invention Submission*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 882) (“burden of showing that the request is unreasonable is on the subpoenaed party”). *Accord FTC v. Church & Dwight Co.*, 756 F. Supp. 2d 81, 85 (D.D.C. 2010).

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Commission uses to determine whether a law violation may have occurred) could have prevented the File disclosure because Tiversa's technology "can penetrate even the most robust network security,"¹⁹ and (2) no actual injury resulted from the File disclosure.

The Commission is not required, as a precondition to conducting a law enforcement investigation, to make a showing that it is likely that a law violation has occurred. The D.C. Circuit confirmed this point in *FTC v. Texaco, Inc.*, when it stated, "[I]n the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue."²⁰ Here, Petitioners seek to quash the CIDs by asserting that LabMD's practices must have been reasonable under the FTC Act because the 1,718 File was retrieved using Tiversa's powerful searching technology. Accepting this argument would prevent the Commission from exploring relevant issues bearing on reasonableness, such as, for example, whether the company's security practices could have prevented the 1,718 File from being retrieved using the common P2P programs that are used by millions of computer users each day or whether there were readily available security measures LabMD did not implement that would have prevented even Tiversa's technology from successfully retrieving the file. Although such evidence (if it exists at all) could undermine their reasonableness claim, Petitioners nonetheless argue that the Commission cannot use CIDs to investigate whether the evidence exists unless it already has reason to believe it does exist. For this reason, Petitioners' argument that the strength of Tiversa's P2P searching technology

¹⁹ LabMD Pet., at 7.

²⁰ 555 F.2d 862, 874 (D.C. Cir. 1977). This holding from *Texaco* has been repeatedly reaffirmed, most recently in *FTC v. Church & Dwight*, 747 F. Supp. 2d 3, 6, *aff'd*, 2011 U.S. App. LEXIS 24587 (D.C. Cir. Dec. 13, 2011).

²¹ 15 U.S.C. § 45(n) (an unfair practice is one that "causes or *is likely to cause* substantial injury to consumers"); *see also* FTC Policy Statement on Unfairness, 104 F.T.C. 949, 1073 & n.15 (1984).

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precludes the possibility that a law violation occurred, regardless of the state of LabMD's security, must fail.

Similarly, Petitioners' assertion that no law violation can have occurred because no actual harm has been shown also fails because, under Section 5, a failure to implement reasonable security measures may be an unfair act or practice if the failure is *likely* to cause harm. No showing of actual harm is needed.²¹

Both arguments conflate the purpose of a CID with the purpose of a future potential complaint. A CID can only compel information necessary for an investigation, and the investigation may or may not result in allegations of a law violation.²²

Additionally, Petitioners have claimed that the CIDs are burdensome, but they have not come forward with any support for these assertions. Instead, they make only bald statements that the CIDs are "highly burdensome," "unduly burdensome," "costly and burdensome," and "deeply burdensome."²³ Having offered no factual information about the alleged burdens of complying with

²² Petitioners also argue that the CIDs are improper for other reasons. They claim that because security issues posed by P2P programs were common (according to Tiversa), such issues could not constitute an unfair or deceptive practice in violation of the FTC Act. LabMD Pet., at 7-8 & n.34. This argument is unavailing. The fact that a particular practice may be pervasive or widespread has no bearing on whether the FTC may investigate it as also deceptive or unfair. Indeed, accepting Petitioners' argument would confine the FTC to investigating only those activities that were rare or uncommon, thus crippling the agency's law enforcement mission. Along the same lines, Petitioners contend that the risks of P2P technology, and the resulting potential liabilities to businesses, were not known in 2008, when the File disclosure occurred. In support of this claim, they assert that the FTC did not notify businesses or publish guidance about P2P until 2010. LabMD Pet., at 8. In fact, many, including the FTC, warned about the risks presented by P2P programs years before the File disclosure occurred. *See, e.g.*, FTC Staff Report, "Peer-to-Peer File Sharing Technology: Consumer Protection and Competition Issues" (June 2005), available at <http://www.ftc.gov/reports/p2p05/050623p2prpt.pdf>; Prepared Statement of the Federal Trade Commission Before The Committee on Oversight and Government Reform, United States House of Representatives (July 24, 2007) (discussing P2P programs and risks), available at <http://www.ftc.gov/os/testimony/P034517p2pshare.pdf>.

²³ LabMD Pet., at 7, 9, & 10.

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the CIDs, Petitioners have not sustained their burden to demonstrate that the CIDs are unduly burdensome.²⁴

Such a showing would be difficult here in any event. Notwithstanding Petitioners' description, the CIDs call primarily for testimony, not documents. Thus, it seems unlikely that compliance would require large-scale or time-consuming document production. Furthermore, to the extent that the CIDs call for narrative responses, they merely require Petitioners to identify documents related to the requested testimony. In fact, there is only one specification that requires the production of documents, and even that specification is limited to documents identified in response to the interrogatories to the extent they were "not already been produced to the FTC."²⁵

Finally, Petitioners, without explaining its relevance, contend that the timing of the CIDs is "troubling," coming after LabMD's conduct had been reviewed by two congressional committees, and after LabMD filed suit against Tiversa and others alleging conversion and trespass, among other violations, based on the File disclosure in 2008.²⁶ Though Petitioners seem to believe that there is some connection between their rejection of Tiversa's offer to provide LabMD with information security services, their subsequent lawsuit, and the FTC's investigation, the chronology of the investigation does not support such a conclusion. The FTC first contacted LabMD for information in January 2010, well

²⁴ See, e.g., *Texaco*, 555 F.2d at 882 ("The burden of showing that the request is unreasonable is on the subpoenaed party.") (citing *United States v. Powell*, 379 U.S. 48, 58 (1964)); accord *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 476 (4th Cir. 1986) (subpoena is enforceable absent a showing by recipient that the requests are unduly burdensome); *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (recipient has responsibility to show burden and must make "a record . . . of the measure of their grievance rather than ask [the court] to assume it"); *In re Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998) (FTC ruling that petition to quash must substantiate burden with specific factual detail).

²⁵ LabMD Pet., Ex. A.

²⁶ LabMD Pet., at 9 & Ex. F.

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before LabMD filed its lawsuit against Tiversa in October 2011.²⁷ Moreover, the claim that LabMD's conduct was reviewed by congressional committees does not appear to be based on evidence presented in the Petitions. Although Petitioners have attached as exhibits three instances of congressional testimony by Tiversa, none identifies LabMD by name or discusses the specifics of the File disclosure.

C. The resolution provides sufficient notice of the purpose and scope of the FTC's investigation.

Under the FTC Act, a CID is proper when it "state[s] the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation."²⁸ It is well-established that the resolution authorizing the process provides the requisite statement of the purpose and scope of the investigation,²⁹ and also that the resolution may define the investigation generally, need not state the purpose with specificity, and need not tie it to any particular theory of violation.³⁰

Despite this, Petitioners object that Resolution File No. P954807 did not provide sufficient notice of the purpose and scope of the investigation, and they further claim that this resolution is inadequate under the standard developed by the D.C. Circuit in *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980).³¹

²⁷ We note further that this suit came more than three years after the solicitations Petitioners complain of in their Petitions. LabMD Pet., Ex. F, at 1, 17-23.

²⁸ 15 U.S.C. § 57b-1(c)(2).

²⁹ *Invention Submission*, 965 F.2d at 1088; *accord Texaco*, 555 F.2d at 874; *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979).

³⁰ *Invention Submission*, 965 F.2d at 1090; *Texaco*, 555 F.2d at 874 & n.26; *FTC v. Nat'l Claims Serv., Inc.*, No. S 98-283 FCD DAD, 1999 WL 819640, at *2 (E.D. Cal. Feb. 9, 1999) (citing *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 477 (9th Cir. 1988)).

³¹ LabMD Pet., at 10-12.

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Petitioners' first argument reads the governing standard too narrowly. Resolution File No. P954807 authorizes the use of compulsory process:

to determine whether unnamed persons, partnerships, corporations, or others are engaged in, or may have engaged in, deceptive or unfair acts or practices related to consumer privacy and/or data security, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended.³²

This general statement of the purpose and scope of the investigation is more than sufficient under the standard for such resolutions, and courts have enforced compulsory process issued under similarly broad resolutions.³³

Petitioners' reliance on *Carter* is also misplaced. While *Carter* held that a bare reference to Section 5, without more, "would not serve very specific notice of purpose," the Court approved the resolution at issue in that case, noting that it also referred to specific statutory provisions of the Cigarette Labeling and Advertising Act, and further related it to the subject matter of the investigation.³⁴ With this additional information, the Court felt "comfortably apprised of the purposes of the investigation and the subpoenas issued in its pursuit"³⁵

³² LabMD Pet., Ex. A.

³³ See *FTC v. Nat'l Claims Serv.*, 1999 WL 819640, at *2 (finding omnibus resolution referring to FTC Act and Fair Credit Reporting Act sufficient); *FTC v. O'Connell Assoc., Inc.*, 828 F. Supp. 165, 171 (E.D.N.Y. 1993) (enforcing CIDs issued pursuant to omnibus resolution). The Commission has repeatedly rejected similar arguments about such omnibus resolutions. See, e.g., *Firefighters Charitable Found.*, No. 102-3023, at 4 (Sept. 23, 2010); *D. R. Horton, Inc.*, Nos. 102-3050, 102-3051, at 4 (July 12, 2010); *CVS Caremark Corp.*, No. 072-3119, at 4 (Dec. 3, 2008).

³⁴ *Carter*, 636 F.2d at 788.

³⁵ *Id.*

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The resolution here, like the one in *Carter*, does not cite solely to Section 5, but also recites the subject matter of the investigation: “deceptive or unfair acts or practices related to consumer privacy and/or data security.” Since the resolution here discloses the subject matter of the investigation in addition to invoking Section 5, the resolution provides notice sufficient under *Carter* of the purpose and scope of the investigation.

As a final note, the history of the investigation itself undermines Petitioners’ argument that the present CIDs do not sufficiently advise them of the nature and scope of the investigation. Petitioners have been under investigation since January 2010 and have engaged in repeated discussions with staff. At no point have Petitioners indicated they did not understand the purpose or scope; in fact, Petitioners have already produced hundreds of pages of documents in response to staff requests. Moreover, the Petitions under consideration here present highly detailed and factual arguments going to the very merits of the investigation. The Commission has previously found that such interactions may be considered along with the resolution in evaluating the notice provided to Petitioners.³⁶

D. Petitioners’ challenge to the FTC’s regulatory authority is premature and without basis.

Petitioners’ final argument is that the FTC lacks jurisdiction to conduct the instant investigation.³⁷ Petitioners assert that LabMD is a health care company and that the information disclosed in the

³⁶ *Assoc. First Capital Corp.*, 127 F.T.C. 910, 915 (1999) (“[T]he notice provided in the compulsory process resolutions, CIDs and other communications with Petitioner more than meets the Commission’s obligation of providing notice of the conduct and the potential statutory violations under investigation.”).

³⁷ Petitioners also claim that the resolution does not meet the requirements established by the FTC’s Operating Manual. LabMD Pet., at 10. As discussed above, by disclosing the statutory basis and subject matter of the investigation, the resolution does provide notice as required by the Operating Manual. That said, the Operating Manual, by its own terms, is advisory. It is not a “basis for nullifying any action of the Commission or the staff.” Operating Manual, § 1.1.1.1. See also *FTC v. Nat’l Bus. Consultants, Inc.* 1990 U.S. Dist. LEXIS 3105, 1990-1 Trade Cas. (CCH) ¶68,984, at *29 (E.D. La. March 19, 1990).

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1,718 File is protected health information (“PHI”) under the Health Insurance Portability and Accountability Act (“HIPAA”). Accordingly, they contend, the adequacy of their security practices with respect to this information is subject to the exclusive jurisdiction of HHS.³⁸

As an initial matter, it is well-established that challenges to the FTC’s jurisdiction are not properly raised through challenges to investigatory process. As the D.C. Circuit stated: “Following *Endicott [Johnson Corp. v. Perkins]*, 317 U.S. 501, 509 (1943), courts of appeals have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process.”³⁹ The reasons for such a rule are obvious. If a party under investigation could raise substantive challenges in an enforcement proceeding, before the agency has obtained the information necessary for its case – essentially requiring the FTC to litigate an issue before it can learn about it – then the FTC’s investigations would be foreclosed or substantially delayed.⁴⁰ Thus, Petitioners’ basic challenge to the FTC’s jurisdiction is premature and will not support quashing the instant CIDs.

In any event, the claim that HHS has exclusive jurisdiction to investigate privacy and data security issues involving PHI is without basis. Petitioners essentially invoke the doctrine of implied repeal to assert that HIPAA and its Privacy and Security Rules displace FTC jurisdiction. But implied repeal is “strongly

³⁸ LabMD Pet., at 12-13.

³⁹ *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (citing *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 5 (1st Cir. 1996)); *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 468-73 (2d Cir. 1996); *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir. 1985); *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir. 1982); *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979); accord *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 213-14 (1946).

⁴⁰ *Texaco*, 555 F.2d at 879.

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disfavored,” for two reasons.⁴¹ First, courts have recognized that agencies may have overlapping or concurrent jurisdiction, and thus that the same issues may be addressed and the same parties proceeded against simultaneously by more than one agency.⁴² Second, courts rarely hold that one federal statute impliedly repeals another because “when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.”⁴³ Thus, repeals by implication will only be found where the Congressional intent to effect such a repeal is “clear and manifest.”⁴⁴

Petitioners can point to no such “clear or manifest” evidence that Congress intended HIPAA or its rules to displace the FTC Act. The authority Petitioners cite for the proposition that HHS has exclusive jurisdiction does not address such repeal.⁴⁵ To the contrary, there is ample evidence against such implied repeal. For one, the same authority cited by Petitioners – the preamble to the Privacy Rule – expressly provides that entities covered by that Rule are “also subject to other federal statutes and regulations.”⁴⁶

⁴¹ *Galliano v. United States Postal Serv.*, 836 F.2d 1362, 1369 (D.C. Cir. 1988).

⁴² *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *see also Texaco*, 555 F.2d at 881 (“[T]his is an era of overlapping agency jurisdiction under different statutory mandates.”); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986). Because agencies have overlapping jurisdiction, they often work together. For instance, the FTC and HHS collaborated on the investigation of CVS Caremark Corporation. *See CVS Caremark Corp.*, No. 072-3119, at 7 (Aug. 6, 2008).

⁴³ *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

⁴⁴ *Id.* at 154.

⁴⁵ LabMD Pet., at 12 (citing 65 Fed. Reg. 82,462, 82,472 (Dec. 28, 2000)). This Federal Register notice is the Notice of Public Rulemaking for the Privacy and Security Rules under HIPAA. The excerpt cited by Petitioners does not address the scope of HHS’ enforcement jurisdiction, but rather discusses the delegation of enforcement authority from the Secretary of HHS to HHS’ Office for Civil Rights. 65 Fed. Reg. 82,472 (Dec. 28, 2000).

⁴⁶ 65 Fed. Reg. 82,462, 82,481 (Dec. 28, 2000).

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Also, this preamble includes an “Implied Repeal Analysis,” which is silent as to any implied repeal of the FTC Act.⁴⁷ Recent legislation shows that, if anything, Congress intended the FTC and HHS to work collaboratively to address potential privacy and data security risks related to health information. The American Recovery and Reinvestment Act of 2009, for instance, required HHS and the FTC to develop harmonized rules for data breach notifications by HIPAA-covered and non-HIPAA-covered entities, respectively. *See* 74 Fed. Reg. 42,962, 42,962-63 (Aug. 25, 2009). Thus, HIPAA and its Rules do not serve to repeal FTC jurisdiction, which is overlapping and concurrent to HHS’.

This is particularly appropriate where, as here, the consumer information at issue included more than just health information. The consumer information exposed in the 1,718 File also included names, Social Security numbers, and dates of birth. While this information can be considered PHI under HIPAA when combined with health information, the information clearly exposes consumers to the risk of identity theft and is exactly the kind of sensitive personal information that the Commission is charged with protecting under Section 5 of the FTC Act and other statutes. Petitioners have provided no proper basis to challenge the investigation as an exercise of the Commission’s jurisdiction under these authorities.

III. CONCLUSION AND ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** LabMD, Inc.’s Petition to Limit or Quash the Civil Investigative Demand be, and hereby is, **DENIED**; and

IT IS FURTHER ORDERED THAT Michael J. Daugherty’s Petition to Limit or Quash the Civil Investigative Demand be, and hereby is, **DENIED**; and

IT IS FURTHER ORDERED THAT Commission staff may reschedule the investigational hearings of LabMD and Michael J. Daugherty at such dates and times as they may direct in writing,

⁴⁷ *Id.* at 82,481-487.

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in accordance with the powers delegated to them by 16 C.F.R. § 2.9(b)(6); and

IT IS FURTHER ORDERED THAT all other responses to the specifications in the Civil Investigative Demands to LabMD, Inc. and Michael J. Daugherty must now be produced on or before May 11, 2012.

By direction of the Commission.

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GOOGLE INC.

FTC File No. 111 0163 – Decision, June 18, 2012

RESPONSE TO SAMSUNG TELECOMMUNICATIONS AMERICA, LLC'S
PETITION TO LIMIT SUBPOENA *DUCES TECUM*
DATED FEBRUARY 9, 2012

Dear Messrs. Huffman and Stoltz and Ms. Williams:

On April 23, 2012, the Federal Trade Commission (“FTC” or “Commission”) received the above Petition filed by Samsung Telecommunications America, LLC (“Samsung”). This letter advises you of the Commission’s disposition of the Petition, effected through this ruling by Commissioner Julie Brill, acting as the Commission’s delegate.¹

For the reasons explained below, the Petition is denied. You may request review of this ruling by the full Commission.² Any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling.³ The timely filing of a request for review by the full Commission shall not stay the return dates established by this ruling.⁴

I. INTRODUCTION

In 2011, in connection with an investigation of Google, Inc., the FTC issued a resolution authorizing its staff to use compulsory process

¹ See 16 C.F.R. § 2.7(d)(4).

² 16 C.F.R. § 2.7(f).

³ *Id.* This ruling is being delivered by e-mail and courier delivery. The e-mail copy is provided as a courtesy, and the deadline by which an appeal to the full Commission would have to be filed should be calculated from the date on which you receive the original letter by courier delivery.

⁴ *Id.*

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[t]o determine whether Google Inc. may be engaging, or may have engaged, in any unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by monopolizing, attempting to monopolize, or restraining competition in online or mobile search, search advertising, or Internet-related goods or services.⁵

On February 9, 2012, in furtherance of the investigation, the Commission issued a third-party subpoena *duces tecum* (“subpoena”) to Samsung.⁶ Samsung manufactures and sells mobile phones and devices, many of which are installed with Google’s Android operating system as well as other mobile applications and services developed by Google and Google’s competitors. The subpoena required Samsung to provide the requested documents no later than March 9, 2012.⁷

On or about March 1, 2012, Samsung asked, and received, an extension of the return date to April 9, 2012, conditioned on Samsung producing documents responsive to Specifications 1, 2, and 11, no later than Monday, March 9.⁸ FTC staff also agreed to obviate the requirement that Samsung obtain and produce documents from its corporate parent in Korea.⁹

On April 5, 2012, Samsung requested a second extension of the return date.¹⁰ In subsequent discussions regarding the need for

⁵ Petition of Samsung Telecomm. of America, LLC, to Limit Subpoena Duces Tecum, File No. 111-0163, Google, Inc., Att. 1, Exh. A (Apr. 21, 2012) [hereinafter Petition].

⁶ *Id.*


⁷ *Id.*

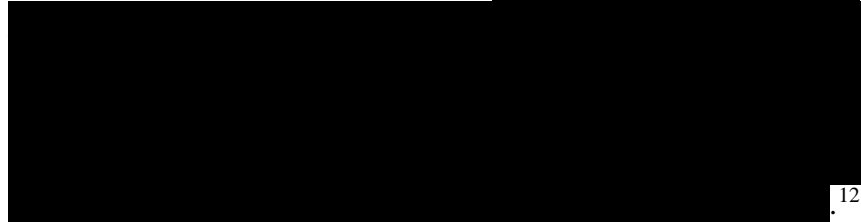
⁸ *Id.* at Att. 4, Ex. B (E-mail from Gregory Huffman to Melissa Westman-Cherry (Mar. 2, 2012, 12:22 PM)); *id.* at Att. 4, Ex. C (Letter from Melissa Westman-Cherry to Gregory Huffman (Mar. 2, 2012)).

⁹ *Id.* at Att. 4, Ex. B (E-mail from Melissa Westman-Cherry to Gregory Huffman (Mar. 2, 2012, 10:27 AM); E-mail from Melissa Westman-Cherry to Gregory Huffman (Mar 2, 2012, 11:55 AM)).

¹⁰ *Id.* at Att. 4, Ex. B (E-mail from Gregory Huffman to Melissa Westman-Cherry (Apr. 5, 2012, 6:15 PM)).

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the extension, Samsung for the first time also asked staff to limit the required response in several respects.¹¹ Specifically, with regard to Specifications 5, 9, and 10, 



Samsung also asked staff to accept other limitations, including foregoing a search for informal agreements between Samsung and Google, and restated its request for an extension of the return date.

FTC staff accepted some of Samsung's proposals, modified the subpoena pursuant to 16 C.F.R. § 2.7(c), and extended the return date to April 23, 2012.¹³ On April 11, 2012,

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On April 11,

Samsung claimed that their proposed search was going to be unduly burdensome.¹⁵ On April 20, 2012, based on the results of the searches it had performed to date, Samsung requested a third extension of time. When staff declined a further extension, Samsung filed the instant petition.

¹¹ *Id.* at Att. 4, Ex. C (Letter from Melissa Westman-Cherry to Gregory Huffman (Apr. 10, 2012)).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, at Att. 4, Ex. B (Letter from Melissa Westman-Cherry to Gregory Huffman (Apr. 11, 2012)).

¹⁵ *Id.*, at Att. 4, Ex. B. (E-mail from Melissa Westman-Cherry to Gregory Huffman (Apr. 11, 2012, 4:15 PM); E-mail from Richard Rosalez to Melissa Westman-Cherry and Gregory Huffman (Apr. 11, 2012, at 6:45 PM)).

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II. ANALYSIS

Samsung's petition lodges objections to each of the specifications in the subpoena. Among these objections, Samsung claims the specifications: (1) are overly broad or unduly burdensome; (2) seek information not relevant to the investigation or not likely to lead to the discovery of relevant evidence; and (3) include vague terms or fail to seek documents with sufficient particularity.¹⁶ For the following reasons, these objections fail.

A. Samsung has not supported its claims of undue burden and overbreadth.

We conclude that Samsung has failed to support its claims that the subpoena is overly broad and unduly burdensome. As the courts have clearly stated, “[a]ny subpoena places a burden on the person to whom it is directed. Time must be taken from normal activities and resources must be committed to gathering the information necessary to comply.”¹⁷ Thus, the recipient of process bears the burden of demonstrating that this burden is undue.¹⁸ Specifically, a recipient of FTC investigative process must show that compliance threatens to seriously impair or

¹⁶ Samsung objects generally that the subpoena calls for documents in the possession, custody, and control of its corporate parent in Korea, and goes on to assert that it cannot access these documents and therefore should not have to produce them. FTC staff has already agreed that Samsung need not obtain documents from its Korean parent. *Id.* at Att. 4, Ex. B (E-mail from Melissa Westman-Cherry to Gregory Huffman (Mar. 2, 2012, 10:27 AM); E-mail from Melissa Westman-Cherry to Gregory Huffman (Mar 2, 2012, 11:55 AM)). As this issue has been resolved, we need not address it here.

¹⁷ *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *accord FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977).

¹⁸ *Texaco*, 555 F.2d at 882; *In re Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998). *See also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 476 (4th Cir. 1986); *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (recipients of subpoena must show unreasonableness of the Commission's demand and make a record to show the “measure of their grievance rather than [asking the court] to assume it.”) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 654 (1950); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 217-18 (1946)).

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unduly disrupt the normal operations of its business.¹⁹ Likewise, investigative process is not unreasonably broad where the breadth of the inquiry is commensurate with the magnitude or complexity of a recipient's business operations.²⁰

Here, Samsung offers essentially three arguments to support its claim of burden.²¹ First, noting that the subpoena calls for information about mobile phones, Samsung states that it manufactured over 300 different models of mobile phone during the period in question, each with a distinct configuration of software, and that collecting information related to each phone would be unduly burdensome.²² Second,

may yield more than one million "hits" of possibly responsive documents that would have to be reviewed and produced.²³ Third, Samsung offers a declaration from a litigation support supervisor, who states that this review of the documents identified will require 2000 days of review time, assuming that a single reviewer reviews 500 documents per day (1 reviewer times

¹⁹ *Shaffner*, 626 F.2d at 38; *Texaco*, 555 F.2d at 882.

²⁰ *Texaco*, 555 F.2d at 882.

²¹ The cases Samsung cites for the proposition that requests that ask for "all documents" are overly broad and unreasonable are inapposite. In *McKinley v. F.D.I.C.*, 807 F. Supp. 2d, 1 (D.D.C. 2011), the request at issue was directed to the FDIC under FOIA. The request did not ask for "all documents" but rather "any information available." *Id.* at 6-77. The court found that such requests for records that relate "in any way" did not enable FDIC staff to identify responsive records with reasonable effort. *Id.* In this case, however, FTC staff has not asked Samsung for documents that relate to subjects "in any way."

For the same reason, *Judicial Watch, Inc. v. Ex-Im Bank*, 108 F. Supp. 2d 19, 27-28 (D.D.C. 2000) is also inapposite. In *Judicial Watch*, the request at issue asked for contacts between two individuals and "companies, entities, and/or persons related or doing or conducting business *in any way* with the People's Republic of China." *Id.* at 26 (emphasis added). None of the requests in the FTC's subpoena to Samsung is similarly broad.

²² Petition, *supra* note 5, at 3-4.

²³ *Id.*, at 5.

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500 documents/per day times 2,000 days = 1 million documents).²⁴

These arguments do not establish that the subpoena is overly broad or unduly burdensome. Samsung has not provided facts or details, such as reliable estimates of the costs of compliance, to support these claims. Instead, Samsung's objections to the specifications appear premised on the fact that they may result in many potentially responsive documents. But the volume of potentially responsive documents is not dispositive of the question whether a subpoena is unduly burdensome.²⁵ The searches may have resulted in many "hits," but ultimately it is Samsung's responsibility to show that the burden of compliance rises to the high threshold set by cases such as *Texaco* and Samsung has not offered solid evidence – or even alleged – that compliance here meets that standard.²⁶ Moreover, given the magnitude and complexity of the company's operations and the breadth of its product line, there is nothing unusual about the possibility that the subpoena potentially calls for many documents related to a large number of mobile devices.²⁷

B. Samsung has not shown that the information requested is irrelevant to this administrative investigation.

Samsung has also objected to several specifications on the grounds they fail to seek information relevant to the subject matter of the investigation, or are not likely to lead to the discovery of relevant or admissible evidence.²⁸ As such,

²⁴ *Id.*, Att. 5.

²⁵ *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513-14 (4th Cir. 1996) (“[A] subpoena is not unduly burdensome merely because it requires production of a large number of documents . . .”). *See also F.D.I.C. v. Garner*, 126 F.3d 1138, 1145-46 (9th Cir. 1997) (enforcing subpoena that called for over one million documents where recipients failed to demonstrate the requests were unduly burdensome).

²⁶ *See, e.g., Texaco*, 555 F.2d at 882.

²⁷ *Texaco*, 555 F.2d at 882.

²⁸ *See, e.g.,* Petition, *supra* note 5, at 8-10.

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Samsung seems to argue that the requirements of the subpoena do not comport with the requirements applicable to discovery requests propounded under the Federal Rules of Civil Procedure.²⁹

However, the Federal Rules of Civil Procedure do not apply to agency investigations. “Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may flow from it.”³⁰ As the D.C. Circuit and other courts have recognized, “[t]he standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally, as it was in the Commission’s resolution here.”³¹ Agencies thus have “extreme breadth” in conducting their investigations,³² and “in light of [this] broad deference . . . , it is essentially the respondent’s burden to show that the information is irrelevant.”³³

Samsung’s conclusory assertions³⁴ do not satisfy this standard. As stated in the Commission’s investigatory resolution, the purpose of the investigation is to determine whether Google is

²⁹ One such example is Samsung’s claim that the subpoena calls for irrelevant evidence, or evidence that is not reasonably likely to lead to the discovery of relevant or admissible evidence. These objections are premised on Fed. R. Civ. P. 26(b)(1), which addresses the scope of discovery in a civil action.

³⁰ *Linde Thomsen Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) (citing *EEOC v. Deer Valley Unified Sch. Dist.*, 968 F. 2d 904, 906 (9th Cir. 1992); *EEOC v. Univ. of Notre Dame du Lac*, 551 F. Supp. 737, 742 (N.D. Ind. 1982), *rev’d on other grounds*, 715 F.2d 331 (7th Cir. 1983)).

³¹ *FTC v. Invention Submission Corp.*, 965 F. 2d 1086, 1090 (D.C. Cir. 1992) (emphasis in original; internal citations omitted) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980); *Texaco*, 555 F.2d at 874 & n.26)).

³² *Linde Thomsen*, 5 F.3d at 1517 (citing *Texaco*, 555 F.2d at 882).

³³ *Invention Submission Corp.*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 882); accord *FTC v. Church & Dwight Co., Inc.*, 756 F. Supp. 2d 81, 85 (D.D.C. 2010).

³⁴ See, e.g., Petition, *supra* note 5, at 8-13.

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engaged in “unfair methods of competition” by, *inter alia*, monopolizing, attempting to monopolize, or restraining competition in online or mobile search, search advertising, or Internet-related goods or services. Samsung is a manufacturer of mobile devices that are used by consumers for online or mobile search, for using Internet-related goods and services, and on which consumers receive search advertising. Thus, information about the relationship between Google and Samsung as it relates to those topics is plainly relevant to this investigation, and Samsung has offered nothing to challenge this conclusion.

C. The subpoena specifications are not vague and identify the requested documents with sufficient particularity.

Samsung also objects to Specifications 5 and 10 on the grounds that they include terms that Samsung finds vague, such as “business strategy,” “consideration, development and use,” or “competes with.” Samsung claims that it cannot identify which documents might be responsive to these requests.

Samsung has not shown that these terms have multiple meanings that make it difficult to determine which documents are responsive. Terms such as “business strategy,” or “consideration, development and use” are commonly employed by companies of Samsung’s size and complexity. In particular, we expect that Samsung, a global manufacturer of mobile devices, understands the term “competes with” in the context of mobile products and software. Furthermore, these terms appear in the subpoena in the context of specifications that contain additional guidance as to the limits and scope of the requests. For example, specification 5 includes examples of responsive documents, such as “strategic plans, business plans, marketing plans, advertising plans, pricing plans, technology plans, forecasts, strategies, and decisions; market studies; and presentations to management committees, executive committees, and boards of directors.”³⁵ Instead, it appears that Samsung objects to these terms because they call for many responsive documents, but, as discussed above, without more, this is not a proper basis for an objection.³⁶ For these

³⁵ *Id.*, Att. 1, Ex. A, at 7.

³⁶ *Carolina Food Processors, Inc.*, 81 F.3d at 513-14.

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reasons, Samsung's claim that the subpoena terms are vague or insufficiently particular fails.

III. CONCLUSION AND ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Samsung Telecommunications America LLC's Petition to Limit Subpoena Duces Tecum be, and it hereby is, **DENIED**; and

IT IS FURTHER ORDERED THAT all other responses to the specifications in the subpoena *duces tecum* must now be produced on or before July 2, 2012. Pursuant to Rule 2.7(c), 16 C.F.R. § 2.7(c), staff has the authority to determine the terms of satisfactory compliance, including allowing Petitioner to abide by previously-reached agreements to limit the production of documents and information responsive to the subpoena *duces tecum*.

By direction of the Commission.

Responses to Petitions to Quash

LABMD, INC.*FTC File No. 102 3099 – Decision, June 21, 2012*RESPONSE BY THE FULL COMMISSION TO LABMD, INC.'S AND ITS
PRESIDENT, MICHAEL J. DAUGHERTY'S PETITIONS TO LIMIT OR
QUASH THE CIVIL INVESTIGATIVE DEMANDS
DATED DECEMBER 21, 2011

Dear Mr. Fusco:

This letter advises you of the Commission's disposition of LabMD, Inc.'s and Michael J. Daugherty's request dated April 25, 2012, that the full Commission review the denial of their petition to limit or quash civil investigative demands.

The Commission issued the CIDs to LabMD and Mr. Daugherty on December 21, 2011. LabMD and Mr. Daugherty filed petitions to limit or quash the CIDs, which were received by the Commission on January 10, 2012. On April 20, 2012, Commissioner Brill directed the issuance of a letter denying both petitions and directing both petitioners to comply by May 11, 2012. That deadline was extended to June 8, 2012 due to emergency circumstances that you brought to the Commission's attention.¹

The Commission affirms the ruling denying the petitions to limit or quash the civil investigative demands. The Commission has independently reviewed LabMD and Mr. Daugherty's petitions to limit or quash the CIDs, and their requests for full Commission review. The Commission has also reviewed the letter ruling issued by the Commission at the direction of Commissioner Brill, and hereby affirms that ruling, finding its conclusions to be valid and correct.

¹ On April 30, 2012, you contacted the Commission's Office of the Secretary to request additional time to comply with the CID due to emergency circumstances. By letter dated May 7, 2012, the Commission modified the date to June 8, 2012.

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Commissioner Rosch generally agrees with the Commission's decision to enforce the CIDs, but dissents from this ruling to the extent it permits staff to rely on a LabMD document found on a peer-to-peer file sharing network, out of concern about petitioners' allegations that a third party located this document through wrongdoing and for financially-motivated reasons. In this ruling, we make no findings of fact regarding that third party's conduct or the admissibility of this document, nor do we need to do so. In upholding the CIDs, the Commission allows staff to continue to use pertinent information—including information from or concerning any LabMD documents made available to users of peer-to-peer file-sharing networks and accessed by any third party—to conduct its data security investigation. Indeed, in our data security investigations, the Commission often uses information obtained by third parties concerning security vulnerabilities of entities that maintain substantial amounts of personal information. Although we understand petitioners have alleged that the third party in question has a financial incentive to use its patented monitoring tool to find information that has been improperly disclosed on peer-to-peer file sharing networks, that does not overcome the Commission's compelling public interest in seeking to protect consumers' sensitive health data by pursuing this investigation through all lawful means, including the use of this document.

The April 25, 2012 request for full Commission review also requested a hearing on the denial of the petitions. The FTC Rule governing petitions to quash or limit, 16 C.F.R. § 2.7, does not provide for such a hearing, however, and accordingly, this request will be denied.

For the forgoing reasons,

IT IS ORDERED THAT the April 20, 2012 letter ruling is **AFFIRMED**;

IT IS FURTHER ORDERED THAT LabMD's and Mr. Daugherty's request for a hearing is **DENIED**;

IT IS FURTHER ORDERED THAT Commission staff may reschedule the investigational hearings of LabMD and Michael J.

Dissenting Statement

Daugherty at such dates and times as they may direct in writing, in accordance with the powers delegated to them by 16 C.F.R. § 2.9(b)(6)(2012); and

IT IS FURTHER ORDERED THAT all other responses to the specifications in the Civil Investigative Demands to LabMD, Inc. and Michael J. Daugherty must be produced on or before June 8, 2012.

By direction of the Commission, Commissioner Rosch dissenting, and Commissioner Ohlhausen not participating.

Dissenting Statement of Commissioner J. Thomas Rosch

I dissent from the Commission's vote affirming Commissioner Brill's letter decision, dated April 20, 2012, that denied the petitions of LabMD, Inc. and Michael J. Dougherty to limit or quash the civil investigative demands.

I generally agree with Commissioner Brill's decision to enforce the document requests and interrogatories, and to allow investigational hearings to proceed. As she has concluded, further discovery may establish that there is indeed reason to believe there is Section 5 liability regarding petitioners' security failings *independent* of the "1,718 File" (the 1,718 page spreadsheet containing sensitive personally identifiable information regarding approximately 9,000 patients) that was originally discovered through the efforts of Dartmouth Professor M. Eric Johnson and Tiversa, Inc. In my view, however, as a matter of prosecutorial discretion under the unique circumstances posed by this investigation, the CIDs should be limited. Accordingly, without reaching the merits of petitioners' legal claims, I do not agree that staff should further inquire - either by document request, interrogatory, or investigational hearing - about the 1,718 File.

Dissenting Statement

Specifically, I am concerned that Tiversa is more than an ordinary witness, informant, or “whistle-blower.” It is a commercial entity that has a financial interest in intentionally exposing and capturing sensitive files on computer networks, and a business model of offering its services to help organizations protect against similar infiltrations. Indeed, in the instant matter, an argument has been raised that Tiversa used its robust, patented peer-to-peer monitoring technology to retrieve the 1,718 File, and then repeatedly solicited LabMD, offering investigative and remediation services regarding the breach, long before Commission staff contacted LabMD. In my view, while there appears to be nothing *per se* unlawful about this evidence, the Commission should avoid even the appearance of bias or impropriety by not relying on such evidence or information in this investigation.

ADVISORY OPINION

IN THE MATTER OF

NATIONAL CONSUMER LAW CENTER

FTC File No. P124802 - Opinion, May 3, 2012

Re: Whether the Holder Rule limits a consumer's right to an affirmative recovery to circumstances where the consumer can legally rescind the transaction or where the goods or services sold to the consumer are worthless.

Dear Mr. Sheldon and Ms. Carter:

This letter is in response to the National Consumer Law Center's request for a Commission advisory opinion regarding the Federal Trade Commission's Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433, commonly known as the Holder Rule.¹ Specifically, you ask the Commission to affirm that the Holder Rule does not limit a consumer's right to an affirmative recovery to circumstances where the consumer can legally rescind the transaction or where the goods or services sold to the consumer are worthless. Your letter states that even though the plain language of the Rule is clear—which FTC staff confirmed in a 1999 opinion letter²—some courts continue to bar consumers from affirmative recoveries unless rescission is warranted.³

¹ Your letter requesting an advisory opinion is co-signed by representatives from Public Citizen, U.S. PIRG, the Center for Responsible Lending, and the National Association of Consumer Advocates.

² See Attachment, FTC Staff Letter (Sept. 25, 1999).

³ Your letter lists six cases that have been decided since the issuance of the 1999 FTC staff opinion letter that have held that a consumer may only obtain an affirmative recovery against a creditor under the Holder Rule when the seller's breach is so substantial that rescission and restitution are justified or where the goods or services sold to the consumer are worthless: *Rollins v. Drive-1 of Norfolk, Inc.*, No. 2:06cv375, 2007 WL 602089 (E.D. Va. Feb. 21, 2007); *Phillips v. Lithia Motors, Inc.*, No. 03-3109-HO, 2006 WL 1113608 (D.

Advisory Opinion

The Holder Rule protects consumers who enter into credit contracts with a seller of goods or services by preserving their right to assert claims and defenses against any holder of the contract, even if the original seller subsequently assigns the contract to a third-party creditor. In particular, the Holder Rule requires sellers that arrange for or offer credit to finance consumers' purchases to include in their credit contracts the following Notice:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED [PURSUANT HERETO OR] WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2.

A creditor or assignee of the contract is thus subject to all claims or defenses that the consumer could assert against the seller. The Holder Rule does not create any new claims or defenses for the consumer; it simply protects the consumer's existing claims and defenses. The *only* limitation included in the Rule is that a consumer's recovery "shall not exceed amounts paid" by the consumer under the contract.

Thus, the plain language of the Rule permits a consumer to assert a seller's misconduct (1) to defend against a creditor's lawsuit for amounts owed under the contract and/or (2) to maintain a claim against the creditor for a refund of money the

Or. Apr. 27, 2006); *Costa v. Mauro Chevrolet, Inc.*, 390 F. Supp. 2d 720 (N.D. Ill. 2005); *Comer v. Person Auto Sales, Inc.*, 368 F. Supp. 2d 478 (M.D.N.C. 2005); *Herrara v. North & Kimball Group, Inc.*, No. 01C7349, 2002 U.S. Dist. LEXIS 2640 (N.D. Ill. Feb. 15, 2002); *Bellik v. Bank of America*, 869 N.E.2d 1179 (Ill. App. Ct. 2007). You cite *Comer* as pointedly rejecting the FTC staff opinion letter. *Comer* notes that the staff letter is "not binding on the Commission." 368 F. Supp. 2d at 490.

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consumer has already paid under the contract (*i.e.*, an affirmative recovery). Despite the Rule's plain language, however, some courts have imposed additional limitations on a consumer's right to affirmative recovery. Beginning with *Ford Motor Credit Co. v. Morgan*, 536 N.E.2d 587 (Mass. 1989),⁴ these courts have allowed affirmative recovery only if the consumer is entitled to rescission or similar relief under state law.⁵ Courts following the *Morgan* approach have not imposed any similar limitation on a consumer's right to raise the seller's misconduct as a defense in a lawsuit.

The Commission affirms that the Rule is unambiguous, and its plain language should be applied.⁶ No additional limitations on a consumer's right to an affirmative recovery should be read into the Rule, especially since a consumer would not have notice of those limitations because they are not included in the credit contract. Had the Commission meant to limit recovery to claims subject to rescission or similar remedy, it would have said so in the text of the Rule and drafted the contractual provision

⁴ In *Morgan*, the court faced extensive consumer misconduct in connection with the financing of a car purchase. After experiencing problems with the car, the consumer concealed the automobile, removed the battery, removed or deflated the tires, and surrendered the automobile only after being found in contempt by the trial judge. He also delayed the sale of the automobile, during which time it was extensively vandalized, resulting in a total loss that was not recoverable due to the consumer's failure to obtain insurance. The creditor sued the consumer for the balance due under the contract, and the consumer filed a counterclaim based on the dealer's misrepresentations. Notably, in contravention of the one express limitation in the Holder Rule, the consumer sought recovery of an amount in excess of what the consumer had paid under the contract. The court ultimately held that the consumer was not entitled to any affirmative recovery, but he did not have to pay the remaining balance due. 536 N.E.2d at 588.

⁵ See, *e.g.*, n.3, *supra*.

⁶ See *Qwest Corp. v. Colorado Public Utilities Comm'n*, 656 F.3d 1093, 1099 (10th Cir. 2011) ("We begin with the plain language of the regulation. . . . If the regulation's language is clear, our analysis ends and we must apply its plain meaning.") (internal citations and quotations omitted); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1095 (W.D. Mich. 2000) ("No basis exists for referring to the commentary to understand the meaning of language that is unambiguous on its face.").

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accordingly. It remains the Commission's intent that the plain language of the Rule be applied, which many courts have done.⁷

The purpose of the Holder Rule, as stated in the Rule's Statement of Basis and Purpose ("SBP"), supports this plain reading. The Commission adopted the Rule to provide recourse to consumers who otherwise would be legally obligated to make full payment to a creditor despite breach of warranty, misrepresentation, or even fraud on the part of the seller.⁸ The Commission found that "the creditor is *always* in a better position than the buyer to return seller misconduct costs to sellers, the guilty party,"⁹ and therefore concluded that "[s]ellers and creditors will be responsible for seller misconduct."¹⁰ Moreover, the Commission considered, but firmly rejected, a suggestion by industry representatives that the Rule be amended so that a consumer "may assert his rights only as a matter of defense or setoff against a claim by the assignee or holder," finding instead that "[t]he practical and policy considerations which militate against such a limitation on affirmative actions by consumers are

⁷ See, e.g., *Lozada*, 91 F. Supp. 2d at 1094-95; *Simpson v. Anthony Auto Sales, Inc.*, 32 F. Supp. 2d 405, 409 n.10 (W.D. La. 1998); *Riggs v. Anthony Auto Sales*, 32 F. Supp. 2d 411, 416 n.13 (W.D. La. 1998); *Beemus v. Interstate Nat'l Dealer Servs., Inc.*, 823 A.2d 979, 984-85 (Pa. Super. Ct. 2003); *Jaramillo v. Gonzalez*, 50 P.3d 554, 561 (N.M. Ct. App. 2002); *Scott v. Mayflower Home Improvement Corp.*, 831 A.2d 564, 573-74 (N.J. Super. Ct. Law Div. 2001).

⁸ See 40 Fed. Reg. 53506, 53507 (Nov. 18, 1975) ("The rule is directed at what the Commission believes to be an anomaly. . . . The creditor may assert his right to be paid by the consumer despite misrepresentation, breach of warranty or contract, or even fraud on the part of the seller, and despite the fact that the consumer's debt was generated by the sale.")

⁹ *Id.* at 53523 (emphasis added); see also *id.* at 53509 ("Between an innocent consumer, whose dealings with an unreliable seller are, at most, episodic, and a finance institution qualifying as 'a holder in due course,' the financier is in a better position both to protect itself and to assume the risk of a seller's reliability."); *id.* at 53523 ("We believe that a rule which compels creditors to either absorb seller misconduct costs or return them to sellers, by denying sellers access to cut-off devices, will discourage many of the predatory practices and schemes. . . . The market will be policed in this fashion and all parties will benefit accordingly.").

¹⁰ *Id.* at 53524.

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far more persuasive.”¹¹ For example, the Commission noted that some consumers may feel compelled to continue payments because of the threat of negative credit reporting and that “a stronger potential consumer remedy will encourage greater policing of merchants by finance institutions.”¹²

Thus, to give full effect to the Commission’s original intent to shift seller misconduct costs away from consumers, consumers must have the right to recover funds already paid under the contract if such recovery is necessary to fully compensate the consumer for the misconduct—even if rescission of the transaction is not warranted. Otherwise, whether a consumer is able to be fully compensated would depend on how much the consumer paid under the contract at the time of the dispute. For example, consider a consumer who finances the purchase of an automobile, later discovered to be defective, for \$10,000 and is entitled to compensation of \$3,000 based on the seller’s misrepresentations regarding the condition of the automobile. If the consumer has paid \$4,000 under the financing contract and still owes \$6,000, the consumer could withhold \$3,000 of the balance due and be fully compensated—a defensive posture sanctioned by *Morgan*. If, however, the consumer has paid \$8,000 and owes \$2,000, the *Morgan* approach would permit the consumer to withhold the remaining \$2,000 payment, but not affirmatively recover the additional \$1,000 that would be necessary to make the consumer whole.¹³ There is no basis under the plain language and the intent of the Rule for such an anomalous result.

Courts that have followed the *Morgan* approach have misinterpreted two isolated comments in the SBP that accompanies the Rule. In part, the SBP states that affirmative recovery by the consumer “will only be available where a seller’s breach is so substantial that a court is persuaded that rescission

¹¹ *Id.* at 53526.

¹² *Id.* at 53527.

¹³ This example is drawn from Michael Greenfield & Nina Ross, *Limits on a Consumer’s Ability to Assert Claims and Defenses Under the FTC’s Holder in Due Course Rule*, 46 Bus. Law. 1135, 1140 (1991).

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and restitution are justified”¹⁴ and that consumers “will not be in a position to obtain an affirmative recovery from a creditor, unless they have actually commenced payments and received little or nothing of value from the seller.”¹⁵ However, when read in context of the entire SBP, including the SBP language highlighted above, the two SBP comments cited by *Morgan* and its progeny do not undermine the plain language of the Rule. As explained by one court that rejected the *Morgan* approach, “[w]here one or more parts of the [SBP] fully comport with the text of the rule while another, read in a particular way, is at odds with the plain language of the regulation, there exists no basis for giving controlling weight to an interpretation which narrows the language of the rule itself.”¹⁶ These statements should be read as practical observations or predictions, instead of as contradicting the Rule. In most instances where there is significant consumer injury associated with seller misconduct but rescission is not warranted, the consumer is likely to find out about the injury shortly after the transaction is consummated, and thus is likely to stop payments before the claim amount is larger than the balance due. In other words, affirmative recoveries will be rare in cases where rescission is not justified because such recoveries occur only if the consumer’s claim is larger than what the consumer still owes on the loan.¹⁷ When read in this context, the two SBP comments do not conflict with the rest of the SBP and the plain language of the Rule.

Thus, the Commission affirms the plain language of the Holder Rule and the intent of the Rule as discussed in the entire SBP. Specifically, the Rule places no limits on a consumer’s right to an affirmative recovery other than limiting recovery to a refund of monies paid under the contract. Further, the Rule does

¹⁴ 40 Fed. Reg. at 53524.

¹⁵ *Id.* at 53527.

¹⁶ *Lozada*, 91 F. Supp. 2d at 1096.

¹⁷ *See id.* at 1095 (noting that the SBP “is susceptible of being understood as a statement of agency prediction that affirmative recoveries will occur only when courts are persuaded that the equities so require and when damages exceed the amount due on the account”); *accord Jaramillo*, 50 P.3d at 561.

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not limit affirmative recovery only to those circumstances where rescission is warranted or where the goods or services sold to the consumer are worthless.

By direction of the Commission.

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