IN THE MATTER OF

THE RECEIVABLE MANAGEMENT SERVICES CORPORATION

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4472; File No. 142 3031
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses The Receivable Management Services Corporation's ("RMS") alleged false or misleading representations that RMS made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that RMS, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from February 2010 until November 2013, RMS was not a "current" participant in the Safe Harbor. The consent order prohibits RMS from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin*, and *Katherine White.*

For the *Respondent*: *Nancy Perkins, Arnold & Porter LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Receivable Management Services Corporation, a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent The Receivable Management Services Corporation is a Delaware corporation with its principal office or place of business at 240 Emery Street, Bethlehem, PA 18015.

2. Respondent is a collection agency.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.rmsna.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement

action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor Framework.

The U.S.-EU Safe Harbor Framework Certification Mark

9. In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark"). Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. In addition, Commerce has established certain rules for using the mark, such as requirements relating to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor. The mark appears as follows:

U.S. ★ EU
SAFEHARBOR
U.S. DEPARTMENT OF COMMERCE

Violations of Section 5 of the FTC Act

10. In February 2009, respondent submitted to Commerce a self-certification of compliance with the Safe Harbor.

11. In February 2010, respondent did not renew its self-certification to the Safe Harbor, and Commerce subsequently updated respondent's status to "not current" on its public website.

12. From at least February 2009 until November 2013, respondent disseminated or caused to be disseminated privacy

policies and statements on the www.rmsna.com website, including, but not limited to, the following statements:

> RMS is registered with the U.S. Department of Commerce's Safe Harbor program, and adheres to the U.S. Safe Harbor principles of Notice, Choice, Onward Transfer, Security, Data Integrity, Access, and Enforcement as defined by the agency…

13. From at least February 2009 until November 2013, respondent displayed the mark on the www.rmsna.com website.

14. Through the means described in Paragraphs 12 and 13, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor Framework.

15. In truth and in fact, from February 2010 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representations set forth in Paragraph 14 are false and misleading.

16. The acts and practices of respondent as alleged in this complaint constitute deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission" or "FTC"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 *et seq*.;

The respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), which includes: a statement by respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent violated the FTC Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure prescribed Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent The Receivable Management Services Corporation is a Delaware corporation with its principal office or place of business at 240 Emery Street, Bethlehem, PA 18015.

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

ORDER

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

A. Unless otherwise specified, "respondent" shall mean The Receivable Management Services Corporation and its successors and assigns.

B. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. For any business entity resulting from any change in structure set forth in Part IV, delivery shall be at least ten (10) days prior to the change in structure. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re The Receivable Management Services Corporation*, FTC File No. 1423031.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit an additional true and accurate written report.

VI.

This order will terminate on June 19, 2034, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. any Part in this order that terminates in fewer than twenty (20) years;

B. this order's application to any respondent that is not named as a defendant in such complaint; and

C. this order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order as to such respondent will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to The Receivable Management Services Corporation ("RMS").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that RMS made to consumers concerning its participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. These principles include notice, choice, onward transfer, security, data integrity, access, and enforcement. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

In 2008, Commerce developed the U.S.-EU Safe Harbor Framework Certification Mark ("the mark") to allow companies to highlight for consumers their compliance with the Safe Harbor Framework. Upon request, Commerce provides the mark to those organizations that maintain a "current" self-certification to the U.S.-EU Safe Harbor Framework. Commerce has established certain rules for using the mark, such as requirements related to the mark's placement on a website and the inclusion of a link to www.export.gov/safeharbor.

RMS is a collection agency. According to the Commission's complaint, from at least February 2009 until November 2013, RMS set forth on its website, www.rmsna.com, privacy policies and statements about its practices, including statements related to its participation in the U.S-EU Safe Harbor Framework. In addition, from at least February 2009 until November 2013, RMS displayed the mark on its website.

The Commission's complaint alleges that RMS, through its statements and use of the mark, falsely represented that it was a "current" participant in the Safe Harbor when, in fact, from February 2010 until November 2013, RMS was not a "current" participant in the Safe Harbor. The Commission's complaint alleges that in February 2009, RMS submitted a Safe Harbor self-certification. RMS did not renew its self-certification in February 2010 and Commerce subsequently updated RMS's status to "not current" on its public website.

Part I of the proposed order prohibits RMS from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires RMS to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that RMS submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed complaint or order or to modify the order's terms in any way.

IN THE MATTER OF

TENNESSEE FOOTBALL, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4473; File No. 142 3032
Complaint, June 19, 2014 – Decision, June 19, 2014

This consent order addresses Tennessee Football, Inc.'s ("the Tennessee Titans") alleged false or misleading representations that the Tennessee Titans made to consumers concerning their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that the Tennessee Titans falsely represented that they were a "current" participant in the Safe Harbor when, in fact, from August 2009 until November 2013, the Tennessee Titans were not a "current" participant in the U.S.-EU Safe Harbor Framework. The consent order prohibits the Tennessee Titans from making misrepresentations about their membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Participants

For the *Commission*: *Jessica Lyon, Katie Race Brin*, and *Katherine White.*

For the *Respondents*: *John Graubert* and *Kurt Wimmer, Covington & Burling LLP*.

COMPLAINT

The Federal Trade Commission, having reason to believe that Tennessee Football, Inc. a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Tennessee Football, Inc., which owns and operates the Tennessee Titans football team ("Tennessee Titans"), is a Delaware corporation with its principal office or place of business at 460 Great Circle Road, Nashville, TN 37228.

2. Respondent is a professional football team and a member of the National Football League.

3. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

4. Respondent has set forth on its website, www.titansonline.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("U.S.-EU Safe Harbor Framework").

The Framework

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection ("Directive"). Enacted in 1995, the Directive sets forth European Union ("EU") requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is referred to commonly as meeting the EU's "adequacy" standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The U.S.-EU Safe Harbor Framework allows U.S. companies to transfer personal data lawfully from the EU. To join the U.S.-EU Safe Harbor Framework, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission ("FTC"), as well as the U.S. Department of Transportation, are eligible to join the U.S.-EU Safe Harbor

Framework. A company under the FTC's jurisdiction that claims it has self-certified to the Safe Harbor principles, but failed to self-certify to Commerce, may be subject to an enforcement action based on the FTC's deception authority under Section 5 of the FTC Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the U.S.-EU Safe Harbor Framework. The listing of companies indicates whether their self-certification is "current" or "not current" and a date when recertification is due. Companies are required to re-certify every year in order to retain their status as "current" members of the U.S.-EU Safe Harbor Framework.

Violations of Section 5 of the FTC Act

9. In August 2005, respondent submitted to Commerce a self-certification of compliance to the U.S.-EU Safe Harbor Framework.

10. In August 2009, respondent did not renew its self-certification to the U.S.-EU Safe Harbor Framework, and Commerce subsequently updated respondent's status to "not current" on its public website.

11. From at least August 2005 until November 2013, respondent disseminated or caused to be disseminated privacy policies and statements on the www.titansonline.com website, including, but not limited to, the following statements:

> The Website complies with [the] EU Safe Harbor framework as set forth by the Department of Commerce regarding the collection, use, and retention of data from the European Union.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it was a "current" participant in the U.S.-EU Safe Harbor Framework.

13. In truth and in fact, from August 2009 until November 2013, respondent was not a "current" participant in the U.S.-EU Safe Harbor Framework. Therefore, the representation set forth in Paragraph 12 is false and misleading.

14. The acts and practices of respondent as alleged in this complaint constitute deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this nineteenth day of June, 2014, has issued this complaint against respondent.

By the Commission, Commissioner McSweeny not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission" or "FTC"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 *et seq*.;

The respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), which includes: a statement by respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the FTC Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent Tennessee Football, Inc., which owns and operates the Tennessee Titans football team, is a Delaware corporation with its principal office or place of business at 460 Great Circle Road, Nashville, TN 37228.

2. Respondent neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in this order. Only for purposes of this action, respondent admits the facts necessary to establish jurisdiction.

ORDER

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

A. Unless otherwise specified, "respondent" shall mean Tennessee Football, Inc. and its successors and assigns.

B. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework.

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this section.

IV.

IT IS FURTHER ORDERED that respondent shall notify the Commission within fourteen (14) days of any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *In re Tennessee Football, Inc.*, FTC File No. 1423032.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, within ninety (90) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit an additional true and accurate written report.

VI.

This order will terminate on June 19, 2034, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. any Part in this order that terminates in fewer than twenty (20) years;

B. this order's application to any respondent that is not named as a defendant in such complaint; and

C. this order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order as to such respondent will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner McSweeny not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, a consent agreement applicable to Tennessee Football, Inc. ("the Tennessee Titans").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

This matter concerns alleged false or misleading representations that the Tennessee Titans made to consumers concerning their participation in the Safe Harbor privacy framework ("Safe Harbor") agreed upon by the U.S. and the European Union ("EU") ("U.S.-EU Safe Harbor Framework"). It is among several actions the Commission is bringing to enforce the promises that companies make when they certify that they participate in the Safe Harbor Framework. The Safe Harbor framework allows U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor framework, a company must self-certify to the U.S. Department of Commerce ("Commerce") that it complies with a set of principles and related requirements that have been deemed by the European Commission as providing "adequate" privacy protection. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor framework. The listing of companies indicates whether their self-certification is "current" or "not current." Companies are required to re-certify every year in order to retain their status as "current" members of the Safe Harbor framework.

The Tennessee Titans are a professional football team and a member of the National Football League. According to the Commission's complaint, from August 2005 until November 2013, the Tennessee Titans set forth on their website, www.titansonline.com, privacy policies and statements about their practices, including statements related to their participation in the U.S-EU Safe Harbor Framework.

The Commission's complaint alleges that the Tennessee Titans falsely represented that they were a "current" participant in the Safe Harbor when, in fact, from August 2009 until November 2013, the Tennessee Titans were not a "current" participant in the U.S.-EU Safe Harbor Framework. The Commission's complaint alleges that in August 2005, the Tennessee Titans submitted a

Safe Harbor self-certification. The Tennessee Titans did not renew the self-certification in August 2009, and Commerce subsequently updated the Tennessee Titans' status to "not current" on its public website.

Part I of the proposed order prohibits the Tennessee Titans from making misrepresentations about their membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires the Tennessee Titans to retain documents relating to compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that the Tennessee Titans submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed complaint or order or to modify the order's terms in any way.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

PINNACLE ENTERTAINMENT, INC.
AND
AMERISTAR CASINOS, INC.

Docket No. 9355. Order, January 6, 2014

Letter approving application to divest the Lumiere Assets to Tropicana Entertainment, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Jonathan S. Gowdy, Esquire
Morrison & Foerster LLP

Dear Mr. Gowdy:

This letter responds to the Application for Approval of Divestiture of the Lumiere Assets ("Lumiere Application") filed by Pinnacle Entertainment, Inc. on September 13, 2013. The Lumiere Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, Pinnacle's proposed divestiture of the Lumiere Assets to Tropicana Entertainment, Inc. The Application was placed on the public record for comments until November 12, 2013, and no comments were received.

After consideration of the proposed divestiture as set forth in Pinnacle's Lumiere 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 representations made in connection with Pinnacle's Lumiere Application and has assumed them to be accurate and complete.

By direction of the Commission.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, January 16, 2014

Opinion and Order denying respondent's motion to dismiss the Complaint in this adjudicatory proceeding, arguing that the Commission has no authority to address private companies' data security practices as "unfair . . . acts or practices" under Section 5(a)(1) of the Federal Trade Commission Act.

ORDER DENYING RESPONDENT LABMD'S MOTION TO DISMISS

By Commissioner Joshua D. Wright, for a unanimous Commission:[1]

This case presents fundamental questions about the authority of the Federal Trade Commission ("FTC" or "the Commission") to protect consumers from harmful business practices in the increasingly important field of data security. In our interconnected and data-driven economy, businesses are collecting more personal information about their customers and other individuals than ever before. Companies store this information in digital form on their computer systems and networks, and often transact business by transmitting and receiving such data over the Internet and other public networks. This creates a fertile environment for hackers and others to exploit computer system vulnerabilities, covertly obtain access to consumers' financial, medical, and other sensitive information, and potentially misuse it in ways that can inflict serious harms on consumers. Businesses that store, transmit, and use consumer information can, however, implement safeguards to reduce the likelihood of data breaches and help prevent sensitive consumer data from falling into the wrong hands.

Respondent LabMD, Inc. ("LabMD") has moved to dismiss the Complaint in this adjudicatory proceeding, arguing that the Commission has no authority to address private companies' data security practices as "unfair . . . acts or practices" under Section

[1] Commissioner Brill did not take part in the consideration or decision herein.

5(a)(1) of the Federal Trade Commission Act ("FTC Act" or "the Act"), 15 U.S.C. § 45(a)(1). This view, if accepted, would greatly restrict the Commission's ability to protect consumers from unwanted privacy intrusions, fraudulent misuse of their personal information, or even identity theft that may result from businesses' failure to establish and maintain reasonable and appropriate data security measures. The Commission would be unable to hold a business accountable for its conduct, even if its data security program is so inadequate that it "causes or is likely to cause substantial injury to consumers [that] is not reasonably avoidable by consumers themselves and [such injury is] not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. § 45(n).

LabMD's Motion to Dismiss Complaint with Prejudice and to Stay Administrative Proceedings ("Motion to Dismiss" or "Motion"), filed November 12, 2013, calls on the Commission to decide whether the FTC Act's prohibition of "unfair . . . acts or practices" applies to a company's failure to implement reasonable and appropriate data security measures. We conclude that it does. We also reject LabMD's contention that, by enacting the Health Insurance Portability and Accountability Act ("HIPAA") and other statutes touching on data security, Congress has implicitly stripped the Commission of authority to enforce Section 5 of the FTC Act in the field of data security, despite the absence of any express statutory language to that effect. Nor can we accept the premise underlying LabMD's "due process" arguments – that, in effect, companies are free to violate the FTC Act's prohibition of "unfair . . . acts or practices" without fear of enforcement actions by the Commission, unless the Commission has first adopted regulations. Accordingly, we deny LabMD's Motion to Dismiss.

PROCEDURAL BACKGROUND

On August 28, 2013, the Commission issued an administrative complaint ("Complaint") against LabMD, a Georgia-based company in the business of conducting clinical laboratory tests on specimen samples from consumers and reporting test results to consumers' health care providers. The Complaint alleges that LabMD engaged in "practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computer networks," *see* Complaint, ¶ 10; that these practices caused harm to consumers, including exposure to identity theft and disclosure of sensitive, private medical information, *id.*, ¶¶ 12, 17-21; and, consequently, that LabMD engaged in "unfair . . . acts or practices" in violation of the FTC Act. *Id*., ¶¶ 22-23. LabMD submitted its Answer and Affirmative Defenses to the Administrative Complaint ("Answer") on September 17, 2013.

LabMD filed its Motion to Dismiss on November 12, 2013.[2] On November 22, 2013, Complaint Counsel filed its Response in Opposition to Respondent's Motion to Dismiss Complaint with Prejudice ("CC Opp."). LabMD filed its Reply to Complaint Counsel's Response in Opposition to Respondent's Motion to Dismiss ("Reply") on December 2, 2013. Factual discovery is now underway and is scheduled to close on March 5, 2014. The evidentiary hearing before the Administrative Law Judge is scheduled to begin on May 20, 2014.

STANDARD OF REVIEW

We review LabMD's Motion to Dismiss using the standards a reviewing court would apply in assessing a motion to dismiss for failure to state a claim.[3] *See* Fed. R. Civ. P. 12(b)(6); *see also* Motion at 8; CC Opp. at 3; *S.C. State Bd. of Dentistry*, 138 F.T.C. 230, 232-33 (2004); *Union Oil Co.*, 138 F.T.C. 1, 16 (2004). Under this framework, "[o]ur task is to determine whether the

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[2] The Commission issued an Order on December 13, 2013, denying both LabMD's request for a stay of the administrative proceedings pending resolution of its Motion to Dismiss (*see* Motion at 29-30) and a separate Motion for Stay Pending Judicial Review that LabMD filed on November 26, 2013.

[3] The Commission's administrative adjudicatory proceedings are governed by the FTC Act and the Commission's Rules of Practice, rather than the rules and standards that govern federal courts. Nonetheless, "since many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists." FTC Op. Manual § 10.7. Here, the most relevant provision in the Commission's Rules of Practice (16 C.F.R. § 3.11(b)(2)) is very similar to the analogous court rule (Fed. R. Civ. P. 8(a)(2)). Thus, in this instance, we exercise our discretion to apply the pleading standards summarized above.

[Complaint] contains sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Resnick v. AvMed, Inc.,* 693 F.3d 1317, 1326 (11th Cir. 2010) (citation omitted). For purposes of this analysis, we "accept[] the allegations in the complaint as true and constru[e] them in the light most favorable to [Complaint Counsel]." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010).

ANALYSIS

I. THE COMMISSION HAS AUTHORITY TO ENFORCE THE FTC ACT BY ADJUDICATING WHETHER THE DATA SECURITY PRACTICES ALLEGED IN THE COMPLAINT ARE "UNFAIR."

LabMD contends that the Commission lacks statutory authority to regulate or bring enforcement action with respect to the data security practices alleged. Motion at 9-21. We disagree. As discussed below, the Commission's authority to protect consumers from unfair practices relating to deficient data security measures is well-supported by the FTC Act, is fully consistent with other statutes, and is confirmed by extensive case law.[4]

A. Congress Intended to Delegate Broad Authority to the Commission to Proscribe Activities that Qualify as "Unfair Acts or Practices."

LabMD's broadest argument is that Section 5 does not authorize the FTC to address *any* data security practices. *See,*

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[4] At some points in the Motion, LabMD frames its arguments as challenges to the scope of the Commission's "jurisdiction" (*e.g.*, at 1, 2, 8, 16, 18, 19), while elsewhere it acknowledges the Commission's "Section 5 'unfairness' authority" but asserts that we cannot apply such authority to LabMD's data security practices. *Id.* at 18. As the Supreme Court recently clarified, "there is *no difference,* insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870 (2013). This is because, "for agencies charged with administering congressional statutes[,] [b]oth their power to act and how they are to act is authoritatively prescribed by Congress." *Id.* at 1869; *see* Motion at 9.

e.g., Motion at 10 ("even if Section 5 does authorize the FTC to regulate data-security, which it does not"); *id.* at 17 (asserting "the Commission's lack of power to regulate data security through its general Section 5 'unfairness' authority'"). Motion at 16. LabMD points out that "there is nothing in Section 5 explicitly authorizing the FTC to directly regulate . . . data-security practices." *Id.* at 20. Ignoring the facially broad reach of Section 5's prohibition of "unfair . . . acts or practices in or affecting commerce," LabMD urges the Commission to conclude from the absence of explicit "data security" authority in the FTC Act that the Commission has no such authority. *See, e.g.,* Motion at 14 ("When Congress has wanted the FTC to have data security authority, it has said so"); *id.* ("However, Congress has never given the Commission such authority and has, in fact, repeatedly made it clear that the FTC's power is very limited in application and very narrow in scope."); *id.* at 16 ("Section 5 does not give the FTC the authority to regulate data-security practices as 'unfair' acts or practices"); *id.* at 21 ("Section 5 does not contain a clear and manifest statement from Congress to authorize the Commission's [authority over] data security"). The statutory text, legislative history, and nearly a century of case law refute LabMD's argument.

As the courts have long recognized, "[n]either the language nor the history of the [FTC] [A]ct suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories." *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 310 (1934). Rather, the legislative history of the FTC Act confirms that Congress decided to delegate broad authority "to the [C]ommission to determine what practices were unfair," rather than "enumerating the particular practices to which [the term 'unfair'] was intended to apply. . . . There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972) (quoting S. Rep. No. 597, 63d Cong., 2d Sess., 13 (1914), and H.R. Conf. Rep. No.1142, 63d Cong., 2d Sess., 19 (1914)). *See also Atl. Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) (Congress "intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce.'") (quoting S. Rep. No. 592, 63d Cong., 2d Sess., 13 (1914)).

This legislative history pertains to Congress' enactment of the prohibition of "unfair methods of competition" in 1914. Similar considerations motivated Congress's reuse of the same broad term ("unfair") when it amended the statute in 1938 to proscribe "unfair and deceptive acts and practices" as well as "unfair methods of competition." The 1938 amendment perpetuated and expanded the broad congressional delegation of authority to the Commission by "overturn[ing] . . . attempts [in some court decisions] to narrowly circumscribe the FTC's authority." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 966 (D.C. Cir. 1985). Congress thus clarified that "the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors." *Id.* (quoting H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937)).

As LabMD points out (*see* Motion at 18), Congress enacted legislation in 1994 that provided a sharper focus for the application of the Commission's "unfairness" authority, by amending the FTC Act to incorporate three specific criteria governing the application of "unfair . . . acts or practices" in adjudicatory and rulemaking proceedings. Specifically, the new Section 5(n) of the Act provides that, in enforcement actions or rulemaking proceedings, the Commission has authority to determine that an act or practice is "unfair" if that act or practice "[1] causes or is likely to cause substantial injury to consumers which is [2] not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. 45(n). These criteria, derived from the Commission's pre-existing *Policy Statement on Unfairness*, codified the analytical framework that the Commission already had been applying for the preceding decade in its efforts to combat "unfair . . . acts or practices." *See* Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980) ("*Policy Statement on Unfairness*"), *reprinted in Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984). Section 5(n)'s specific criteria provide greater certainty for businesses by setting forth the factors to be used to evaluate whether their acts or practices are "unfair." That fact alone refutes LabMD's contention that the "general statutory terms" in Section 5 are too "vague" to be applied to the conduct alleged in the Complaint. *See* Motion at 19.

At the same time, Congress, in enacting Section 5(n), confirmed its intent to allow the Commission to continue to ascertain, on a case-by-case basis, which specific practices should be condemned as "unfair." Thus, to this day, "Congress has not at any time withdrawn the broad discretionary authority originally granted the Commission in 1914 to define unfair practices on a flexible, incremental basis." *Am. Fin. Servs. Ass'n*, 767 F.2d at 966.

The Commission and the federal courts have been applying these three "unfairness" factors for decades and, on that basis, have found a wide range of acts or practices that satisfy the applicable criteria to be "unfair," even though – like the data security practices alleged in this case – "there is nothing in Section 5 explicitly authorizing the FTC to directly regulate" such practices (*see* Motion at 20). *See, e.g., FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) (creating and delivering unverified checks that enabled fraudsters to take unauthorized withdrawals from consumers' bank accounts); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009) (covert retrieval and sale of consumers' telephone billing information); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364 (11th Cir.1988) (unilateral breach of standardized service contracts); *Am. Fin. Servs. Ass'n,* 767 F.2d at 971 (oppressive litigation conduct to repossess household goods sold on credit).

LabMD cites *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), for the proposition that the Commission is overstepping the bounds of its authority to interpret the FTC Act. *See* Motion at 20. But that case is inapposite. *ABA* concerned the agency's determination, in construing the Gramm-Leach-Bliley Act ("GLB Act"), that attorneys fell within that statute's definition of "financial institutions" – a defined term that, in turn, incorporated by reference a set of lengthy and detailed definitions imported from other statutes and other agencies' regulations. The court found it "difficult to believe" that, in enacting a statutory "scheme of the length, detail, and intricacy of the one" under review, Congress could have left sufficient remaining ambiguity, "hidden beneath an incredibly deep mound of specificity," to support imposing GLB Act requirements upon "a profession never before regulated by federal [financial service] regulators, and never mentioned in the statute." 430 F.3d at 469. By contrast, the statutory text at issue in this case – "unfair . . . acts or practices" – conveys a far broader scope of interpretive flexibility, particularly given that this term is at the core of the Commission's own organic statute, the FTC Act.

LabMD similarly invokes *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), for the proposition that "simple 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude' . . . reinforces the conclusion that the FTC lacks the authority to regulate the acts or practices alleged in the Complaint." Motion at 19 (quoting *Brown & Williamson*, 529 U.S. at 133). But *Brown & Williamson* is inapposite as well. In that case, the Court found that the Food and Drug Administration's attempts to regulate tobacco products conflicted directly with concrete manifestations of congressional intent. In particular, the Court concluded that, if the FDA had the authority it claimed, its own findings would have compelled it to ban tobacco products outright, whereas various tobacco-related statutes made clear that Congress wished *not* to ban such products. *See* 529 U.S. at 137-39. Here, of course, LabMD can cite no similar congressional intent to preserve inadequate data security practices that unreasonably injure consumers.

Similarly, the Court found that "Congress' specific intent when it enacted the FDCA" (Food, Drug & Cosmetics Act) in 1938 was to deny the FDA authority to regulate tobacco products. 529 U.S. at 146. The Court reasoned that, "*given the economic and political significance of the tobacco industry at the time*, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter." *Id.* at 147 (emphasis added).[5] By contrast, when

[5] As the D.C. Circuit has recently recognized, these considerations are essential to the holding of *Brown & Williamson*, and, in their absence, that case does not justify restricting agency action under a broad statutory mandate. *See Verizon v. FCC*, No. 11-1355, at 23-25 (D.C. Cir., Jan. 14, 2014) (slip op.).

enacting the FTC Act in 1914 and amending it in 1938, Congress had no way of anticipating the "economic and political significance" of data security practices in today's online environment. Accordingly, the fact that "there is no evidence in the text of the [FTC Act] or its legislative history that Congress in 1938 even considered the applicability of the Act" to data security practices is completely irrelevant. Congress could not possibly have had any "specific intent" to deny the FTC authority over data security practices. It did, however, intend to delegate broad authority to the FTC to address emerging business practices – including those that were unforeseeable when the statute was enacted. That is the only congressional intent that matters here.

B. The Commission Has Consistently Affirmed Its Authority under the FTC Act to Take Enforcement Action against Unreasonable Data Security Activities that Qualify as Unfair Acts and Practices

LabMD similarly attempts to draw support from the *Brown & Williamson* Court's determination that the FDA's 1996 "assertion of authority to regulate tobacco products" contradicted the agency's previous "consistent and repeated statements [over the preceding 73 years] that it lacked authority . . . to regulate tobacco absent claims of therapeutic benefit by the manufacturer," and the Court's conclusion that congressional enactments "against the backdrop" of the FDA's historic disavowal of authority confirmed that Congress did not intend to authorize such regulation. 529 U.S. at 132, 144-46. LabMD argues, by analogy, that "the Commission [previously] did not claim Section 5 'unfairness' authority to regulate patient-information (or any other) data-security practices," but "recently reversed course without explanation," thus purportedly defying congressional intent. Motion at 16, 18.

That analogy, too, is without merit. Unlike the FDA, the Commission has never disavowed authority over online privacy or data security matters. To the contrary, "[t]he Commission has been involved in addressing online privacy issues for almost as long as there has been an online marketplace," and has repeatedly and consistently affirmed its authority to challenge unreasonable data security measures as "unfair . . . acts or practices" in violation of Section 5. *See* FTC Report to Congress, *Privacy Online*, at 2 (June 1998) ("*1998 Online Privacy Report*").[6] LabMD cites out-of-context snippets from the Commission's 1998 and 2000 reports to Congress for the unfounded proposition that, at that time, the Commission believed its authority over data security matters was "limited to ensuring that Web sites follow their stated information practices."[7] LabMD's characterization does not withstand scrutiny. Neither the text it quotes nor the reports as a whole can plausibly be read as disavowing the Commission's authority to take enforcement action against data security practices that violate Section 5's prohibition of "unfair . . . acts or practices," as defined in Section 5(n). Indeed, the Commission clearly stated that certain conduct relating to online data security is "likely to be an unfair practice," and, in both reports, confirmed its view that the FTC Act "provides a basis for government enforcement" against information practices [that] may be inherently . . . unfair, regardless of whether the entity has publicly adopted any fair information practice policies."[8] In context, the sentences from the 1998 and 2000 reports relied upon

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[6] *See* http://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf.

[7] Motion at 16 n.12 (quoting *1998 Online Privacy Report* at 41) ("As a general matter, the Commission lacks authority to require firms to adopt information practice policies."); Reply at 7-8 (quoting FTC Report to Congress, *Privacy Online: Fair Information Practices in the Electronic Age* (May 2000) ("*2000 Online Privacy Report*") (http://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf) ("As a general matter, . . . the Commission lacks authority to require firms to adopt information practice policies or to abide by the fair information practice principles on their Web sites").

[8] *1998 Online Privacy Report* at 12-13, 40-41. *See also 2000 Online Privacy Report* at 33-34 ("The Commission's authority over the collection and dissemination of personal data collected online stems from Section 5[,]" which "prohibits unfair and deceptive practices in and affecting commerce," and thus "authorizes the Commission to seek injunctive and other equitable relief, including redress, for violations of the Act, and provides a basis for government enforcement of certain [norms concerning] fair information practices").

by LabMD simply recognize that the Commission's existing authority may not be sufficient to effectively protect consumers with regard to *all* data privacy issues of potential concern (such as aspects of children's online privacy) and that expanded rulemaking authority and enforcement remedies could enhance the Commission's ability to meaningfully address a broader range of such concerns.[9] The same error infects LabMD's mischaracterization of testimony that Commissioners and high-level Commission staff members delivered to various congressional committees and subcommittees.[10]

Since the late 1990s, the Commission has repeatedly affirmed its authority to take action against unreasonable data security measures as "unfair . . . acts or practices" in violation of Section 5, in reports, testimony to Congress, and other publicly-released documents.[11] The Commission has also confirmed this view by

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[9] *See 1998 Online Privacy Report* at 42 (recognizing that "Section 5 may only have application to some but not all practices that raise concern about the online collection and use of information from children," and recommending legislation authorizing the Commission to promulgate "standards of practice governing the online collection and use of information from children."); *2000 Online Privacy Report* at 36-37 (seeking legislation granting "authority to promulgate more detailed standards pursuant to the Administrative Procedure Act," including "rules or regulations [that] could provide further guidance to Web sites by defining fair information practices with greater specificity[,]"such as "what constitutes 'reasonable access' and 'adequate security'"). *See also* Motion at 17 n.13 (quoting same).

[10] *See* Motion at 16-17, nn.12, 13, 14 (citing testimony by Chairman Robert Pitofsky in 1998, then-Commissioner Edith Ramirez in 2011, Chairman Jonathan Leibowitz in 2012, and Bureau Directors Eileen Harrington and David Vladeck in 2009 and 2011, respectively). In such testimony, the FTC representatives conveyed the Commission's support for draft data security legislation that would expand the FTC's *existing* authority by providing it with rulemaking authority under the Administrative Procedure Act and civil penalty authority. *See, e.g.*, Prepared Statement of the FTC, *Data Security*, presented by Commissioner Edith Ramirez to House Comm. on Energy & Commerce, Subcomm. on Commerce, Mfg., and Trade, at 11-12 (June 5, 2011) (http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-data-security/110615datasecurityhouse.pdf).

[11] *See, e.g.*, Prepared Statement of the FTC, *Identity Theft: Innovative Solutions for an Evolving Problem*, presented by Bureau Dir. Lydia B. Parnes to Senate Comm. on the Judiciary, Subcomm. on Terrorism, Tech., and

bringing administrative adjudicatory proceedings and cases in federal court challenging practices that compromised the security of consumers' data and resulted in improper disclosures of personal information collected from consumers online. For example, on May 1, 2006, the Commission filed a complaint in the U.S. District Court for the District of Wyoming, charging that defendant Accusearch, Inc. and its principal obtained consumers' private information (specifically, data concerning their telecommunications usage) and caused such data to be disclosed to unauthorized third parties without consumers' knowledge or consent. *FTC v. Accusearch, Inc.*, Case No. 2:06-cv-0105, Complaint, at ¶¶ 9-13. The Commission alleged that this conduct was "an unfair practice in violation of Section 5(a) of the FTC Act," *id.*, ¶ 14, because it "caused or [was] likely to cause substantial injury to consumers that [was] not reasonably avoidable by consumers and [was] not outweighed by countervailing benefits to consumers or competition." *Id.*, ¶ 13. The district court agreed, granting summary judgment to the Commission in 2007, and the Tenth Circuit affirmed in 2009. *See Accusearch*, *supra*, 570 F.3d 1187. Since then, the Commission has taken the same position in dozens of other enforcement proceedings, including administrative adjudications,[12] as well as

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Homeland Security, at 5-6 (Mar. 21, 2007) (http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-identity-theft-innovative-solutions-evolving-problem/p065409identitytheftsenate03212007.pdf); FTC Staff Report, *Protecting Consumers in the Next Tech-ade*, at 29-30 (Spring 2008) (http://www.ftc.gov/sites/default/files/documents/reports/protecting-consumers-next-tech-ade-report-staff-federal-trade-commission/p064101tech.pdf); FTC Report, *Security in Numbers, SSNs and ID Theft*, at 7 (Dec. 2008) (http://www.ftc.gov/os/2008/12/P075414ssnreport.pdf); Prepared Statement of the FTC, *Protecting Social Security Numbers From Identity Theft*, presented by Assoc. Bureau Dir. Maneesha Mithal to House Comm. on Ways and Means, Subcomm. on Soc. Security, at 8 (April 13, 2011) (http://ftc.gov/os/testimony/110411ssn-idtheft.pdf); FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change*, at 14, 73 (March 26, 2012) (http://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers). *See also* note 13, *infra*.

[12] *See BJ's Wholesale Club, Inc.*, 140 F.T.C. 465, 470 (2005); *DSW, Inc.*, 141 F.T.C. 117, 122 (2006); *CardSystems Solutions, Inc.*, Docket No. C-4168, 2006 WL 2709787, *3 (Sept. 5, 2006); *Reed Elsevier, Inc.*, Docket No. C-4226, 2008 WL 3150420, *4 (July 29, 2008); *TJX Cos., Inc.*, Docket No. C-4227, 2008 WL 3150421, *3 (Sept. 29, 2008). In these and similar cases, the Commission

complaints filed in federal courts, *see* CC Opp. at 12-13 n.9 (citing cases). In these cases, the Commission challenged allegedly unreasonable data security measures (or other practices that enabled unauthorized third parties to harm consumers by obtaining access to their confidential personal data) as "unfair acts or practices" in violation of Section 5. And in each case, it clearly reaffirmed its position that it possessed jurisdiction over the allegedly "unfair" data security practices under Section 5.

The fact that the Commission initially focused its enforcement efforts primarily on "deceptive" data security practices, and began pursuing "unfair" practices in 2005, does not mean that the Commission lacked jurisdiction over "unfair" practices before then. As then-Commissioner Orson Swindle testified to a House subcommittee in 2004, "To date, the Commission's security cases have been based on its authority to prevent deceptive practices," but it "also has authority to challenge practices as unfair if they cause consumers substantial injury that is neither reasonably avoidable nor offset by countervailing benefits. The Commission has used this authority in appropriate cases to challenge a variety of injurious practices, including unauthorized charges in connection with 'phishing.'"[13] LabMD cites Commissioner Swindle's reference to the Commission's "deceptiveness" authority over data security practices, *see* Motion at 16 n.12, but neglects to mention his reference to the Commission's "unfairness" authority over such practices.

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issues its final Decisions & Orders only after placing the relevant proposed consent orders on the public record, issuing Notices in the Federal Register that summarize and explain the provisions of the proposed orders and invite public comment, and considering comments filed by interested members of the public. *See* 16 C.F.R. § 2.34(c) & (e).

[13] Prepared Statement of the FTC, *Protecting Information Security and Preventing Identity Theft*, presented by Commissioner Orson Swindle to House Comm. on Gov't Reform, Subcomm. on Tech., Info. Policy, Intergovernmental Relations, and the Census, at 7, 14 n.24 (Sept. 22, 2004) (http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-protecting-information-security-and-preventing-identity/040922infosecidthefttest.pdf) ("*Comm'r Swindle's 2004 Information Security Testimony*").

LabMD also misinterprets the Commission's expressions of support for legislation relating to data security as requests for authority to fill regulatory "gaps" that it could not fill without such legislation. *Id.* at 17 & nn.13, 14. LabMD refers to three data security-related laws that the Commission supported, and that Congress ultimately enacted – *i.e.*, the GLB Act,[14] the Children's Online Privacy Protection Act ("COPPA"),[15] and the Fair and Accurate Credit Transactions Act of 2003 ("FACTA").[16] But these laws *recognized* the Commission's *existing* enforcement authority, *expanded* that authority in particular respects, and affirmatively *directed* the Commission to take particular actions to protect consumer interests in specified contexts. For example, in COPPA, Congress authorized the Commission to sue for civil penalties in addition to the equitable monetary relief available under existing law, and authorized and directed the Commission to promulgate rules to protect children's online privacy pursuant to the streamlined procedures of the Administrative Procedure Act ("APA"), rather than using the more time-consuming procedures mandated by Section 18 of the FTC Act, 15 U.S.C. § 57a. Similarly, in both FACTA and the GLB Act, Congress directed the Commission to adopt rules addressing specified topics using streamlined APA procedures; and in FACTA, Congress also expanded the range of remedies available in Commission enforcement actions.

Finally, even if they were otherwise plausible, LabMD's arguments about the intended meaning of the past statements of the Commission or its members or staff would still be immaterial to the ultimate question of the Commission's statutory authority. "An agency's initial interpretation of a statute that it is charged with administering is not 'carved in stone,'" and agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances." *Brown & Williamson,* 529 U.S. at 156-57 (quoting *Chevron U.S.A. Inc. v. Natural Resources*

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[14] Pub. L. 106-102 (1999) (codified in pertinent part at 15 U.S.C. § 6804(a)(1)).

[15] Pub. L. 105-277 (1998) (codified in pertinent part at 15 U.S.C. §§ 6502(b), 6505(d)).

[16] Pub. L. 108-159 (2003) (codified in pertinent part at 15 U.S.C. § 1681s(a)).

Defense Council, Inc., 467 U.S. 837, 863 (1984); *Smiley v. Citibank (S.D.)*, 517 U.S. 735, 742 (1996); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); and *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)); *see also Verizon v. FCC*, *supra* note 5, at 19-20. Presented with the concrete circumstances of this case, the Commission concludes that it can and should address whether or not LabMD's data security procedures constitute "unfair . . . acts or practices" within the meaning of the FTC Act. To conclude otherwise would disregard Congress's instruction to the Commission to protect consumers from harmful practices in evolving technological and marketplace environments.

C. HIPAA and Other Statutes Do Not Shield LabMD from the Obligation to Refrain from Committing Unfair Data Security Practices that Violate the FTC Act.

Contrary to LabMD's contention, Congress has never enacted any legislation that, expressly or by implication, forecloses the Commission from challenging data security measures that it has reason to believe are "unfair . . . acts or practices." LabMD relies on numerous "targeted statutes" that Congress has enacted in recent years "specifically delegating" to the Commission or to other agencies "statutory authority over data-security" in certain narrower fields. Motion at 15. But LabMD has not identified a single provision in any of these statutes that expressly withdraws any authority from the Commission. Thus, its argument that these more specific statutes implicitly repeal the FTC's preexisting authority is unpersuasive. "The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). Thus, one cannot conclude that Congress implicitly repealed or narrowed the scope of an existing statute (*i.e.*, Section 5) by subsequently enacting a new law unless "the intention of the legislature to repeal [is] clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act . . . ." *Id.*; *see also Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the [later] Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"); *Morton v. Moncari*, 417 U.S. 535, 551 (1974) ("when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

Nothing in HIPAA, HITECH,[17] or any of the other statutes LabMD cites reflects a "clear and manifest" intent of Congress to restrict the Commission's authority over allegedly "unfair" data security practices such as those at issue in this case. LabMD identifies no provision that creates a "clear repugnancy" with the FTC Act, nor any requirement in HIPAA or HITECH that is "clearly incompatible" with LabMD's obligations under Section 5. *See* Motion at 13. To the contrary, the patient-information protection requirements of HIPAA are largely consistent with the data security duties that the Commission has enforced pursuant to the FTC Act. Indeed, the FTC and the Department of Health and Human Services ("HHS") have worked together "to coordinate enforcement actions for violations that implicate both HIPAA and the FTC Act." HHS, *Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules*, Final Rule, 78 Fed. Reg. 5566, 5579 (Jan. 25, 2013). And the two agencies have obtained favorable results by jointly investigating the data security practices of companies that may have violated each of these statutes.[18]

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[17] *See* Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191 (1996) (codified in pertinent part at 42 U.S.C. §§ 1320d *et seq.*); American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, Div. A, Title XIII, and Div. B, Title IV ("Health Information Technology for Economic and Clinical Health Act") ("HITECH") (codified at 42 U.S.C. §§ 1320d-5 *et seq.*).

[18] For example, in 2009, CVS Caremark simultaneously settled HHS charges of HIPAA violations and FTC charges of FTC Act violations, stemming from the two agencies' coordinated investigations of the company's failure to securely dispose of documents containing consumers' sensitive financial and medical information. *See* FTC Press Release: *CVS Caremark Settles FTC Charges: Failed to Protect Medical and Financial Privacy of Customers and Employees; CVS Pharmacy Also Pays $2.25 Million to Settle Allegations of HIPAA Violations* (Feb. 18, 2009) (http://www.ftc.gov/news-events/press-releases/2009/02/cvs-caremark-settles-ftc-chargesfailed-protect-medical-financial); *CVS Caremark Corp.*, Consent Order, FTC Docket No. C-4259,

LabMD further argues that HIPAA's comprehensive framework governing "patient-information data-security practices" by HIPAA-regulated entities somehow trumps the application of the FTC Act to that category of practices. Motion at 11-12. But HIPAA evinces no congressional intent to preserve anyone's ability to engage in inadequate data security practices that unreasonably injure consumers in violation of the FTC Act, and enforcement of that Act thus fully comports with congressional intent under HIPAA. LabMD similarly contends that, by enacting HIPAA, Congress vested HHS with "exclusive administrative and enforcement authority with respect to HIPAA-covered entities under these laws." *Id.* at 11. That argument is also without merit. To be sure, the Commission cannot enforce HIPAA and does not seek to do so.[19] But nothing in HIPAA or in HHS's rules negates the Commission's authority to enforce the FTC Act.[20]

2009 WL 1892185 (June 18, 2009). *See also* HHS Press Release: *CVS Pays $2.25 Million and Toughens Practices to Settle HIPAA Privacy Case* (Feb. 18, 2009) (http://www.hhs.gov/news/press/2009pres/02/20090218a.html). Similarly, in 2010, Rite Aid entered consent decrees to settle both FTC charges of FTC Act violations and HHS charges of HIPAA violations, which the two agencies had jointly investigated. *See Rite Aid Corp.*, Consent Order, 150 F.T.C. 694 (2010); HHS Press Release: Rite Aid Agrees to Pay $1 Million to Settle HIPAA Privacy Case (July 27, 2010) (http://www.hhs.gov/news/press/2010pres/07/20100727a.html).

[19] LabMD repeatedly – but incorrectly – asserts that "the FTC agrees that LabMD has not violated HIPAA or HITECH." *See, e.g.*, Motion at 13; *see also* Reply at 4 ("a company FTC admits *complied* with HIPAA/HITECH in all respects") (emphasis in original); *id.* at 5 ("FTC admits LabMD has always complied with all applicable data-security regulations"); *id.* at 12 ("FTC *admits* that LabMD, a HIPAA-covered entity, always complied with HIPAA/HITECH regulations") (emphasis in original). The Commission does not enforce HIPAA or HITECH, and has never expressed any view on whether LabMD has, or has not, violated those statutes.

[20] Both HHS (pursuant to HIPAA and HITECH) and the FTC (pursuant to the American Recovery and Reinvestment Act of 2009) have promulgated regulations establishing largely congruent requirements concerning notification of data breaches involving consumers' private health information, but they are applicable to two different categories of firms. *Compare* 16 C.F.R. Part 318 (FTC rule) *with* 45 C.F.R. Part 164, Subparts D & E (HHS rule). LabMD correctly notes that this FTC rule does not apply to HIPAA-covered entities, *see* Motion at 12 & n.9, but the conclusion it draws from this fact is unfounded. Significantly, the Complaint in the present proceeding alleges only statutory

Indeed, the FTC Act makes clear that, when Congress wants to exempt a particular category of entities or activities from the Commission's authority, it knows how to do so explicitly – further undermining LabMD's claim to an implicit "carve-out" from the Commission's jurisdiction over HIPAA-covered entities or their "patient-information data security practices." Section 5(a)(2) specifically lists categories of businesses whose acts and practices are not subject to the Commission's authority under the FTC Act. These include banks, savings and loans, credit unions, common carriers subject to the Acts to regulate commerce, air carriers, and entities subject to certain provisions in the Packers and Stockyards Act of 1921. 15 U.S.C. § 45(a)(2). Congress could have added "HIPAA-covered entities" to that list, but it did not. Similarly, the statute identifies certain types of practices that the Commission may not address, such as commerce with foreign nations in certain circumstances. *Id.* § 45(a)(3). But it provides no carve-out for data security practices relating to patient information, to which HIPAA may apply.

LabMD relies on *Credit Suisse Securities, LLC v. Billing*, 551 U.S. 264 (2007), for the proposition that industry-specific requirements in other statutes may trump more general laws such as the FTC Act. *See* Motion at 13. *Credit Suisse* is clearly distinguishable. As LabMD concedes, there was a "possible conflict between the [securities and antitrust] laws," creating a "risk that the specific securities and general antitrust laws, if both applicable, would produce conflicting guidance, requirements, . . . or standards of conduct." *Id.* By contrast, nothing in the FTC Act compels LabMD to engage in practices forbidden by HIPAA, or vice versa. It is not unusual for a party's conduct to be governed by more than one statute at the same time, as "we live in 'an age of overlapping and concurrent regulatory jurisdiction[.]'" *FTC v. Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) (quoting *Thompson Med. Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1996)). LabMD and other companies may well be obligated to ensure their data security practices comply with both HIPAA and the FTC Act. But so long as the requirements of those statutes do not conflict with one another, a party cannot plausibly assert that,

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violations; it does not allege violations of the FTC's Health Breach Notification Rule.

because it complies with one of these laws, it is free to violate the other. Indeed, courts have consistently ruled that "the FTC may proceed against unfair practices even if those practices [also] violate some other statute that the FTC lacks authority to administer." *Accusearch*, 570 F.3d at 1194-95 (concluding that conduct may be an unlawful "unfair . . . act or practice" under the FTC Act even if it also violates the Telecommunications Act of 1996). *See also Orkin Exterminating Co.,* 849 F.2d at 1353 (rejecting proposition that a "mere breach of contract . . . is outside the ambit of [the "unfairness" prohibition in] section 5"); *Am. Fin. Servs. Ass'n*, 767 F.2d at 982-83 (FTC may ban certain creditor remedies, such as wage assignments and repossession of consumers' household goods, as "unfair . . . acts or practices" under the FTC Act, even where such conduct also ran counter to state laws against enforcing unconscionable contracts of adhesion).

Finally, LabMD argues that Congress' enactment of three new statutes addressing the Commission's authority over certain data protection matters in discrete contexts implies that Congress must have believed that, in other respects, the Commission lacked statutory authority to address data protection matters under the FTC Act. That argument, too, is without merit. First, as discussed above, in each of these statutes Congress *expanded* the enforcement and rulemaking tools that the Commission *already* possessed for addressing data security problems in discrete areas. *See supra* at 8 n.10, 9-10. LabMD identifies nothing in any of those bills or their legislative histories indicating that the Commission's authority to enforce Section 5's prohibition of "unfair . . . acts or practices" was limited in any way. Moreover, these statutes affirmatively *directed* the Commission to take particular actions to protect consumer interests in specified contexts.[21] Of course, by *compelling* the Commission to take particular steps in those contexts, Congress did not somehow divest the Commission of its preexisting and much broader *authority* to protect consumers against "unfair" practices.

[21] For example, in COPPA, Congress directed the Commission to promulgate rules addressing the specific duties of child-directed website operators to provide specific notices and obtain parental consent before collecting or disclosing children's personal information. *See* 15 U.S.C. § 6502(b).

Congress commonly authorizes agencies to oversee entire fields while specifying, in a few areas, what minimum steps those agencies must take in exercising that authority, and the enumeration of those minimum steps does not cast doubt on the agencies' broader authority. *See, e.g., Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 705-06 (D.C. Cir. 2011). And LabMD's reliance on data security-related bills that ultimately were *not* enacted into law (*see* Motion at 17-18 & n.15; Reply at 9) contradicts basic principles of statutory interpretation.[22]

In sum, we reject LabMD's contention that the Commission lacks authority to apply the FTC Act's prohibition of "unfair . . . acts or practices" to data security practices, in the field of patient information or in other contexts; and we decline to dismiss the Complaint on that basis.

[22] The fact that a proposed bill was not enacted into law does not mean that Congress consciously "rejected" it. Enacting a bill into law is a notoriously difficult and time-consuming process, given the procedural and political hurdles to be overcome before obtaining majority votes of both Houses of Congress, reconciliation of any differences between the two Houses' versions, and signature by the President. Thus, "the fact that Congress has considered, but failed to enact, several bills" typically sheds little, if any, light on what Congress believed or intended; and the adjudicator's "task . . . is not to construe bills that Congress has failed to enact, but to construe statutes that Congress has enacted." *Wright v. West*, 505 U.S. 277, 294 n.9 (1992) (Thomas, J.) (plurality op.); *see also Verizon v. FCC*, *supra* note 5, at 25 ("pieces of subsequent failed legislation tell us little if anything about the original meaning" of a statute, and thus such later, unenacted legislative proposals provide "an unreliable guide to legislative intent") (citations omitted).

II. THE COMMISSION HAS AUTHORITY TO ENFORCE THE STATUTE BY ADJUDICATING ALLEGED VIOLATIONS, DESPITE THE ABSENCE OF REGULATIONS, WITHOUT INFRINGING LABMD'S DUE PROCESS RIGHTS.

A. Administrative Agencies May Interpret and Enforce Statutory Requirements in Case-by-Case Adjudications, as Well as By Rulemaking.

LabMD argues that the Commission may not adjudicate whether the alleged conduct violated Section 5 of the FTC Act because the Commission "has not prescribed regulations or legislative rules under Section 5 establishing patient-information (or any other) data-security standards that have the force of law." Motion at 23. LabMD asserts that "[t]he FTC's refusal to issue regulations is wrongful and makes no sense." *Id.* at 24. LabMD's position conflicts with longstanding case law confirming that administrative agencies may – indeed, must – enforce statutes that Congress has directed them to implement, regardless whether they have issued regulations addressing the specific conduct at issue. Thus, in the leading case of *SEC v. Chenery*, the Supreme Court recognized that the SEC had not exercised its statutory rulemaking authority with regard to the matter at issue, and squarely rejected the contention "that the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to perform its statutory duty in this case." 332 U.S. 194, 201-02 (1947). To the contrary: "the Commission had a statutory duty to decide the issue at hand in light of the proper standards[,] and . . . this duty remained 'regardless of whether those standards previously had been spelled out in a general rule or regulation.'" *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292 (1974) (quoting *Chenery*, 332 U.S. at 201).

The Commission has long recognized that "information security is an ongoing process of assessing risks and vulnerabilities: no one static standard can assure appropriate security, as security threats and technology constantly evolve." *See Comm'r Swindle's 2004 Information Security Testimony* at 3. Such complex questions relating to data security practices in an online environment are particularly well-suited to case-by-case development in administrative adjudications or enforcement proceedings, given the difficulty of drafting generally applicable regulations that fully anticipate the concerns that arise over emerging business arrangements in this rapidly changing area. As the Supreme Court has explained,

> [P]roblems may arise . . . [that] must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

Chenery, 332 U.S. at 202-03. Accordingly, "agency discretion is at its peak in deciding such matters as whether to address an issue by rulemaking or adjudication[,] [and] [t]he Commission seems on especially solid ground in choosing an individualized process where important factors may vary radically from case to case." *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990). *See also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965) ("the proscriptions [of unfair or deceptive acts and practices] in Section 5 are flexible, to be defined with particularity by the myriad of cases from the field of business," which "necessarily give[] the Commission an influential role in interpreting Section 5 and in *applying it to the facts of particular cases arising out of unprecedented situations*.") (emphasis added).

The Commission has enforced Section 5's prohibition of "unfair . . . acts or practices" primarily through case-by-case adjudication and litigation from the time the statute was enacted. Indeed, numerous recent cases have condemned conduct that facilitated identity theft or involved misuse of confidential consumer information as unlawful "unfair . . . acts or practices," although the practices were unprecedented and not covered by any preexisting rules. Thus, even though the Commission had never promulgated any regulations governing the creation of online checks or bank drafts without adequate verification procedures, the Ninth Circuit, in *Neovi*, easily affirmed both the district court's holding that the defendants had committed "unfair acts or practices," 604 F.3d at 1155-58, and its requirement that the defendants disgorge all revenue from the unlawful conduct. *Id.* at 1159-60. Similarly, despite the absence of any regulation prohibiting online data brokers from gathering and selling consumers' confidential information gleaned from telephone records, the Tenth Circuit affirmed a district court decision finding that the defendants' conduct constituted "unfair acts and practices" and imposing an equitable disgorgement remedy. *See generally Accusearch*, 570 F.3d 1187.

B. This Proceeding Respects LabMD's Due Process Rights

The Commission's decision to proceed through adjudication without first conducting a rulemaking also does not violate LabMD's constitutional due process rights. The courts have rejected such due process challenges to agency adjudications on numerous occasions. For example, in *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000), the court held that the agency did not violate due process in interpreting and implementing the immigration statute in an enforcement proceeding, even though its "policy was developed in the course of an informal adjudication, rather than during formal rulemaking." 212 F.3d at 1350. *See also Taylor v. Huerta*, 723 F.3d 210, 215 (D.C. Cir. 2013) (statute enabling agency to revoke pilot's license following administrative adjudicatory proceeding "represented nothing more than an ordinary exercise of Congress' power to decide the proper division of regulatory, enforcement, and adjudicatory functions between agencies in a split-enforcement regime . . . . [Petitioner] cites no authority, and presents no persuasive rationale, to support his claim that due process requires more."); *RTC Transp., Inc. v. ICC*, 731 F.2d 1502, 1505 (11th Cir. 1984) (rejecting contention that agency's "application of its policy . . . denied them due process because the policy was announced in adjudicatory proceedings, . . . rather than being promulgated in rulemaking proceedings with notice and opportunity for comment"); *Shell Oil Co. v. FERC*, 707 F.2d 230, 235-36 (5th Cir. 1983) (noting that parties in administrative adjudicatory proceedings are not denied due process even when agencies establish new, binding standards of general application in such proceedings, so long as affected parties are given meaningful opportunities to address the factual predicates for imposing liability).

To be sure, constitutional due process concerns may arise if the government imposes criminal punishment or civil penalties for past conduct (or unduly restricts expression protected by the First Amendment) pursuant to a law that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). But, as the D.C. Circuit held in rejecting a constitutional due process challenge to the Commission's implementation of the Fair Credit Reporting Act,

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. The regulated enterprise . . . may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. Finally, the consequences of imprecision are qualitatively less severe when laws have . . . civil rather than criminal penalties.

Trans Union Corp. v. FTC, 245 F.3d 809, 817 (D.C. Cir. 2001) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982)).

Here, the three-part statutory standard governing whether an act or practice is "unfair," set forth in Section 5(n), should dispel LabMD's concern about whether the statutory prohibition of "unfair . . . acts or practices" is sufficient to give fair notice of what conduct is prohibited. In enacting Section 5(n), Congress endorsed the Commission's conclusion that "the unfairness standard is the result of an evolutionary process . . . . [that] must be arrived at by . . . a gradual process of judicial inclusion and exclusion." *Policy Statement on Unfairness*, 104 F.T.C. at 1072. This is analogous to the manner in which courts in our common-law system routinely develop or refine the rules of tort or contract law when applying established precedents to new factual situations. As the Supreme Court has recognized, "[b]roadly worded constitutional and statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law tradition." *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 (1981).

LabMD's due process claim is particularly untenable when viewed against the backdrop of the common law of negligence. Every day, courts and juries subject companies to tort liability for violating uncodified standards of care, and the contexts in which they make those fact-specific judgments are as varied and fast-changing as the world of commerce and technology itself. The imposition of such tort liability under the common law of 50 states raises the same types of "predictability" issues that LabMD raises here in connection with the imposition of liability under the standards set forth in Section 5(n) of the FTC Act. In addition, when factfinders in the tort context find that corporate defendants have violated an unwritten rule of conduct, they – unlike the FTC – can normally impose compensatory and even punitive damages. Even so, it is well-established that the common law of negligence does not violate due process simply because the standards of care are uncodified. There is similarly no basis to conclude that the FTC's application of the Section 5(n) cost-benefit analysis violates due process, particularly where, as here, the complaint does not even seek to impose damages, let alone retrospective penalties.

III. LABMD'S ALLEGED PRACTICES ARE "IN OR AFFECTING COMMERCE" UNDER THE FTC ACT

In Section III of the Motion to Dismiss, LabMD contends that the acts and practices alleged in the Complaint do not satisfy the statutory definition of "commerce" set forth in Section 4 of the FTC Act – *i.e.*, "commerce 'among' or 'between' states." *See* Motion at 28 (citing and paraphrasing 15 U.S.C. § 44, and asserting that LabMD's principal place of business is in Georgia; the alleged acts or practices were committed in Georgia; and its servers and computer network are located in Georgia). This argument is frivolous. The Complaint plainly alleges that LabMD "tests samples from consumers located throughout the United States." Complaint, ¶ 5; *see also* ¶ 2. Indeed, LabMD concedes in its Answer to the Complaint that it "tests samples . . . which may be sent from six states outside of Georgia: Alabama, Mississippi, Florida, Missouri, Louisiana, and Arizona." Answer, ¶ 5. Thus, the complaint unquestionably alleges that LabMD's acts and practices "have been in or affecting commerce, as 'commerce' is defined in Section 4[.]" Complaint, ¶ 2.

IV. THE ALLEGATIONS IN THE COMPLAINT STATE A PLAUSIBLE CLAIM THAT LABMD ENGAGED IN "UNFAIR . . . ACTS OR PRACTICES"

We turn next to LabMD's contention that "the Complaint does not state a plausible claim for relief" on the ground that the "Complaint's allegations are nothing more than inadequate 'legal conclusions couched as factual allegations.'" Motion at 28-29 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).

That is incorrect. The Complaint quite clearly sets forth specific allegations concerning LabMD's conduct and other elements of the charged violation. In particular, it includes plausible allegations that satisfy each element of the statutory standard for unfairness: that (1) the alleged conduct caused, or was likely to cause, substantial injury to consumers; (2) such injury could not reasonably have been avoided by consumers themselves; and (3) such injury was not outweighed by benefits to consumers or competition. 15 U.S.C. § 45(n). We emphasize that, for purposes of addressing LabMD's Motion to Dismiss, we presume – without deciding – that these allegations are true. But the Commission's ultimate decision on LabMD's liability will depend on the factual evidence to be adduced in this administrative proceeding.

A. Causation or Likely Causation of Substantial Injury to Consumers

The Complaint contains sufficient allegations to satisfy the criterion that the respondent's acts or practices "cause[d], or [were] likely to cause, substantial injury to consumers." *Id.* First, the Complaint alleges that LabMD collected and stored on its computer system highly sensitive information on consumers' identities (*e.g.*, names linked with addresses, dates of birth, Social Security numbers, and other information), their medical diagnoses and health status, and their financial transactions with banks, insurance companies, and health care providers. *See* Complaint, ¶¶ 6-9, 19, 21.

Second, the Complaint contains allegations that LabMD implemented unreasonable data security measures. These measures allegedly included (*i*) "acts of commission," such as installing Limewire, a peer-to-peer file sharing application, on a billing manager's computer, *see id.*, ¶¶ 13-19, as well as (*ii*) "acts of omission," such as failing to institute any of a range of readily-available safeguards that could have helped prevent data breaches. *See id.*, ¶¶ 10(a)-(g)).

Third, the Complaint alleges that LabMD's actions and failures to act, collectively, directly caused "substantial injury" resulting from both (*i*) actual data breaches, enabling unauthorized persons to obtain sensitive consumer information, *id.*, ¶¶ 17-21, as well as (*ii*) increased risks of other potential breaches. *Id.*, ¶¶ 11-12, 22. Notably, the Complaint's allegations that LabMD's data security failures led to *actual* security breaches, if proven, would lend support to the claim that the firm's data security procedures caused, or were likely to cause, harms to consumers – but the mere fact that such breaches occurred, standing alone, would not necessarily establish that LabMD engaged in "unfair . . . acts or practices." The

Commission has long recognized that "the occurrence of a breach does not necessarily show that a company failed to have reasonable security measures. There is no such thing as perfect security, and breaches can happen even when a company has taken every reasonable precaution." *See Comm'r Swindle's 2004 Information Security Testimony* at 4.[23] Accordingly, we will need to determine whether the "substantial injury" element is satisfied by considering not only whether the facts alleged in the Complaint actually occurred, but also whether LabMD's data security procedures were "unreasonable" in light of the circumstances. Whether LabMD's security practices were unreasonable is a factual question that can be addressed only on the basis of evidence to be adduced in this proceeding.

Fourth, the Complaint alleges that the actual and potential data breaches it attributes to LabMD's data security practices caused or were likely to cause cognizable, "substantial injury" to consumers, including increased risks of "identity theft, medical identity theft," and "disclosure of sensitive private medical information." *See* Complaint, ¶ 12; *see also id.*, ¶¶ 11, 21-22. These allegations clearly refute LabMD's contentions that the Complaint contains "no allegations of monetary loss or other actual harm" nor "any actual, completed economic harms or threats to health or safety." Motion at 28-29. Moreover, occurrences of actual data security breaches or "actual, completed economic harms" (*id.* at 29) are not necessary to substantiate that the firm's data security activities caused or likely caused consumer injury, and thus constituted "unfair . . . acts or practices." *Accord Policy Statement on Unfairness*, 104 F.T.C. at 949 n.12 (act or practice may cause "substantial injury" if it causes a "small harm to a large number of people" or "raises a significant *risk* of concrete harm") (emphasis added); *accord*

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[23] *See also In re SettlementOne Credit Corp.*, File No. 082 3209, Letter to Stuart K. Pratt, Consumer Data Industry Association, from Donald S. Clark, Secretary, by Direction of the Commission, at 2 (Aug. 17, 2011) (http://www.ftc.gov/sites/default/files/documents/cases/2011/08/110819lettercdia_1.pdf) (affirming, in resolving three cases concerning data security practices alleged to violate the Fair Credit Reporting Act, that it had "applied the standard that is consistent with its other data security cases – that of reasonable security. This reasonableness standard is flexible and recognizes that there is no such thing as perfect security.")

Neovi, 604 F.3d at 1157 (quoting *Am. Fin. Servs.*, 767 F.2d at 972).

B. Avoidability

The Complaint contains plausible allegations that these harms could not reasonably be avoided by consumers. Consumers allegedly did not have any "way of independently knowing about respondent's security failures," let alone taking any action to remedy them or avoid the resulting harm. Complaint, ¶ 12.

C. Countervailing Benefits to Consumers or Competition

Finally, the Complaint alleges that the alleged conduct did not even benefit LabMD, much less anyone else (*id.*, ¶ 20), and that LabMD could have remedied the risks of data breaches "at relatively low cost" (*id.*, ¶ 11). These allegations provide a plausible basis for finding that the harms to consumers were not outweighed by other benefits to consumers or competition. Again, Complaint Counsel will need to prove these allegations, and LabMD will have the opportunity to refute them, on the basis of factual evidence presented at the upcoming hearing.

* * * * *

For the reasons discussed above, we deny LabMD's Motion to Dismiss.

Accordingly,

IT IS ORDERED THAT Respondent LabMD, Inc.'s Motion to Dismiss Complaint with Prejudice **IS DENIED**.

By the Commission, Commissioner Brill recused.

IN THE MATTER OF

COURTESY AUTO GROUP, INC.

Docket No. 9359. Order, January 29, 2014

Order withdrawing this matter from adjudication.

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

Complaint Counsel and Respondent 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 Respondent having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by the Respondent and by Complaint Counsel, and approved by the Director of the Bureau of Consumer Protection, 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 is hereby is, withdrawn from adjudication, and that all proceedings before the Administrative Law Judge are hereby stayed while 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 Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

IN THE MATTER OF

HERTZ GLOBAL HOLDINGS, INC.

Docket No. C-4376. Order, January 30, 2014

Letter responding to the Petition for Approval for the Sale of Simply Wheelz D/B/A Advantage filed by Franchise Services of North America.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Craig M. Geno, Esquire
Law Offices of Craig M. Geno, PLLC

Dear Mr. Geno:

This letter responds to the Petition for Approval for the Sale of Simply Wheelz D/B/A Advantage ("Advantage") filed by Franchise Services of North America ("FSNA") on January 2, 2014 ("Petition"). The Petition requests that the Federal Trade Commission approve, pursuant to the Order in this matter, the sale and assignment of certain Advantage assets to The Catalyst Capital Group Inc. The Petition was placed on the public record for comments until January 22, 2014, and four comments were received.

After consideration of the proposed divestiture as set forth in FSNA's Petition and supplemental documents, as well as other available information, the Commission has determined to approve the proposed sale. In according its approval, the Commission has relied upon the accuracy and completeness of information submitted and representations made in connection with FSNA's Petition. Among the representations relied on is the representation that Catalyst agrees that the assets it acquires from FSNA remain, for three years from the date the Order became final (until July 10, 2016), subject to the prior approval requirements of the Order.

By direction of the Commission, Commissioner Wright not participating.

IN THE MATTER OF

TESORO CORPORATION
AND
TESORO LOGISTICS OPERATIONS LLC

Docket No. C-4405. Order, March 4, 2014

Letter approving the Application for Approval for the divestiture of the Boise Terminal Business and Boise Terminal Assets to Sinclair Transportation Co.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Marc Schildkraut, Esq.
Cooley LLP

Dear Mr. Schildkraut:

This is in reference to the Application For Approval of Proposed Divestiture filed by Tesoro Corporation and Tesoro Logistics Operations LLC (collectively "Tesoro") and received on December 17, 2013 ("Application"). Pursuant to the Decision and Order in Docket No. C-4405, Tesoro requests prior Commission approval of its proposal to divest certain assets to Sinclair Transportation Company ("STC").

After consideration of Tesoro's Application and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Application. In according its approval, the Commission has relied upon the information submitted and the representations made by Tesoro and STC in connection with Tesoro's Application and has assumed them to be accurate and complete.

By direction of the Commission.

IN THE MATTER OF

ARDAGH GROUP, S.A.; SAINT-GOBAIN CONTAINERS, INC.; AND COMPAGNIE DE DAINT-GOBAIN

Docket No. 9356. Order, March 17, 2014

Order withdrawing this matter from adjudication.

ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE PURPOSE OF CONSIDERING A CONSENT PROPOSAL

Complaint Counsel and Respondents, having jointly moved that this matter be withdrawn from adjudication because there is a reasonable possibility of a settlement, and the Commission having been satisfied that there is a likelihood of settlement of 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 withdrawn from adjudication and that all proceedings before the Administrative Law Judge are hereby stayed until April 16, 2014, pending a determination by the Commission with respect to the Consent Proposal;

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

By the Commission.

IN THE MATTER OF

NIELSEN HOLDINGS, N.V.
AND
ARBITRON INC.

Docket No. C-4439; Order, March 31, 2014

Letter approving application to divest the Linkmeter Assets and Related Agreements to comScore Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Dear Mr. Synnott:

This responds to the Application for Approval of Divestiture of Linkmeter Assets and Related Agreements ("Application") to comScore Inc. filed by Nielsen Holdings N.V. dated January 17, 2014. Pursuant to the Decision and Order in Docket No. C-4439, Nielsen requests prior Commission approval of its proposal to divest certain assets to comScore. The Application was placed on the public record for comments for thirty days, until February 24, 2014, and one comment was received.

After consideration of the Application and other available information, the Commission has determined to approve the proposed divestiture to comScore as set forth in the Application. In according its approval, the Commission has relied upon the information submitted and the representations made by Nielsen and comScore in connection with Nielsen's Application and has assumed them to be accurate and complete.

This also responds to Respondents' Request for Extension of Time ("Request") filed by Nielsen dated December 11, 2013. Pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), Nielsen requests an extension of time in which to complete the divestiture required by the Decision and Order in this matter. Pursuant to the terms of the Decision and Order, Nielsen was required to complete the divestiture within three months from the date

Respondents executed the Agreement Containing Consent Order, or by December 12, 2013. Rule 4.3(b) provides that "the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or order of the Commission." Under applicable precedent, Nielsen has the burden of demonstrating good cause, and granting an extension of time rests in the discretion of the Commission. United States v. Swingline, Inc., 371 F. Supp. 37, 45 (E.D.N.Y. 1974). The Commission has reviewed Nielsen's Request, its compliance reports and other information and, after careful consideration, has determined to grant the Request and extend the time in which Nielsen must complete the divestiture to comScore as approved by the Commission today. Nielsen has shown that it began its divestiture efforts immediately upon reaching the consent agreement with the Commission staff, that it has acted diligently throughout the entire divestiture period, and that the delays in completing negotiations were not due to unreasonable demands or other conduct of Nielsen. The Commission expects that Nielsen will complete the divestiture promptly upon the Commission's approval.

By direction of the Commission, Commissioner Ohlhausen recused and Commissioner Wright dissenting.

IN THE MATTER OF

ECM BIOFILMS, INC.
D/B/A
ENVIROPLASTICS INTERNATIONAL

Docket No. 9358; Order, April 8, 2014

Order responding to Complaint Counsel's motion seeking a continuance of the evidentiary hearing.

ORDER RESCHEDULING HEARING DATE

On October 18, 2013, the Federal Trade Commission issued the Administrative Complaint in this adjudicative proceeding and scheduled the evidentiary hearing for June 18, 2014. On March 18, 2014, Complaint Counsel filed a Motion which, among other things, requests that the Commission continue the evidentiary hearing for three months, arguing that such additional time is "the time minimally necessary to complete discovery."[1] Respondent opposes any such delay, arguing that a three-month delay "will substantially increase costs but will not yield any more substantive information than Complaint Counsel now possesses."[2]

On April 1, 2014, Chief Administrative Law Judge Chappell issued an Order ruling on Complaint Counsel's Motion.[3] As

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1 Complaint Counsel's Motion To Certify Scheduling Issues to the Commission and Request for Interim Relief at 12, In the Matter of ECM Biofilms, Inc. et al, F.T.C. Docket No. 9358 (Mar. 18, 2014) [hereinafter Motion], *available at* http://www.ftc.gov/system/files/documents/cases/140318ccmtntocertify.pdf.

2 ECM BioFilm's Opposition To Complaint Counsel's Motion To Certify Scheduling Issues and For Interim Relief, *in camera*, at 2, In the Matter of ECM Biofilms, Inc. et al, F.T.C. Docket No. 9358 (Mar. 28, 2014) (quoted language public, but redacted public version of Opposition not yet filed).

3 Order On Complaint Counsel's Motion To Certify Scheduling Issues To the Commission and Request For Interim Relief, In the Matter of Biofilms, Inc. et al, F.T.C. Docket No. 9358 (Apr. 1, 2014) [hereinafter ALJ Order], *available at* http://www.ftc.gov/system/files/documents/cases/140401ordercertifycommn.pdf.

Judge Chappell points out, the only issue raised by the Motion that is certifiable to the Commission is Complaint Counsel's request for a continuance of the evidentiary hearing.[4] As authorized by the Commission Rules, Judge Chappell has addressed and resolved all of the other issues raised by Complaint Counsel's Motion, and we need not address them here.

On the issue before us – Complaint Counsel's request for a 90-day continuance of the evidentiary hearing – Judge Chappell recommends that the hearing be continued for 45 days. He concludes that, while the parties "are entitled to full and fair discovery," Complaint Counsel's request for a 90-day continuance "is not sufficiently justified."[5] Specifically, Judge Chappell notes that Complaint Counsel asked that the discovery deadlines in the case be extended by 45 days but at the same time requested a 90-day continuance. As Judge Chappell also observes, Respondent opposes the request for continuance, but, in its own motion to compel and for sanctions, also seeks to extend the fact discovery deadline. Judge Chappell therefore recommends that the Commission continue the evidentiary hearing for 45 days, to August 5, 2014.[6] We agree with the recommendation of Judge Chappell.

Based on the foregoing, we find there is good cause to continue the evidentiary hearing to August 5, 2014. Accordingly,

IT IS ORDERED that the evidentiary hearing in this proceeding be, and it hereby is, rescheduled to begin at 10:00 a.m. on August 5, 2014, at the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580.

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[4] Commission Rule 3.22(a), 16 C.F.R. § 3.22(a), provides that during the time an adjudicative proceeding is before an Administrative Law Judge, all motions on which the ALJ has the authority to rule "shall be addressed to and decided by the Administrative Law Judge." Only the Commission has the authority to change the date of the hearing. *See* Commission Rule 3.21(c), 16 C.F.R. § 3.21(c).

[5] ALJ Order, *supra* note 3, at 3.

[6] *Id.* at 1.

By the Commission.

IN THE MATTER OF

MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.

Docket No. 9351; Order, April 11, 2014

Opinion and Order denying respondent's application for a stay of the Commission's Final Order in this matter.

DECISION AND ORDER DENYING RESPONDENT'S APPLICATION FOR STAY OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

On March 13, 2014, Respondent McWane, Inc. applied for a stay of the Commission's Final Order in this matter, pending judicial review by an appropriate U.S. court of appeals. Complaint Counsel opposes the stay. For the reasons discussed below, McWane has failed to demonstrate that a stay is warranted. It has shown neither a likelihood of success on appeal, nor that it will suffer irreparable harm absent a stay. It has also failed to show that staying the order would be in the public interest. Accordingly, the Commission denies McWane's application.[1]

The Commission's Opinion and Final Order in this matter issued on January 30, 2014.[2] The Commission held that McWane unlawfully maintained its monopoly of the domestic ductile iron pipe fittings market by means of exclusive dealing imposed through its Full Support Program. The Commission's order prohibits McWane from: (1) implementing or enforcing any condition, policy, or practice requiring exclusivity with a customer; (2) implementing or enforcing any retroactive rebate

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[1] Commissioner Wright dissents from the Commission's decision to deny McWane's request for a stay on the ground that he believes McWane is likely to succeed on the merits of its appeal, for reasons stated in his dissenting opinion on the merits of this case.

[2] The Commission's opinion in this matter is available at http://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion.pdf. The order is available at http://www.ftc.gov/system/files/documents/cases/140206mcwaneorder.pdf.

program that would effectively demand exclusivity; (3) "[d]iscriminating against, penalizing or otherwise retaliating" against any customer that purchases a competitor's domestic fittings or that "otherwise refuses to enter into or continue any condition [or] agreement" requiring exclusivity; and (4) "enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of [the] Order." Order, ¶¶ II.A-D. We explain our reasons for denying McWane's application below.

Applicable Standard

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).

Pursuant to Commission Rule 3.56(c), an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. *See* 16 C.F.R. § 3.56(c); *In re North Carolina Bd. of Dental Exam'rs*, 2012 WL 588756, at *1 (FTC Feb. 10, 2012); *In re Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). The required likelihood of success is "inversely proportional to the amount of irreparable injury suffered absent the stay," *In re North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006), and varies based on the assessment of the balance of equities described by the last three factors. *Id.*; *see also North Carolina Bd.*, 2012 WL 588756, at *1. We consider these factors below.

Analysis

McWane argues first that the Commission's opinion is contrary to well-settled case law because it relies on harm to a single competitor, Star Pipe Products, Ltd., rather than harm to competition. McWane argues further that the evidence even failed to show harm to Star, and that even if such harm had been proved, it should be disregarded because Star was a less efficient competitor than McWane and, in any event, Star had successfully entered the market.

These arguments are familiar to us. McWane advanced each of them in its appeal to the Commission, and the Commission carefully considered and, for reasons explained in our opinion, rejected them. Although McWane now cites to the dissent issued by Commissioner Wright in support of its application, its repetition of the dissent's arguments neither changes the Commission's conclusion that it engaged in illegal monopoly maintenance nor establishes a likelihood of success on appeal. *See Toys "R" Us*, 126 F.T.C. at 697 (emphasizing that the renewal of previously-rejected arguments alone cannot justify the granting of a stay).

In fact, rather than showing the requisite likelihood of success on appeal, McWane instead contends that it need only show that its appeal involves serious and substantial questions going to the merits of the Commission's decision. While such a showing might support a stay when a serious legal question is involved and the balance of the equities weighs heavily in favor of granting the stay, *NTSP*, 141 F.T.C. at 458 n.3, as discussed below, the balance of the equities here falls far short of that. Indeed, even assuming, *arguendo*, that the existence of serious and substantial questions would be sufficient to satisfy the first factor, "Respondent's mere disagreement with our decision does not establish serious and substantial questions going to the merits." *In re Realcomp II, Ltd.*, 2010 WL 5576189, at *2 (FTC Jan. 7, 2010).

We briefly address why we are not swayed by McWane's arguments. McWane's assertion that the Commission opinion is contrary to case law is unpersuasive; our ruling adheres closely to the analysis in the three leading opinions that have considered the use of exclusive dealing. *See ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *United States v. Dentsply, Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). Moreover, McWane's argument that the Commission failed to identify harm to Star, let alone to competition, is directly belied by the evidence, detailed in the Commission opinion, showing that McWane's exclusive dealing program raised barriers to entry and kept its only rival from achieving the critical sales level necessary to challenge McWane's monopoly. We explained that McWane's program foreclosed Star from accessing a substantial share of distributors and deprived Star of the sales volume needed to operate its own domestic foundry, thereby preventing Star from substantially reducing its costs and threatening McWane's monopoly. Finally, the Commission also rejected McWane's claim that Star's purported inefficiency rendered its exclusion meaningless to competition, explaining that the fundamental concern with exclusive dealing when the dominant firm is already a monopolist is that the conduct prevents the *development* of effective competition.

Turning to the equities, McWane bears the burden of demonstrating that its alleged irreparable injury "is both substantial and likely to occur absent the stay." *NTSP*, 141 F.T.C. at 457. "Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay." *In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *6 (May 22, 1996); *see also Toys "R" Us*, 126 F.T.C. at 698. Because McWane failed to demonstrate likely success on the merits, its burden for demonstrating irreparable harm is high, *California Dental*, 1996 FTC LEXIS 277, at *10, and McWane's showing falls far short of this standard.

McWane provided no supporting affidavits or sworn statements with its application to support its argument of irreparable harm. *See* 16 C.F.R. § 3.56(c). Instead, McWane falls back on conclusory statements and claimed evidence of factory conditions dating back more than five years, which provides no basis for assessing the potential for irreparable injury today. Respondent's Application for Stay of Order Pending Review by U.S. Court of Appeals, at 10. As a result, McWane's assertions that the Commission's order will "unquestionably threaten the viability of McWane's last remaining domestic foundry," *id.*, carry little weight. Similarly, citations to trial testimony suggesting that Star might "cherry pick[]" McWane's business by "simply buying a few dozen patterns" and offering just the most common fittings, *id*., had little relevance by June 2010, at which time "Star had a Domestic Fittings pattern stock comparable to McWane's." *In re McWane, Inc.*, Initial Decision, 2013 FTC LEXIS 76, at *355 (May 8, 2013).

Indeed, McWane's unsubstantiated claims of irreparable injury are particularly suspect in light of its protestations on appeal of the Initial Decision that "[t]he proposed injunctive remedy," which contained the provisions currently at issue, was "moot." Respondent's Appeal Brief at 41. McWane there insisted that its exclusionary conduct was an outgrowth of "a short-term stimulus statute" that had expired, leaving "no threat of recurrence." *Id*. at 41, 43. McWane's current argument that exclusive arrangements in the domestic fittings market are now vital to its well-being is thus belied by its prior assertions. *See Toys "R" Us*, 126 F.T.C. at 699 (recognizing that it would be illogical for a respondent to argue that it would be irreparably harmed by a Commission order prohibiting conduct that the respondent claims it no longer engages).

McWane also argues that the Commission's order is overbroad and will deprive the company and many of its customers of the benefits of lawful exclusive dealing and discounting. Yet the Commission's opinion found *unlawful* exclusive dealing, and to prevent a recurrence of anticompetitive conduct, the order prohibits McWane from repeating its harmful conduct and other arrangements with similar anticompetitive effects.[3]

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[3] *See FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (FTC orders need not be restricted to the "narrow lane" of the respondent's violation, but rather may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity"); *see also FTC v. National Lead Co.*, 352 U.S. 419, 430-31 (1957) (noting the need "not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices" and observing that "those caught violating the Act must expect some fencing in"); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 940 (7th Cir. 2000) ("[T]he FTC is not limited to restating the law in its remedial orders. Such orders can restrict the options for a company that has violated § 5, to ensure that the violation will cease and competition will be restored.").

Indeed, the Commission's order is carefully tailored to prohibit only conduct similar to McWane's anticompetitive exclusive dealing practices. It prohibits practices that require exclusivity and penalties against customers who sell competitors' products. It also bars discounts that are conditioned on exclusivity and retroactive incentives, which could effectively demand exclusivity,[4] but expressly preserves McWane's ability to offer discounts that are volume-based, above average cost, and not retroactive incentives. The claim that the Commission's order places McWane at a disadvantage to its competitors is belied by a specific order proviso permitting McWane to provide discounts, rebates, or other price or non-price incentives that are "designed to meet competition." Order, ¶ II.

Finally, the Commission must consider the potential injury to other market players if a stay is granted, as well as whether a stay is in the public interest. The Commission considers these factors together because, in enforcing the law, Complaint Counsel is responsible for representing the public interest. *North Carolina Bd.*, 2012 WL 588756, at *3; *California Dental*, 1996 FTC LEXIS 277, at *8.

On these points, McWane repeats its claims that the Commission's order will harm consumers by denying them the benefit of lawful competitive practices and by exposing them to lost jobs and higher prices if McWane closes its last domestic foundry. As discussed above, the first contention ignores both the anticompetitive use McWane made of its exclusive dealing program and the narrow scope of the order's provisions, which expressly permit procompetitive conduct. McWane is free to cut its prices and offer discounts that are not structured or conditioned so as to result in exclusivity. Further, McWane's contentions concerning any impact of the order on the viability of McWane's domestic foundry are unpersuasive because they are both unsupported and speculative.

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[4] *See, e.g.*, Willard K. Tom, David A. Balto & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and other Incentives to Exclusive Dealing*, 67 Antitrust L.J. 615 (2000) (explaining that discounts structured to produce total or partial exclusivity should be evaluated like exclusive dealing).

On the other hand, staying the order would cause harm to competition and consumers. The Commission found that McWane's exclusivity arrangements unlawfully maintained its monopoly and deprived consumers of the benefits of price competition and the ability to choose between competing suppliers. Although McWane contends that it has dropped its Full Support Program, the record showed that McWane has not publicly withdrawn its policy or notified distributors of any changes and that at least some distributors remain concerned that the exclusive dealing policy has continued. *See* Commission Opinion at 39-40. Exposing consumers to the continued effects of the Full Support Program or to similar policies and prolonging McWane's ability to unlawfully maintain its monopoly would not be in the public interest.

Conclusion

For the foregoing reasons, we find that McWane has failed to meet its burden for a stay of the Final Order pending appeal. Accordingly,

IT IS ORDERED THAT Respondent McWane's Application for Stay of Order Pending Review by an appropriate U.S. Court of Appeals is **DENIED**.

By the Commission, Commissioner Wright dissenting.

IN THE MATTER OF

TOYS "R" US INC.

Docket No. 9278. Order, April 11, 2014

Order responding to respondent's petition to reopen and modify the consent order.

ORDER REOPENING AND MODIFYING ORDER

On January 3, 2014, Toys "R" Us, Inc. ("TRU") filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C.§ 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. § 2.51, asking the Commission to reopen and modify the consent order in Docket No. 9278 ("Order") issued by the Commission on October 13, 1998.

The Order requires TRU to refrain from certain actions in connection with its suppliers. The Order also requires TRU to maintain records of all its communications with its suppliers. In its petition, TRU requests that the Commission eliminate Paragraphs II.A., II.B., and II.C. of the Order, and modify Paragraph IV.B. of the Order.

TRU bases its petition on changed conditions of fact that it claims are sufficient to warrant reopening and modifying the Order. TRU asserts that it has lost significant market share in the toy markets that were the subject of the Commission's action, and that other large retailers have overtaken TRU in sales rankings. According to TRU, the reasons for the Order provisions that TRU asks be modified have ended. For similar reasons, TRU also claims that the proposed modification would be in the public interest. For the reasons stated below, the Commission has determined to grant the petition.

Background

On May 22, 1996, the Commission issued its Complaint alleging that TRU entered into a series of agreements with major toy manufacturers to prevent the toy manufacturers from selling to club stores the same products they sold to TRU. The Complaint also alleged that TRU facilitated agreements among the toy manufacturers to the same end. On October 13, 1998, the Commission issued its Opinion and Final Order, finding that TRU had violated Section 1 of the Sherman Act as alleged in the Complaint. The Commission found that TRU' s facilitation of a horizontal agreement among the toy manufacturers violated the Sherman Act both on a per se and a rule of reason analysis. The Commission found that the vertical agreements between TRU and its suppliers violated the Sherman Act on a rule of reason analysis. The Commission found that TRU possessed market power as a purchaser and seller of toys. TRU appealed, and the Court of Appeals for the Seventh Circuit affirmed the Commission's decision on August I, 2000.

Paragraph II.A. of the Order requires TRU to cease and desist from "continuing, maintaining, entering into, and attempting to enter into any agreement or understanding with any supplier to limit supply or to refuse to sell toys and related products to any toy discounter."

Paragraph II.B. of the Order requires TRU to cease and desist from "urging, inducing, coercing, or pressuring, or attempting to urge, induce, coerce, or pressure, any supplier to limit supply or to refuse to sell toys and related products to any toy discounter."

Paragraph II.C. of the Order requires TRU to cease and desist from "requiring, soliciting, requesting or encouraging any supplier to furnish information to respondent relating to any supplier's sales or actual or intended shipments to any toy discounter."

Paragraph IV.B. of the Order requires TRU to "maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with suppliers of respondent relating to any aspect of actual or potential purchase or distribution of toys and related products, and records pertaining to any action taken in connection with any activity covered by paragraphs II and III of this order."

Standard to Reopen and Modify

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.[1] A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.[2]

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.[3] In the case of "public interest" requests, FTC Rule of Practice 2.Sl(b) requires an initial "satisfactory showing" of how the modification would serve the public interest before the Commission determines whether to reopen an order.

A "satisfactory showing" requires, with respect to public interest requests, that the petitioner make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a "satisfactory showing" if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.[4]

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[1] *See Supplementary Information, Amendment to* 16 CFR 2.51(b), ("Amendment"), 65 Fed. Reg. 50636, August 21, 2000.

[2] S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). *See also United States* v. *Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992).

[3] Hart Letter at 5; 16 C.F.R. § 2.51.

[4] 16 C.F.R. § 2.51.

This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,[5] and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[6] All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.[7]

Changes of Fact Warrant Reopening and Modifying the Order

The Commission has determined that (i) changes of fact require that the Order be reopened and (ii) the Order should be modified to eliminate Paragraphs II.A., II.B., and II.C., and alter Paragraph IV.B.[8] Paragraphs II.A., II.B., and II.C. of the Order regulate TRU's vertical relationships with its suppliers. These provisions address the violation found as to the vertical

[5] *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

[6] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[7] 16 C.F.R. § 2.51(b).

[8] TRU has asserted both changed conditions of fact and public interest grounds in support of its petition. Because the Commission has determined that TRU has demonstrated changed conditions of fact support the modification, the Commission need not consider whether the public interest also justifies the modifications to the Order.

agreements TRU entered into to prevent its suppliers from selling toys to club stores, and contained broad fencing-in relief. This violation was based on a rule of reason analysis that found that TRU had market power as a buyer and distributor of toys. TRU has demonstrated that it no longer has market power as a buyer of toys. Walmart and Target have overtaken TRU in competitive strength and market share. TRU has submitted data showing that TRU's loss of competitive position is consistent across product categories. TRU has lost ground to Walmart and Target across the competitive landscape. In 2013, Walmart was the market leader, with TRU and Target sparring for second place. In addition, Target operates twice as many locations as TRU, while Walmart has four times as many. In addition to Walmart and Target, TRU has shown that it now faces significant competition from online firms. Online sales, as a proportion of total toy sales, have almost tripled between 2002 and 2012. At the time of the Order, the Commission found that TRU bought 30% or more of the large, traditional toy companies' total output. TRU has shown that it is no longer the largest customer of the major toy companies and that toy companies can and do distribute toys successfully without using TRU. TRU has shown that Walmart and Target have replaced TRU as the most important customer for Hasbro and Mattel, the two largest toy manufacturers.

The changes in market conditions also justify altering the record keeping requirements of Paragraph IV.B. Because TRU no longer has market power, which justifies eliminating Paragraphs II.A., II.B., and II.C. of the Order, it is no longer necessary that TRU maintain all its communications with its suppliers relating to any aspect of actual or potential purchase or distribution of toys and related products, as required by Paragraph IV.B. The only remaining prohibition in the Order is Paragraph II.D, which prohibits TRU from facilitating agreements between or among suppliers to limit the sale of toys and related products to a retailer.[9] Accordingly, Paragraph IV.B. should be modified to capture the communications prohibited by Paragraph II.D. TRU has shown that any attempt to facilitate agreements among suppliers, which are prohibited by Paragraph II.D. of the Order, would have to involve the officers of its merchandizing

[9] Paragraph II.E. has expired by its own terms.

organization, and therefore retaining records only from those persons would meet the Commission's needs.

Conclusion

For the reasons explained above, the Commission has determined to reopen and modify the Order.

Accordingly, **IT IS ORDERED** that this matter be, and it hereby is, reopened;

IT IS FURTHER ORDERED that Paragraphs II.A., II.B., and II.C. are eliminated; and

IT IS FURTHER ORDERED that Paragraph IV.B. of the Order be revised to read:

Maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with suppliers of respondent by the officers of respondent within its merchandizing organization.

By the Commission.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 9, 2014

Letter approving application to divest certain assets to Angeleno Mortuaries, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on February 28, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to Angeleno Mortuaries, Inc. ("Angeleno").

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

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 9, 2014

Letter approving application to divest certain assets to Carriage Services, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on March 7, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to Carriage Services, Inc. ("Carriage").

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

By direction of the Commission.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 9, 2014

Letter approving application to divest certain assets to Legacy Funeral Holdings, Inc.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on March 6, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to Legacy Funeral Holdings, Inc. ("Legacy").

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

By direction of the Commission.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 9, 2014

Letter approving application to divest certain assets to StoneMor Partners L.P.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on March 21, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to StoneMor Partners L.P. ("StoneMor").

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

By direction of the Commission.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, May 19, 2014

Opinion and Order denying respondent's motion seeking a summary decision dismissing with prejudice the Complaint in this matter.

ORDER DENYING RESPONDENT LABMD, INC.'S MOTION FOR SUMMARY DECISION

By Commissioner Joshua D. Wright, for a unanimous Commission:[1]

Respondent LabMD, Inc. ("LabMD") seeks a summary decision dismissing with prejudice the Complaint in this matter. Motion for Summary Decision, filed April 21, 2014 ("Motion"). It argues that there is "no genuine dispute as to any material fact regarding liability or relief" in this case, and that we should proceed to "issue a final decision and order" in LabMD's favor. Motion at 8 (quoting 16 C.F.R. § 3.24(a)(2)). Complaint Counsel opposes that request.[2] We find that there are genuine disputes about some of the facts asserted by LabMD in its Motion, and that other such facts are not material to the ultimate question of whether LabMD is liable for engaging in "unfair acts or practices" in violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act), 15 U.S.C. § 45(a). That question must be resolved based on factual evidence presented at an evidentiary hearing. Accordingly, we deny LabMD's Motion for Summary Decision.

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[1] Commissioner Brill did not take part in the consideration or decision herein.

[2] *See* Complaint Counsel's Response in Opposition to Respondent's Motion for Summary Decision, filed May 5, 2014 ("CC Opp."); Complaint Counsel's Separate and Concise Statement of Material Facts as to Which There Exist Genuine Issues for Trial, filed May 5, 2014 ("CC Stmt."). *See also* LabMD Reply in Support of Motion to Dismiss, filed May 12, 2013 ("LabMD Reply").

BACKGROUND

On August 28, 2013, the Commission issued an administrative Complaint commencing this adjudicatory proceeding. The Complaint alleges that LabMD's data security practices, "taken together, failed to provide reasonable and appropriate security for personal information stored on its computer networks," even though LabMD "could have corrected its security failures at relatively low cost using readily available security measures." Complaint, ¶¶ 10, 11. The Commission thus found "reason to believe" that LabMD's conduct could constitute "unfair . . . acts or practices" in violation of 15 U.S.C. § 45(a), and determined that an adjudicatory proceeding would be "in the public interest." *Id.*, Preamble & ¶¶ 22-23 (quoting 15 U.S.C. § 45(b)).

The Complaint sets forth specific allegations of "reasonable and appropriate" data security measures that LabMD allegedly should have implemented, but failed to implement, to minimize the risk of security breaches. Complaint, ¶¶ 10(a)-(g), 11. The Complaint goes on to allege that LabMD experienced two security breach incidents. First, unauthorized third parties allegedly retrieved a June 2007 "insurance aging report" and possibly other files containing sensitive consumer information from LabMD's computer systems via Limewire, a peer-to-peer file-sharing application that was installed on the computer of LabMD's billing manager. *Id.*, ¶¶ 17-20. Second, the Sacramento Police Department discovered identity thieves in possession of LabMD "day sheets" containing personal information and consumer checks payable to LabMD. *Id.*, ¶ 21.

The Complaint charges (1) that LabMD's purported data security failures caused, or were likely to cause, harm to consumers, including "identity theft, medical identity theft, and . . . disclosure of sensitive, private medical information" and other personal information including addresses, telephone numbers, social security numbers, bank account and credit card numbers. *Id.*, ¶¶ 6, 9, 12, 19, 21, 22; (2) that consumers could not have learned about LabMD's data security practices or avoided these potential injuries independently, *id.*, ¶ 12; and (3) that LabMD's alleged data security failures did not substantially benefit LabMD or anyone else, *id.*, ¶¶ 11, 20, 22.

In its Answer to the Complaint and Affirmative Defenses, filed September 17, 2013 ("Answer"), and its Objections and Responses to Complaint Counsel's Requests for Admission pursuant to 16 C.F.R. § 3.32, filed March 3, 2014 ("LabMD Admissions/Denials"), LabMD admits most, but not all, of the Complaint's allegations regarding the nature of its business, the services it provides, and the types of consumer information stored on its computer systems. *See* Answer, ¶¶ 1, 3-6, 8-9; LabMD Admissions/Denials, ¶¶ 1-13, 16-28, 35-38.[3] LabMD admits that Limewire had been installed on a computer used by its billing manager and that a company called Tiversa, Inc. had obtained access to LabMD's June 2007 insurance aging report. But in other respects, LabMD either denies, or pleads insufficient knowledge to admit or deny, most of the charges concerning the Limewire and Sacramento data breach incidents. Answer, ¶¶ 17-20; LabMD Admissions/Denials, ¶¶ 39-49. LabMD denies the Complaint's allegations concerning the list of specific data security measures that it did not implement. Answer, ¶¶ 10-11. It also generally denies the allegations regarding the causal relationship between its conduct and actual or potential consumer injury, and whether such injury was avoidable by consumers or whether its conduct had any countervailing benefits. *Id.*, ¶¶ 11-12, 22-23.

On November 12, 2013, LabMD filed a motion to dismiss the Complaint. It contended that (1) the Commission has no authority to address private companies' data security practices as "unfair . . . acts or practices" under Section 5(a)(1) of the FTC Act; (2) the Health Insurance Portability and Accountability Act ("HIPAA") and other statutes touching on data security implicitly strip the Commission of authority to enforce Section 5 in the field of data security; and (3) due process requires the Commission to adopt regulations governing data security before we may engage in an enforcement action. The Commission rejected those arguments and denied the motion. *See* Order Denying Respondent LabMD's

[3] LabMD denies that it maintained electronic copies on its computer networks of patients' checks, Answer, ¶ 9(c); LabMD Admissions/Denials, ¶¶ 33-34; and it takes issue with the allegations concerning the number of laboratory tests and the number of affected consumers. Answer, ¶ 7; LabMD Admissions/Denials, ¶¶ 14-15, 19-20.

Motion to Dismiss (issued January 16, 2014) ("MTD Denial Order").

From December 2013 through April 2014, LabMD and Complaint Counsel engaged in discovery concerning factual issues and expert testimony, including extensive document production, depositions, and requests for admissions. This Motion for Summary Decision followed.

STANDARD OF REVIEW

We review LabMD's Motion for Summary Decision pursuant to Rule 3.24 of our Rules of Practice, 16 C.F.R. § 3.24, whose "provisions are virtually identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts." *N.C. Bd. of Dental Examiners*, 151 F.T.C. 607, 610-11 (2011); *see also Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972). A party moving for summary decision must show that "there is no genuine dispute as to any material fact," and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

"[T]he substantive law will identify which facts are material . . . . [*i.e.*, those] that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Here, the applicable substantive law is Section 5(n) of the FTC Act, which deems an act or practice to be "unfair" if it [1] "causes or is likely to cause substantial injury to consumers"; [2] such injury "is not reasonably avoidable by consumers themselves"; and [3] such injury "is not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. § 45(n). Facts are "material" for present purposes only if they tend to prove or disprove that LabMD's data security practices satisfy one or more of these criteria. Facts that have no bearing on these dispositive questions "are irrelevant or unnecessary [and] will not be counted." *Anderson*, 477 U.S. at 248.

There is no "genuine" dispute over material facts where the "evidence favoring the non-moving party . . . is merely colorable, [but] not significantly probative." *Id.* at 249. The "party seeking summary judgment always bears the initial responsibility of . . . identifying" factual information in the record that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where, as here, the party opposing the motion bears the ultimate burden of proof, *see* 16 C.F.R. § 3.43(a) (imposing burden of proof on Complaint Counsel), the moving party may "discharge this initial responsibility" either by showing that "there is an absence of evidence to support the non-moving party's case" or by supplying "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d, 604, 608 (11th Cir. 1991); *see also* 16 C.F.R. § 3.24(a)(3) ("When a motion for summary decision is made and *supported as provided in this rule*, a party opposing the motion . . . must set forth specific facts showing that there is a genuine issue of material fact for trial.") (emphasis added). "On summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

ANALYSIS

I. GENUINE ISSUES OF MATERIAL FACT

In a section of its Motion entitled "Statement of Facts," LabMD sets forth facts that it contends are both "material" and not subject to "genuine" dispute. *See* Motion at 4-8 ("LabMD Stmt."); *cf.* 16 C.F.R. § 3.24(a). We consider the assertions in each of the 24 paragraphs in this Statement,[4] as well as factual assertions set forth in other sections of LabMD's Motion, to determine (1) whether they constitute "material" facts; (2) if so, whether there is no "genuine" dispute about them; and (3)

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[4] We refer to each of these paragraphs using the convention "[X.Y]," where X refers to the page number of the Motion and Y refers to the position of the paragraph in sequence of the paragraphs beginning on that page. Thus, "LabMD Stmt. 5.2" refers to the second full paragraph on page 5 of the Motion.

whether, on that basis, LabMD is entitled to a summary decision in its favor as a matter of law.

A. HIPAA Data Security Standards

LabMD asserts that "[a]ll information received, utilized, maintained and transmitted by LabMD is protected health information ('PHI') as defined by the Health Insurance Portability and Accountability Act of 1996 ('HIPAA')." Motion at 1 (citing 45 C.F.R. § 160.103).[5] LabMD's Statement of Facts includes five paragraphs relating to the data security requirements imposed by HIPAA and related statutes and rules (collectively, "HIPAA Standards"), and characterizes that text as a set of "material" facts that are not in "genuine" dispute.[6]

LabMD further contends that Complaint Counsel's expert witness, Dr. Raquel Hill, articulated data security standards pursuant to Section 5 "that are difficult to reconcile with," and are "far more stringent" than, the HIPAA Security Rule and other HIPAA Standards. Motion at 3, 20. For example, LabMD asserts that Dr. Hill's proposed standards "do not account, as required by HIPAA, for the needs and capabilities of small health care providers and rural health care providers," improperly "presume a level of technical knowledge generally not available to small health care providers," and are "inconsistent with HHS guidance that the risk assessment can be a qualitative and manual process." *Id.* at 21. From those asserted facts, LabMD contends that its

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[5] Significantly, LabMD does not assert that the scope of personal health information included in the definition of "PHI" is co-extensive with the scope of the "personal information" at issue here, as defined in the Complaint (¶ 6), nor does it refer to any evidence or legal authority that would support that proposition.

[6] *See* LabMD Stmt. 4.2 ("LabMD is a "Covered Entity" that receives, maintains and transmits PHI during the normal course of its business."); *id.* 5.5 ("LabMD is a HIPAA-covered entity. . . . It must comply with HHS's HIPAA and Health Information Technology for Economic and Clinical Health Act ("HITECH") regulations . . . ."); *id.*, 5.6 ("HIPAA's Security Rule establishes substantive data-security standards involving PHI with which HIPAA-covered entities, like LabMD, must comply."); *id.* 5.7 ("HHS exclusively enforces HIPAA and HITECH. . . ."); *id.*, 6.1 ("The FTC has not accused LabMD of violating HIPAA, HITECH or any implementing regulations. . . .").

"compliance with the HIPAA [Standards]" should not be deemed "irrelevant to . . . Section 5 unfairness claims," but rather should be a complete "defense" to such claims. *Id.* at 20.

Complaint Counsel responds that LabMD's asserted facts relating to HIPAA "are irrelevant or immaterial" and that it need not "demonstrate that [LabMD's] conduct violated other laws in order to establish that [LabMD's] practices were unfair under Section 5." CC Opp. at 4. Complaint Counsel contends that "the Commission [has] already rejected the argument that the FTC Act and HIPAA are at odds," *id.* at 12 (citing MTD Denial Order at 12), and asserts that LabMD's arguments "that the FTC's data security 'standards' are not scalable or presume too high a level of technical knowledge for small health care providers should be addressed at trial and do not support a summary decision." *Id.*

We conclude that LabMD's factual contentions regarding HIPAA data security standards do not justify a summary decision in LabMD's favor. As LabMD concedes, "[t]he FTC has not accused LabMD of violating HIPAA, HITECH or any implementing regulations," Motion at 6 (LabMD Stmt. 6.1), and "this case has nothing to do with HIPAA." *Id.* at 10 (quoting MTD Denial Order at 12). Rather, this case concerns LabMD's compliance with Section 5 of the FTC Act. Thus, the facts that LabMD alleges about HIPAA could be "material" for purposes of this Motion for Summary Decision only if LabMD were correct that, as a matter of law, the Commission could not hold LabMD liable under Section 5 if its data security practices complied with HIPAA Standards. Motion at 1. But that legal argument is now foreclosed. We held in the Order denying LabMD's Motion to Dismiss that HIPAA does not "trump" Section 5, and that LabMD therefore "cannot plausibly assert that, because it complies with [HIPAA], it is free to violate" requirements imposed independently by Section 5 of the FTC Act. MTD Denial Order at 11, 13; *see infra*, Part II.[7]

[7] Consistently, HHS, in adopting regulations implementing HIPAA, recognized that entities subject to HIPAA "may be required by other Federal law to adhere to additional or more stringent security measures," and consequently, that "[s]ecurity standards in [HHS's] final rule establish a minimum level of security that covered entities must meet." Health Insurance Reform: Security Standards, 68 Fed. Reg. 8334, 8355 (Feb. 20, 2003).

In any event, LabMD's statements of fact regarding HIPAA Standards would be insufficient to merit summary decision in its favor even if, counterfactually, those Standards *did* define the scope of Section 5 liability as a matter of law. LabMD points to no record evidence regarding what measures, if any, it implemented to prevent data breaches. It does not explain which HIPAA Standards apply to LabMD's actions or why LabMD's conduct satisfied them. Indeed, LabMD does not even assert that it *complied* with the applicable HIPAA Standards; it merely avers that the Commission has not accused it of *violating* those requirements. *See, e.g.,* LabMD Stmt. 6.1. The "party seeking summary judgment bears the initial responsibility of informing the [adjudicator] of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (quotation marks omitted). LabMD has not carried this burden.[8]

In sum, because we conclude that LabMD's HIPAA-related factual assertions are not "material" to the violations of law alleged in the complaint and, in any event, are not supported by any evidence, we need not determine whether they are in "genuine" dispute.

B. Alleged Limewire and Sacramento Security Breaches

LabMD identifies what it characterizes as "material" facts regarding the two specific security breaches alleged in the Complaint – *i.e.*, the alleged breach relating to the installation of

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[8] We cannot determine, on the present record, whether, in fact, LabMD *has* complied with or violated HIPAA Standards. For purposes of the present Motion, we must draw all reasonable inferences in support of the party opposing the Motion—*i.e.*, Complaint Counsel—and consequently, we cannot infer from LabMD's unsupported assertions that it complied with applicable HIPAA Standards. Moreover, we express no view on whether and to what extent such compliance or noncompliance might be a relevant factor in our assessment of whether LabMD violated Section 5. We agree with Complaint Counsel that any such arguments "should be addressed at trial." CC Opp. at 12.

Limewire on a billing computer,[9] and the alleged breach discovered by the Sacramento Police Department.[10]

We conclude that these factual claims, even if undisputed, are not material and would not support a summary decision in LabMD's favor. LabMD has not attempted to show how its factual assertions regarding the Limewire and Sacramento incidents are material to its liability as alleged in the Complaint. For example, even if we accepted as true the claims that Tiversa retrieved the Insurance Aging File without LabMD's knowledge or consent (LabMD Stmt. 4.3), that Tiversa improperly passed on that file to Professor Johnson or others (*id.*, 4.5), and that Tiversa touted its unique technology (*id.*, 4.3 n.2), these facts would not resolve the ultimate questions we must decide in this case. In particular, they would not compel us, as a matter of law, to dismiss the allegations in the Complaint that LabMD failed to implement reasonable and appropriate data security and that such failure caused, or was likely to cause, unavoidable and unjustified harm to consumers. To the contrary, LabMD's factual

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[9] *See* LabMD Stmt. 4.3 ("On or about February 5, 2008, without LabMD's knowledge or consent, Tiversa, Inc. ('Tiversa'), took possession of a single LabMD insurance aging file (the 'Insurance Aging File')."); *id.* n.2 ("Tiversa has testified before Congress that it possesses unique technology which among other things allows it to download computer files from unsuspecting third persons inadvertently sharing computer files via peer to peer ('P2P') networks."); *id.*, 4.4 ("The Insurance Aging File contained PHI for over 9,000 patients of LabMD's physician clients."); *id.*, 4.5 ("Subsequently, Tiversa made the Insurance Aging File available to Professor Eric Johnson, of Dartmouth College, who was conducting research under a government contract for his article entitled, 'Data Hemorrhages in the Health Care Sector'."); *id.*, 4.6 ("In January 2010, the FTC began a three year full investigation of LabMD's data security practices based upon the disclosure of the PHI contained in the Insurance Aging File.").

[10] *See* LabMD Stmt. 5.1, 5.2, and 5.3 ("In October 2012, during a raid of a house of suspected identity thieves, the Sacramento Police Department found LabMD 'day sheets' and copies of checks made payable to LabMD. Again, the day sheets and checks contained PHI from patients of LabMD's physician clients."); *id.* 5.2 ("In an attempt to notify LabMD of its find, the Sacramento police 'googled' LabMD, and discovered that LabMD was under investigation by the FTC."); *id.*, 5.3 ("The Sacramento police then notified the FTC of its find, but did not notify LabMD, despite Sacramento's awareness of LabMD's duty to notify under HIPAA.").

contentions concerning Tiversa and the Sacramento Police Department are fully consistent with the Complaint's allegations that LabMD failed to implement reasonable and appropriate data security procedures.

C. Genuine Disputes Over Reasonable and Appropriate Data Security Practices

LabMD raises a number of contentions that could be construed as addressing issues of material fact, but it fails to demonstrate that there is no "genuine dispute" over these issues. For example, LabMD criticizes the opinions of Complaint Counsel's expert witness concerning appropriate data security measures. *See* Motion at 13, 16, 18, 20-22; *id.*, Exh. 5. The issues addressed by this expert report are undoubtedly material. But there is plainly also a genuine dispute about them. Indeed, LabMD submitted the declaration of its own expert witness, whose report conflicts with that of Complaint Counsel's expert witness.[11] *See* Motion, Exh. 12; *see also* Motion at 22; LabMD Reply at 11-13. Such conflicting expert opinion is precisely the type of dispute that evidentiary hearings are held to resolve.

Similarly, LabMD's Statement asserts, "The FTC has never specified what data security standards were in place at any given point during the relevant time period or when LabMD specifically violated them." LabMD Stmt. 6.4. This contention could be read as encompassing both factual and legal issues,[12] of which at least

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[11] We decline to address Complaint Counsel's request that we strike Mr. Baker's declaration on the grounds that LabMD "did not timely designate Mr. Baker [as an expert] in this proceeding and its use of his declaration contravenes the Scheduling Order." CC Opp. at 4 n.2. The Commission (or the ALJ) may consider a Motion to Strike if submitted as a stand-alone pleading, rather than as a footnote to a brief regarding another motion.

[12] It is unclear whether LabMD, in using the term "the FTC" in Stmt. 6.4, intends to refer to Complaint Counsel or to the Commission. To the extent LabMD is contending that Complaint Counsel, in the course of this adjudication, has yet to identify with specificity what data security standards it alleges LabMD violated, this contention is not a material fact because the adjudication is still underway and, as discussed below, the Commission is not bound by Complaint Counsel's arguments or characterizations. *See infra* notes 15-18 and accompanying text. To the extent LabMD's statement is simply an alternative formulation of its legal argument that the Commission infringed its

some are genuinely disputed.[13] We cannot resolve such disputes on the present record, and LabMD has not shown, with respect to this contention, that it is entitled to judgment as a matter of law.

D. Other Immaterial Matters

We conclude that the remaining factual assertions in LabMD's Statement of Facts are immaterial. First, the procedural history of this case, even if undisputed, does not support any particular conclusion on whether LabMD's conduct violated the FTC Act.[14]

In addition, the propositions cited in LabMD's Statement of Facts characterizing the Commission's positions on the basis of Complaint Counsel's statements to the Administrative Law Judge during an Initial Pretrial Conference,[15] Complaint Counsel's

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Constitutional due process rights by providing inadequate advance notice, the statement is unavailing because we have already rejected that legal argument. *See infra* Section II; *see also* MTD Denial Order at 14-17 (rejecting LabMD's due process/fair notice argument); Motion at 11-18 (rearguing the same legal claim); LabMD Reply at 3-12 (same). We recognize that there may be other ways to interpret LabMD's statement that might implicate unresolved legal questions or material issues of fact; but for present purposes, we cannot draw inferences in LabMD's favor.

[13] *Compare* LabMD Stmt. 6.4, 6.5, and 7.1 *with* CC Stmt. ¶¶ 1-10 (and evidence cited therein) (genuine factual disputes over applicable standards and LabMD's conduct). *See also* LabMD Reply at 6-9 (citing and disputing legal arguments in Complaint Counsel's Pre-Trial Brief (filed May 6, 2014)).

[14] *See, e.g.*, LabMD Stmt. 4.6 ("In January 2010, the FTC began a three year full investigation of LabMD's data security practices . . . ."); *id.*, 5.4 ("In August, 2013, FTC filed an Administrative Complaint."); *id.*, 6.2 ("The FTC alleges that LabMD's data-security is inadequate to protect the PHI it possesses and that this failure to adequately protect PHI is an unfair practice affecting consumers in violation of Section 5 of the Federal Trade Commission Act.").

[15] *See* LabMD Stmt. 6.6 ("When asked by the ALJ whether 'the Commission issued guidelines for companies to utilize to protect...[sensitive] information or is there something out there for a company to look to,' the FTC admitted that '[t]here is nothing out there for a company to look to.'"); *id.*, 7.1 ("The FTC admits that it has never promulgated data-security regulations, guidance, or standards under Section 5: '[T]here is no rulemaking, and no rules have been issued . . . .'"); *id.*, 7.2 ("When asked about other sources of data-security standards, FTC said, the 'Commission has entered into almost 57 negotiations and consent agreements that set out . . . the method by which the Commission

responses to LabMD's discovery demands[16] and requests for admissions,[17] and Complaint Counsel's objections to questions posed during a deposition,[18] do not constitute facts at all, let alone material facts. Just because Complaint Counsel has made particular statements or taken certain positions does not necessarily mean *the Commission* has adopted those positions. To the contrary, the Commission is not bound by characterizations employed by Complaint Counsel, and is free to reject Complaint Counsel's arguments or reject its evidence. Moreover, the statements of counsel cited by LabMD are not contained in sworn affidavits or testimony, as required under 16 C.F.R. § 3.24(a)(3) & (4), and thus are little more than "mere allegations or denials,"

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assesses reasonableness.' . . . . And finally the FTC argued that 'the IT industry has issued a tremendous number of guidance pieces and other pieces that basically set out the same methodology . . .,' except that the 'Commission's process' involves 'calculation of the potential consumer harm from unauthorized disclosure of information.'"); *id.*, 8.1 ("At the hearing, the ALJ asked: 'Are there any rules or regulations that you're going to allege were violated here that are not within the four corners of the complaint?' The FTC responded 'No.'"); *id.*, 8.2 ("The FTC also admits that '[n]either the complaint nor the notice order prescribes specific security practices that LabMD should implement going forward.'") (quoting colloquy between Complaint Counsel Alain Sheer and Chief Administrative Law Judge D. Michael Chappell, Transcript of Initial Pretrial Conference, September 25, 2013).

[16] *See* LabMD Stmt. 7.3 ("In response to LabMD's written discovery requesting documents relating to the standards the FTC enforces regarding data-security, the FTC produced thousands of pages of consent decrees, reports, PowerPoint presentations, and articles from the FTC's website, including many in Spanish.") (citing attachments to letters from Complaint Counsel transmitting responses to LabMD document requests).

[17] *See* LabMD Stmt. 6.5 ("The FTC claims it need not 'allege the specific industry standards Respondent failed to meet or specific hardware or software Respondent failed to use.'") (quoting Complaint Counsel's Amended Response to LabMD's First Set of Requests for Admission (filed as Exh. B to Complaint Counsel's Motion to Amend Complaint Counsel's Response to Respondent's First Set of Requests for Admission)).

[18] *See* Motion at 14 ("Respondent's counsel asked [FTC Bureau of Consumer Protection Deputy Director Daniel] Kaufman a series of questions related to published standards that the Bureau sought to enforce against LabMD; however, Complaint Counsel instructed the witness not to respond to any of these questions.") (citing Deposition of Daniel Kaufman, April 14, 2014).

16 C.F.R. § 3.24(a)(3), which can neither support nor defeat a Motion for Summary Decision.

Most significantly, even if these statements or arguments of Complaint Counsel could be construed as facts, and even if they were not genuinely in dispute, they still would not be material to this case. The statements and arguments of Complaint Counsel that LabMD lists in its Statement of Facts relate primarily to LabMD's legal arguments concerning due process, jurisdiction, and related matters, which we already rejected in our Order denying LabMD's Motion to Dismiss. *See infra*, part II. They appear to have little, if any, bearing on the open issues affecting our decision on whether LabMD's data security practices violated Section 5.

Finally, LabMD's contention that it "owns" the consumer information at issue also is immaterial. *See* Motion at 9-10. LabMD contends that "the PHI in LabMD's possession is information that patients voluntarily gave to their doctors, who in turn, voluntarily provided this information to LabMD," and thus, that the information at issue is LabMD's "own property." *Id.*[19] The central questions to be decided here are whether LabMD's data security practices were reasonable and whether they caused, or were likely to cause, significant injury to consumers that was unavoidable and unjustified by offsetting benefits. Those questions do not turn on the "ownership" of the data. It is quite possible that a company could use (or misuse) its "own property" in a manner that causes, or is likely to cause, significant harm to others. If such misuse satisfies the criteria of Section 5, it may constitute an "unfair act or practice."

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[19] In support of this assertion, LabMD contends that, as a matter of law, "consumers who voluntarily provide personal information to third parties lose their privacy rights because the information in question once given, belongs to the receiver and not the consumer." Motion at 9. LabMD therefore rejects what it characterizes as "FTC's foundational premise"—that "consumers who voluntarily give PHI to medical providers have some protectable privacy or other interest in that information beyond that which Congress authorized HHS to carve out under HIPAA." *Id.* at 10. *See also* CC Opp. at 8 & n.3 (opposing argument). For present purposes, we need not resolve the merits of this novel legal proposition.

II. LABMD'S RENEWED DUE PROCESS AND JURISDICTIONAL CHALLENGES

LabMD asserts that we wrongly denied its Motion to Dismiss, Motion at 8, and implicitly asks us to reconsider the issues raised in that Motion. We decline to do so. We have already carefully addressed and disposed of LabMD's arguments that (1) its due process rights were infringed and that it lacked adequate notice of what conduct is prohibited (*compare* Motion at 11-12, 15-16, and LabMD Reply at 4-6, *with* MTD Denial Order at 16-17); (2) the Commission cannot bring enforcement actions to address statutory violations unless it has adopted specific rules or announced detailed compliance standards in advance (*compare* Motion at 13-18 and LabMD Reply at 6-10, *with* MTD Denial Order at 14-17); and (3) HIPAA supersedes any FTC authority over unfair data security practices and that HIPAA and the FTC Act are in irreconcilable conflict (*compare* Motion at 18-20, and LabMD Reply at 13-15, *with* MTD Denial Order at 10-13).

We need not reiterate the legal analysis set forth in our earlier Order. LabMD identifies no "new questions raised by the decision . . . upon which [it] had no opportunity to argue," *see* 16 U.S.C. § 3.55; and even if it had done so, it failed to submit a Petition for Reconsideration within 14 days of the service of our Order. *Id.* To the extent LabMD continues to disagree with the legal conclusions set forth in that interlocutory decision, it may seek judicial review pursuant to 15 U.S.C. § 45(c)-(d)—but *only* if and when we issue a final order against LabMD at the conclusion of this adjudicatory proceeding. *See, e.g., FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980).[20] We express no view on the open legal questions at issue in this proceeding, or on the numerous, genuinely disputed issues of material fact that have not yet been resolved.

[20] *See also LabMD, Inc. v. FTC*, No. 13-15267-F (11th Cir. Feb. 18, 2014) (*per curiam*) (dismissing challenge to adjudicatory proceeding for lack of jurisdiction, because no cease and desist order had been issued); *LabMD, Inc. v. FTC*, No. 1:14-cv-00810-WSD (N.D. Ga. May 12, 2014) (same), *appeal pending*.

Accordingly,

IT IS ORDERED THAT Respondent LabMD, Inc.'s Motion for Summary Decision **IS DENIED**.

By the Commission, Commissioner Brill not participating.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.

Docket No. C-4423. Order, May 20, 2014

Letter approving application to divest certain assets to Signature Funeral and Cemetery Investments LLC and/or its affiliates d/b/a The Signature Group.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International ("SCI") and received on March 14, 2014 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to Signature Funeral and Cemetery Investments LLC and/or its affiliates d/b/a The Signature Group (collectively, "Signature").

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

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

HERTZ GLOBAL HOLDINGS, INC.

Docket No. C-4376. Order, May 29, 2014

Letter responding to the Petition for Approval for the sale and assignment of ten closed Advantage locations to Hertz Global Holdings, Inc. and twelve closed Advantage locations to Avis Budget Group.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Craig M. Geno, Esquire
Law Offices of Craig M. Geno, PLLC

Dear Mr. Geno:

This letter responds to the Petition of Franchise Services Corporation, Inc. for Prior Approval of the Sale of the Non-Transferred Locations filed by Franchise Services of North America ("FSNA") on April 10, 2014 ("Petition"). The Petition requests that the Federal Trade Commission approve, pursuant to the Order in this matter, the sale and assignment of ten closed Advantage locations to Hertz Global Holdings, Inc. and twelve closed Advantage locations to Avis Budget Group. The Petition was placed on the public record for comments until May 19, 2014. No comments were received.

After consideration of the proposed divestiture as set forth in FSNA's Petition and supplemental documents, as well as other available information, the Commission has determined to approve both proposed sales. In according its approval, the Commission has relied upon the accuracy and completeness of information submitted and representations made in connection with FSNA's Petition.

By direction of the Commission, Commissioner Wright and Commissioner McSweeny not participating.

IN THE MATTER OF

ARDAGH GROUP, S.A.; SAINT-GOBAIN CONTAINERS, INC.; AND COMPAGNIE DE DAINT-GOBAIN

Docket No. 9356. Order, June 17, 2014

Letter approving application to divest the Anchor Glass Business to Glass Container Acquisition LLC.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Wayne Dale Collins, Esq.
Shearman & Sterling LLP

Dear Mr. Collins:

This letter responds to the Application for Approval of Divestiture of Anchor Glass Business to Glass Container Acquisition LLC (“Anchor Glass Application”) filed by Ardagh Group S.A. (“Ardagh”) on April 24, 2014. The Anchor Glass Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, Ardagh’s proposed divestiture of the Anchor Glass Business to Glass Container Acquisition LLC, an affiliate of KPS Capital Partners L.P. The Application was placed on the public record for comments until May 28, 2014, and no comments were received.

After consideration of the proposed divestiture as set forth in Ardagh’s Anchor Glass 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 representations made in connection with Ardagh’s Anchor Glass Application and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Wright dissenting and Commissioner McSweeny not participating.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

AUTO DEALERS

FTC File No. 131 0206 – Decision, April 21, 2014

RESPONSE TO ZIEGLER SUPERSYSTEMS, INC.'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND DATED FEBRUARY 11, 2014

By WRIGHT, Commissioner:

Ziegler Supersystems, Inc. ("ZSS") has filed a petition to quash or limit the civil investigative demand ("CID") issued by the Federal Trade Commission on February 11, 2014. For the reasons stated below, the petition is denied.

I. BACKGROUND

TrueCar.com matches potential automobile purchasers and dealers and gives consumers pricing information about specific vehicles. Before February 2012, TrueCar matched buyers and sellers through online reverse auctions. A user would specify a desired car make and model, along with a zip code. In response, TrueCar provided "leads" that identified participating local dealers with the car in stock, together with a price bid by each dealer. The website then generated a coupon stating that the user was entitled to buy the desired car at the price quoted by the dealer. The website also purported to provide the dealer's cost for the car after rebates, the factory invoice price, the average market price, and the manufacturer's suggested retail price.

This business model came to an end in February 2012, after thousands of dealers ended their business relationships with TrueCar during the previous few months. At that point, the company announced that it would eliminate the reverse auctions and dealer cost disclosures. Commission staff is now investigating whether dealers, consultants, and other firms in the retail automotive industry violated Section 5 of the FTC Act, 15

U.S.C. § 45 (as amended), by agreeing that they would collectively refuse to participate in TrueCar's reverse auctions.

As part of this investigation, the Commission has sought information from James Ziegler, an industry consultant who is the owner and President of petitioner ZSS. Mr. Ziegler advises dealers nationwide, organizes management seminars, speaks at industry conventions, and writes opinion pieces for trade periodicals and blogs.[1] In the months preceding TrueCar's announcement that it was changing its business model, Mr. Ziegler appears to have contributed unfavorable blog posts and comments about TrueCar's reverse-auction business model to the industry blogs DealerElite and Automotive Digital Marketing. Mr. Ziegler himself states that he encouraged "thousands" of dealers and "industry influencers" to end their relationships with TrueCar,[2] and that he was recognized for "spear-heading the Anti-TrueCar movement."[3] Staff is now investigating whether he may have helped orchestrate an unlawfully collusive agreement among dealers to suppress price competition.

On February 11, 2014, pursuant to a Commission resolution authorizing the use of compulsory process,[4] the FTC issued a CID to ZSS seeking, *inter alia*, the communications of its employees (including Mr. Ziegler) with dealers, manufacturers, consultants, and trade associations concerning TrueCar's effects on the retail price of automobiles and any decisions by dealers to terminate TrueCar's services. The CID's initial return date (February 20,

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[1] Pet. 2. Although ZSS's Petition to Quash refers to itself as a "media publications company," the company's website (http://www.zieglersuper systems.com) promotes Mr. Ziegler's consulting services, seminars, and speaking engagements.

[2] James A. Ziegler, TRUE CAR and ZAG Cyber Bandits, Parasites or Good for the Car Business?, Dec. 3, 2011 comment, DealerElite (Nov. 27, 2011), *available at* http://www.dealerelite.net/profiles/blog/show?id=5283893%3A BlogPost%3A250154&commentId=5283893%3AComment%3A254205&xg_s ource=activity.

[3] *Id.* at Feb. 9, 2012 comment.

[4] *See* Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, File No. 1310206 (Jan. 17, 2014).

2014) was extended to March 20, 2014. During a phone call on March 18, 2014, counsel for ZSS first informed Commission staff that ZSS intended to withhold documents responsive to certain CID specifications on the ground that they were privileged under state and federal laws protecting journalists. ZSS's counsel did not voice any other specific issues with the CID at that time.

On March 20, 2014, ZSS produced 138 pages of documents and filed this petition to limit or quash.

II. ANALYSIS

A. The Applicable Legal Standards

Agency compulsory process 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 inquiry, as defined by the Commission's investigatory resolution.[5] Agencies have wide latitude to determine what information is relevant to their law enforcement investigations and need not even have a belief that wrongdoing has actually occurred.[6] As the D.C. Circuit has explained, "[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."[7] Furthermore, if the recipient of compulsory process asserts an

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[5] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

[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.").

[7] *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.3d at 874 & n.26).

evidentiary privilege, it has the burden to establish that the privilege applies.[8]

ZSS argues that the CID's demands for its TrueCar-related documents should be quashed on the grounds that they violate the journalist's privilege, the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa(a)-(b), and the Georgia reporter's shield law. Additionally, ZSS asserts that the Commission resolution was overbroad; the CID seeks irrelevant material concerning ZSS's income sources, personnel, and document retention policies; and the CID's demands for ESI production are unduly burdensome. These contentions lack merit.

B. ZSS's Privilege Claims Are Without Merit

Most appellate courts recognize a qualified privilege that protects journalists from disclosing in civil proceedings information that they obtained while reporting the news.[9] A person who claims the privilege must bear the burden to show that he or she (1) gathered the material with the intent to disseminate information to the public, *and* (2) did so with journalistic independence from the subject matter.[10] Even when the privilege applies, it must give way if the party seeking the material demonstrates that the material is highly relevant, necessary to the

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[8] *CFTC v. McGraw-Hill Cos.*, 390 F. Supp. 2d 27, 32 (D.D.C. 2005) (*McGraw-Hill I*); *CFTC v. McGraw-Hill Cos.*, 507 F. Supp. 2d 45, 50 (D.D.C. 2007) (*McGraw-Hill II*).

[9] Although most courts of appeals have recognized the privilege in some form, they have taken conflicting positions about whether it is mandated by the First Amendment, *see Price v. Time, Inc.*, 416 F.3d 1327, 1342-43 (11th Cir. 2005), or is grounded in federal common law, *see Riley v. City of Chester*, 612 F.2d 708, 714-16 (3d Cir. 1979). The Seventh Circuit, by contrast, concludes that "rather than speaking of privilege, courts should simply make sure" that a subpoena directed to a journalist be "reasonable in the circumstances, which is the general criterion for judicial review of subpoenas." *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003). *But see Branzburg v. Hayes,* 408 U.S. 665, 690-91 (1972) (journalists not immune from testifying about confidential sources before a criminal grand jury).

[10] *See, e.g.*, *Chevron Corp. v. Berlinger*, 629 F.3d 297, 307-08 (2d Cir. 2011); *von Bulow v. von Bulow*, 811 F.2d 136, 142-45 (2d Cir. 1987).

investigation, and unavailable from other sources.[11] When, as here, a federal agency is investigating possible law violations, the privilege is "more qualified" than it would be in private civil litigation, in light of the "public interest" in combating harms to consumers, such as "artificially inflated prices."[12]

Here, ZSS has failed to establish that the journalist's privilege shields its TrueCar-related documents from disclosure. Commission Rule 2.10(a)(1) requires that a Petition to Quash "set forth all assertions of protected status . . . including all appropriate arguments, affidavits, and other supporting documentation."[13] ZSS, however, did not submit credible evidence that Mr. Ziegler acted primarily for newsgathering purposes, nor did it provide any evidentiary support regarding the scope and nature of the documents it seeks to protect under the journalist's privilege. Accordingly, we conclude that Mr. Ziegler has not shown that he was engaged in newsgathering and, in any event, has not established that he exercised the requisite journalistic independence. Moreover, even if he had made both of those showings, any privilege claim would yield to FTC staff's *bona fide* need for these documents because they contain information that lies at the heart of the investigation and is not reasonably available from other sources.

1. *Mr. Ziegler was not engaged in independent newsgathering*

The journalist's privilege does not extend "to any person with a manuscript, a web page or a film."[14] It applies only if the person claiming the privilege "demonstrate[s], through competent evidence," that he or she intended to use the claimed protected material "to disseminate information to the public and that such

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[11] *See, e.g., United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

[12] *See, e.g., McGraw-Hill I*, 390 F. Supp. 2d at 33 ("The CFTC is a federal agency authorized by Congress to investigate violations of law, a posture quite distinct from that of a private litigant seeking personal redress.").

[13] 16 C.F.R. § 2.10(a)(1).

[14] *Madden*, 151 F.3d at 129.

intent existed at the inception of the newsgathering process."[15] The privilege does not protect those who collect information "for personal reasons, unrelated to dissemination of information to the public," even if such persons later decide to publish what they have learned.[16] Instead, the privilege is reserved for "persons whose purposes are those traditionally inherent to the press; persons gathering news for publication."[17]

ZSS asserts that the journalist's privilege protects Mr. Ziegler's "information and documents relating to TrueCar" because he intended to "prepar[e] articles" on this subject.[18] However, a general intention to publish articles is not enough; such intention must have existed at the inception of the newsgathering process and be proven through competent evidence. ZSS has not shown that Mr. Ziegler spoke with industry members about TrueCar for journalistic or investigatory purposes. For example, ZSS has not provided a sworn declaration from Mr. Ziegler affirming that his primary purpose was simply to inform the public about TrueCar's business relationships or its effects on the price of cars. Instead, Mr. Ziegler's blog posts state that his purpose was to encourage dealers to "Cancel your dealership's Affiliation with TrueCar" and "Bring This Monster to It's [sic] Knees" in order to prevent the price of automobiles from falling (11/27/11, DealerElite and Automotive Digital Marketing).[19] Statements such as this suggest that Mr. Ziegler, who describes himself as an "advis[or to] more than 500 [car] dealerships throughout the country,"[20] was functioning more like an industry facilitator than like a journalist. Although the purpose

[15] *von Bulow*, 811 F.2d at 144.

[16] *Id.* at 143; *see also Chevron*, 629 F.3d at 307.

[17] *Madden*, 151 F.3d at 129-30; *see also Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1293-94 (9th Cir. 1993); *Warnell v. Ford Motor Co.*, 183 F.R.D. 624, 625 (N.D. Ill. 1998); *Pinkard v. Johnson*, 118 F.R.D. 517, 521 (M.D. Ala. 1987).

[18] Pet. 8.

[19] Ziegler, supra note 2, at Nov. 27, 2011 comment.

[20] Pet. 2.

of our investigation is to learn all the relevant facts, the facts we have before us now tend to discredit any claim that Mr. Ziegler was engaged in genuine journalistic activities.

Even if ZSS had shown that Mr. Ziegler acted with a newsgathering purpose, it also failed to meet its additional burden to demonstrate his financial and editorial independence from the subject matter. "A person (or entity) that undertakes to publish commentary but fails to establish that its research or reporting [was] done with independence from the subject of the reporting either has no press privilege at all, or in any event, possesses a privilege that is weaker and more easily overcome."[21] Although ZSS has acknowledged that Mr. Ziegler served as an advisor to car dealerships, it has not disputed the natural inference that Mr. Ziegler was compensated for those business services. To the contrary, ZSS has not identified its income sources in response to the CID, and in fact seeks to quash the CID's request for such information.[22]

2. The FTC has an investigative need for Mr. Ziegler's TrueCar materials

Even if ZSS had met its burden of demonstrating that the journalist's privilege applies, any such privilege would nonetheless yield to the FTC's overriding need for ZSS's TrueCar-related materials.

When the government investigates potential federal law violations, it has greater entitlement to journalistic resources than a private civil litigant. In *Branzburg v. Hayes*, 408 U.S. 665, at 701 (1972), the Supreme Court ruled that journalists must disclose their confidential sources when subpoenaed before a grand jury, in light of that institution's "role . . . as an important instrument of effective law enforcement," and its far-reaching "investigatory

[21] *Chevron*, 629 F.3d at 309. "The privilege is designed to support the press in its valuable public service of seeking out and revealing truthful information. An undertaking to publish matter in order to promote the interests of another, regardless of justification, does not serve the same public interest, regardless of whether the resultant work may prove to be one of high quality." *Id.* at 308.

[22] See Part II.D.2, *infra.*

function." Although it is a civil enforcement agency, the FTC, like a grand jury, has a broad investigatory function that advances the public interest in effective law enforcement. As courts have held, the journalist's privilege is even more "qualified" than it is in private civil litigation if "the party seeking disclosure is the government pursuing an enforcement matter."[23]

Here, any First Amendment interests ZSS might claim in its TrueCar-related material must yield to staff's investigatory needs because that material is unquestionably (1) highly relevant, (2) necessary to a full investigation of the issues, and (3) not reasonably available from other sources. In particular, that material is critical to the pending investigation into whether dealers and consultants, including Mr. Ziegler, orchestrated a collusive refusal to deal with TrueCar, an innovative new industry entrant:

- Specification Three seeks ZSS's communications related to the TrueCar National Dealer Council, which was established after TrueCar announced it was changing its business model. These documents may help determine whether the Dealer Council developed, implemented, or benefited from a potential concerted refusal to deal, and may allow staff to evaluate any justifications that the dealers and consultants might offer to defend their conduct.

- Specification Four seeks ZSS's communications with TrueCar. These materials may clarify whether dealers and consultants entered into a concerted refusal to deal with TrueCar, whether any threats were issued to the company,

[23] *McGraw-Hill I*, 390 F. Supp. 2d at 33 (observing that the CFTC's interests in pursuing an energy price manipulation inquiry are "more akin to those in a criminal case than a purely civil matter"); *see also McGraw-Hill II*, 507 F. Supp. 2d at 51 (citing the CFTC's "significant public interest" in investigating law violations as a reason for limiting the scope of the journalist's privilege). *Accord*, *Univ. of Pa. v. EEOC*, 493 U.S. 182, 194 (1990) (rejecting university's claim that it had a First Amendment privilege to withhold academic tenure review files from the EEOC, since this "would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination").

and whether the actions of dealers and consultants influenced TrueCar's decision to change its business model.

- Specification Five seeks ZSS's internal and external communications regarding TrueCar's services, the effect or perceived effect of TrueCar's reverse auctions on automobile prices, and any decisions by dealers to terminate their TrueCar affiliations. Such information may help Commission staff assess whether competing dealers engaged in direct communications regarding TrueCar, any anticompetitive effects of such communications, and any anticompetitive motive for a refusal to deal that might contradict purported justifications offered by dealers and consultants.

In addition, much of the information the CID seeks is not reasonably available from other sources. Mr. Ziegler claimed that he spoke with "thousands" of auto dealers regarding TrueCar,[24] but he only identified a few by name. Although Commission staff is seeking relevant information from other sources, only Mr. Ziegler can identify all those with whom he communicated about TrueCar and what was said. Therefore, such material is unavailable from other sources. Although Specification Four seeks ZSS's communications with a known entity, TrueCar, we conclude that this specification will likely reveal information unavailable from another source, given the strong possibility that responsive communications have been lost or deleted with the passage of time. Additionally, even if certain information responsive to Specification Four were available from another source, we decline to limit or quash this specification because ZSS has not established that Mr. Ziegler is eligible to claim the journalist's privilege.

In sum, we reject ZSS's journalist's privilege claim because (1) Mr. Ziegler has not satisfied his burden to show that he acted as an independent journalist; and (2) the FTC's need for the material would outweigh any First Amendment interests at stake.

[24] Ziegler, supra note 2, at Dec. 3, 2011 comment.

Responses to Petitions to Quash

Finally, ZSS's other privilege claims are likewise without merit. ZSS's Georgia shield law is not relevant because federal common law governs evidentiary privileges in investigations of potential violations of federal law.[25] The Privacy Protection Act is inapposite, too, because that statute "applies only when there is a criminal investigation or prosecution."[26]

C. ZSS's Remaining Arguments Lack Merit

ZSS also asserts that the CID should be quashed because (1) the resolution authorizing compulsory process was "overly expansive"; (2) the CID seeks irrelevant information; and (3) the CID's request for electronically stored information would cause undue burden.[27] As a preliminary matter, ZSS failed to raise these arguments with Commission staff in any of its four teleconferences with staff to date. Commission Rule 2.7(k) provides, "The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process."[28]

A CID recipient's obligation to meet and confer with Commission counsel is an essential component of the Commission's procedures. It requires the recipient to give Commission staff an opportunity to resolve disputes in an efficient manner and thus prevents the investigation from being

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[25] *See, e.g., Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993); *Gilbreath v. Guadalupe Hosp. Found. Inc.*, 5 F.3d 785, 791 (5th Cir. 1993).

[26] *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 567 (6th Cir. 2007). Under the PPA, "the government, in connection with the investigation or prosecution of a criminal offense, is prohibited from searching for or seizing any documentary. . . materials 'possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.'" *United States v. Any & All Radio Station Transmission Equip.*, 218 F.3d 543, 551 n.4 (6th Cir. 2000) (quoting 42 U.S.C. § 2000aa(b)).

[27] Pet. 9-10.

[28] 16 C.F.R. 2.7(k).

sidetracked by avoidable or inconsequential disagreements. ZSS's failure to satisfy the meet and confer requirements is an adequate and independent reason to deny ZSS's arguments concerning relevance, burden, and the breadth of the authorizing resolution.

In any event, even if ZSS had satisfied the meet and confer requirement in Commission Rule 2.7(k), ZSS's petition should be denied because it provides no basis for ZSS to refuse to produce the documents required by the CID.

1. The Commission resolution was sufficiently specific

ZSS asserts, but without explanation, that the Commission resolution authorizing compulsory process in this investigation was "over-broad" and "outside the FTC's authority."[29] 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." 15 U.S.C. § 57b-1(c)(2). It is well-established that the resolution authorizing process provides the requisite statement of the purpose and scope of the investigation.[30] 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.[31]

Resolution File No. 1310206 authorizes the use of compulsory process:

> [t]o determine whether firms in the retail automobile industry, including automobile dealers

[29] Pet. 10.

[30] *Invention Submission*, 965 F.2d at 1088, 1090; *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).

[31] *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, 446 (9th Cir. 1988)).

> and industry consultants, may be engaging in, or may have engaged in, conduct violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by agreeing to restrain competition, including by agreeing to refuse to deal with TrueCar, Inc.[32]

This resolution is plainly sufficient under the legal standards outlined above. It gives ample notice of the general purpose, scope, and legal authority for the investigation.

2. The CID seeks relevant information

ZSS challenges the relevance of CID Specification One, which directs ZSS to identify its personnel; Specification Two, which requests ZSS's income received from dealerships and trade associations; and Specification Seven, which seeks ZSS's document retention policies.[33] In the context of an administrative CID, "relevance" is defined broadly and with deference to an administrative agency's determination.[34] An administrative agency is accorded "extreme breadth" in conducting an investigation.[35] As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is "more relaxed" than in an adjudicatory proceeding.[36] As a result, a CID recipient must demonstrate that the agency's determination is "obviously wrong," or the documents are "plainly irrelevant" to the investigation's purpose.[37]

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[32] Pet. Exh. 1.

[33] Pet. 10.

[34] *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

[35] *Linde Thomson*, 5 F.3d at 1517.

[36] *Invention Submission*, 965 F.2d at 1090.

[37] *Id.* at 1089; *Carter*, 636 F.2d at 788.

Here, the material sought by the CID is plainly relevant. ZSS has already provided information about its employees and document retention policies in the partial CID response it submitted on March 20, 2014. To the extent ZSS still objects to providing such material, we note that FTC staff routinely ask for this material because it helps to ensure the investigation is accurate, thorough, and comprehensive. Additionally, the request for ZSS's income sources is relevant to the core issue in the investigation: whether consultants and dealers may have orchestrated a concerted refusal to deal.

3. *The request for electronically stored information is not unduly burdensome*

ZSS also asserts that the CID would impose an undue burden by requiring ZSS to "conduct sophisticated searches for electronically stored information," which would require "assistance from an information technology specialist from outside the company," resulting in "substantial costs that are not justified . . . ."[38] When an agency inquiry pursues a lawful purpose and the requested documents are relevant to that purpose, the reasonableness of its request is presumed absent a showing that compliance threatens undue disruption to the normal operations of the business.[39] Some burden on the recipient of process is "to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest."[40] Thus a recipient of process must produce the materials unless the request is unduly burdensome or unreasonably broad.[41] In other words, the recipient must make a record to show the "measure of their grievance rather than [asking the court] to assume it."[42]

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[38] Pet. 10.

[39] *In re Line of Business Report Litig.*, 595 F.2d 685, 703 (D.C. Cir. 1978) (citing *Texaco*, 555 F.2d at 882).

[40] *Texaco*, 555 F.2d at 882.

[41] *Texaco*, 555 F.2d at 882 & n.49 (citing *United States v. Powell*, 379 U.S. 48, 58 (1964)).

[42] *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (citing *Morton Salt*, 338 U.S. at 654).

It is not enough for ZSS to assert that the Commission CID is unduly burdensome because it requires "sophisticated searches." ZSS has provided no evidence that the costs imposed by the CID exceed costs typically incurred in an investigation, that these costs are unduly burdensome in light of the company's normal operating costs, or that these costs would hinder or threaten its normal operations. We note, moreover, that ZSS never presented FTC staff with detailed information about the company and the manner in which it stores its information. ZSS also did not make any suggestions about how the CID might be modified so as to reduce any burden yet also satisfy staff's investigative needs.[43] Indeed, as noted, ZSS failed to raise these concerns at all in the four teleconferences with FTC staff.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Ziegler Supersystems, Inc. to quash the Civil Investigative Demand be, and it hereby is, DENIED.

IT IS FURTHER ORDERED THAT Petitioner Ziegler Supersystems, Inc. shall comply with the Commission's CID by May 6, 2014.

By the Commission.

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[43] *See* 16 C.F.R. § 2.7(k) (anticipating that in a meet and confer session parties may discuss "ESI systems and methods of retrieval").

THE COLLEGE NETWORK, INC.

FTC File No. 132 3236 – Decision, April 21. 2014

RESPONSE TO THE COLLEGE NETWORK, INC.'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND DATED JANUARY 16, 2014

By WRIGHT, Commissioner:

The College Network, Inc. ("TCN" or "Petitioner") has filed a petition to strike or limit the civil investigative demand ("CID") issued by the Federal Trade Commission on January 16, 2014. Petition to Strike or Limit of The College Network, Inc., F.T.C. File No. 1323236 (Mar. 20, 2014) [hereinafter Pet.]. For the reasons stated below, the petition is denied.

I. INTRODUCTION

TCN is an educational services and publishing company that creates and markets self-guided educational materials and exams to adults seeking to complete college course equivalency examinations. TCN sells study guides called Comprehensive Learning Modules ("CLMs"). After a consumer completes a CLM, the consumer can register to take a college course equivalency exam offered by TCN or a third party. If the consumer passes the exam and later enrolls at a "university partner," that university may accept the passing exam as course credit towards a degree or certificate awarded by that school. As TCN states in its petition, TCN itself is not a school and does not award college degrees.

After receiving hundreds of complaints, FTC staff opened an investigation of TCN and its practices. As authorized by a Commission-approved resolution,[1] the FTC issued a CID to TCN

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[1] The Commission's Resolution Directing Use of Compulsory Process in a Non-public Investigation of Secondary or Postsecondary Educational Products or Services or Educational Accreditation Products or Services describes the nature and scope of the investigation as follows:

seeking information concerning TCN's advertising, marketing, and sales of educational products and services. Pet. Exh. A, CID attached as Exh. 1. The CID seeks, among other things, information regarding TCN's products and services, and the marketing claims regarding those products and services, including claims regarding the content of its CLMs, TCN's affiliations with universities, cancellation and refund policies, and the nature and terms of loans TCN offers or facilitates to consumers. Counsel for TCN and FTC staff agreed to some limitations of the CID, but could not reach agreement on all issues before the deadline to file this Petition. Since TCN filed its petition, staff has further limited the CID.[2]

As described below, TCN challenges the CID on the ground that it is overbroad and vague, and that it could lead to undue burden of compliance. TCN also opposes production of certain information because it claims the information is proprietary. Finally, TCN challenges various requests for information as an improper "fishing expedition."

To determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaging in deceptive or unfair acts or practices in or affecting commerce in the advertising, marketing, or sale of secondary or postsecondary educational products or services, or educational accreditation products or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

Resolution File No. P138402 (Nov. 14, 2013).

[2] Pet. at 1-3. On March 19, 2014, FTC staff modified the CID by limiting the scope of particular definitions and extending the date for compliance. *See* Pet. at 3; Pet. Exh. G (March 19, 2014 Letter from Thomas N. Dahdouh to Jeanne M. Cors). FTC staff further modified the CID after the Petition was filed. Because these modifications mooted some of Petitioner's objections, we do not address them in detail in this order. Specifically, staff struck Interrogatory 40; modified Document Specification 15(c) to accept TCN's proposal to produce customer files for certain listed customers; and modified Interrogatories 37a and 39 to clarify that they apply only to natural persons, businesses, or organizations.

II. ANALYSIS

A. The Definitions and Specifications in the CID Clearly Identify Responsive Materials and Do Not Impose Undue Burden

TCN challenges numerous definitions and specifications in the CID, claiming variously that they are overly broad, oppressive, unreasonable, vague and ambiguous, and unduly burdensome. These challenges lack merit.

The standards for evaluating TCN's claims are well established. A CID is impermissibly vague where it lacks reasonable specificity or is too indefinite to enable a responding party to comply.[3] A CID is overbroad where it is "out of proportion to the ends sought," and "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."[4]

A CID imposes an undue burden only if compliance threatens to seriously impair or unduly disrupt the normal operations of the recipient's business.[5] The recipient bears the responsibility of establishing that the burden of compliance is undue.[6] It must show the "measure of their grievance rather than [asking the court] to assume it."[7] Of course, balanced against this required

[3] *See, e.g.*, *United States v. Fitch Oil Co.*, 676 F.2d 673, 679 (Temp. Emer. Ct. App. 1982); *United States v. Wyatt*, 637 F.2d 293, 302 n.16 (5th Cir. 1981); *United States v. Cox*, 73 F. Supp. 2d 751, 766 (S.D. Tex. 1999); *United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989).

[4] *Wyatt*, 637 F.2d at 302 (quoting, among others, *United States v. Morton Salt Co.*, 338, U.S. 632, 652 (1950)).

[5] *See FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *In re Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998).

[6] *See EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 475-76 (4th Cir. 1986); *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *Texaco*, 555 F.2d at 882.

[7] *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962).

showing is the understanding that “any subpoena places a burden on the person to whom it is directed.”[8]

We address each challenge of particular specifications against these standards. We also consider the cumulative effect of Petitioner’s challenges and conclude that compliance with the CID does not impose undue burden.

The Defined Word “Company.” The CID, as issued, defined the term “Company” to mean “The College Network, Inc. and its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, including College Network Inc. and The College Network Inc., and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.” The phrase “and affiliates” was later deleted after discussions between TCN and staff.[9] TCN seeks to limit that definition further.[10] It argues that the description of “other persons working for or on behalf of” TCN is vague, overly broad, and could include unrelated entities like lead vendors or independent contractors over whose documents TCN lacks custody or control. Pet. at 4-5.

We find that the definition of “Company,” including the challenged phrase, is sufficiently definite. That definition is used routinely in similar FTC CIDs. Nothing about the phrase lacks reasonable specificity or is too indefinite to enable TCN to identify responsive materials. In fact, TCN’s argument recognizes that lead vendors and independent contractors who sell or market to prospective customers fall within the definition.

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[8] *Shaffner*, 626 F.2d at 38.

[9] *See* Pet. Exh. F (March 17, 2014 Letter from Yan Fang to Jeanne M. Cors), at 1-2, 6-7. The definition of “Company” that strikes “and affiliates” is a “provisional” definition.

[10] Petitioner also objects to the particular Interrogatories and Document Specifications that use or reference the word “Company.” Petitioner objects to Interrogatories 1-8, 10-24, 26-37, and 39, and Document Specifications 1-2, 4, 7, 18-31, and 35-36. Pet. at 3-4.

TCN's real claim seems to be not that it cannot understand what information is called for, but that it cannot produce that information because it is in the hands of third parties – vendors and independent contractors who sell or market to prospective customers (and therefore fall within the definition of "Company"). That contention is without merit. The CID imposes no obligation on TCN to produce materials over which it lacks possession, custody or control – which in this context means the legal or practical ability to obtain the responsive documents.[11] A party can be said to control documents if, for example, they are available through a contractual right of access,[12] or are in the possession of a party's agents.[13] Thus, under the Instructions of the CID, if TCN does not control the documents of its vendors and contractors, the definition of "Company" imposes no obligation on TCN to produce them. We now address TCN's factual claims.

To support its contention that TCN lacks possession, custody or control over the documents of lead vendors and independent contractors, TCN relies on the Affidavit of Cory Eyler, who states that he is "unaware of any ability of TCN to demand production of those types of documents from independent contractors or lead vendors." Pet. Exh. H (Eyler Affidavit) ¶ 5. However, Mr. Eyler's affidavit does not indicate whether TCN has in its possession any documents from the contractors or whether it has

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[11] *See, e.g.*, *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (applying Fed. R. Civ. P. 34) (citing *Bank of NY v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146-47 (S.D.N.Y. 1997)). *See also, e.g.*, *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 236 F.R.D. 177, 180 (S.D.N.Y. 2006); *Dietrich v. Bauer*, 2000 WL 1171132 at *3 (S.D.N.Y. 2000) ("'Control' has been construed broadly by the courts as the legal right, authority or practical ability to obtain the materials sought upon demand.").

[12] *Flagg v. City of Detroit*, 252 F.R.D. 346, 353 (E.D. Mich. 2008) (citing *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 928-29 (1st Cir. 1988); *Golden Trade, S.r.L. v. Lee Apparel Co*., 143 F.R.D. 514, 525 (S.D.N.Y. 1992)).

[13] *Flagg*, 252 F.R.D. at 353 (citing *Commercial Credit Corp. v. Repper*, 309 F.2d 97, 98 (6th Cir. 1962); *Am. Soc. for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 233 F.R.D. 209, 212 (D.D.C. 2006); *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984)).

ready access to such documents. If it does, it must produce that material. Nor does the affidavit provide any other detail regarding Mr. Eyler's review of any relevant contract terms, or other facts that might clarify whether TCN has a right to access the requested materials. The tentative and conclusory statement in the affidavit does not allow us to determine whether relevant documents and material fall beyond TCN's possession, custody, or control.

Petitioner also has failed to establish that producing the requested materials would be unduly burdensome (assuming it has them, or has a right to retrieve them). As explained above, a CID recipient bears the responsibility of establishing that the burden of compliance is undue. "At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost of meeting the particular specifications at issue)."[14] But TCN's affidavit provides no details regarding the burden associated with searching and retrieving documents and materials from its lead vendors and independent contractors. Pet. at 4-5. The affidavit states that TCN has more than 125 lead vendors and 140 independent contractors, Pet. Exh. H (Eyler Affidavit) ¶ 5, but it includes no additional facts to support the conclusion that "[e]ven attempting to obtain information orally [from the independent contractors] would be an expensive, time consuming, and overly burdensome undertaking." Pet. at 5.

Instead of addressing the burden of searching and retrieving all documents and materials from its lead vendors and independent contractors, Petitioner provides only an example of the number of links or advertisements that are generated by lead vendors and independent contractors demanded by Document Specification 20. Pet. Exh. H (Eyler Affidavit) ¶ 5. Petitioner does not identify or provide factual support regarding other types of documents that lead vendors and independent contractors are likely to have, estimate their volume, or provide estimates of the burden of production. Thus, except for Document Specification

[14] *Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998).

20, which is discussed below, TCN has not made a sufficient showing that compliance is unduly burdensome.

The Defined Word "Identify." TCN asks the Commission to strike Interrogatories 6, 7, 10, 12, 23, 25, 34, and 37c because the word "identify" requires TCN to name the officers, directors, managers, and contact persons of third party businesses or organizations. Pet. at 6-8. TCN also objects that a telephone number must be provided in addition to the name and business address for these parties. Pet. at 7-8. TCN argues that such demands are oppressive, unreasonable, overbroad and unduly burdensome. As an alternative to its motion to strike the interrogatories, TCN proposes to limit the definition so that TCN would provide only names and job titles or business affiliations for natural persons, and names and addresses for third party businesses or entities.

After TCN filed its petition, FTC staff narrowed the definition of "Identify" to reduce some of TCN's burden.[15] Although the modified definition is still somewhat broader than the definition TCN proposes in its Petition, we find that it is reasonable. As modified, it asks for business affiliations, business addresses and telephone numbers for natural persons, and the names and telephone numbers of TCN's contacts at businesses and organizations. Such information is relevant to the investigation and should be readily available to TCN; in any event, the CID requests it for only a limited number of persons or organizations. Consequently, we decline Petitioner's proposal to limit the definition further.

Interrogatory 3. Interrogatory 3 asks TCN to identify current and former officers, employees, independent contractors,

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[15] Letter from Thomas N. Dahdouh to Jeanne M. Cors (Apr. 1, 2014). The modified definition states: "'Identify' or 'the Identity of' shall be construed to require identification of (a) natural persons, by stating the person's name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home address; and (b) businesses or other organizations, by stating the business's or organization's name and address, and the name and contact telephone number of TCN's contacts at the organization, where applicable."

affiliates, and agents with responsibility or knowledge about four topics. TCN argues that this Interrogatory is overbroad and oppressive because "virtually all TCN personnel have some knowledge" about the particular issues. Pet. at 10. That is not a valid objection. Indeed, the phrasing of the interrogatory is no broader than Federal Rule of Civil Procedure 26(a)(1)(A)(i), which mandates disclosure in litigation of "each individual likely to have discoverable information."

Even if the Interrogatory asked TCN to identify all its employees, it is not unduly burdensome because TCN has approximately 150 employees,[16] 125 lead vendors, and 140 independent contractors. Listing those persons and entities imposes no great burden. Under the modified definition of "Identify" discussed above, TCN must provide a "person's name, title, and department" for current employees of The College Network, Inc. For businesses such as the 125 lead vendors, TCN must provide the business or organization name and address, and the name and telephone number of TCN's contact(s). For individuals such as TCN's 140 independent contractors, TCN must provide a person's name, title, business affiliation, business address and telephone number. To the extent that former employees, lead vendors, or independent contractors must be identified, the CID covers a limited time period that begins in 2011, so the number of persons or entities should be limited. This information should be readily available and easily assembled by TCN, and is relevant for the investigation.

Interrogatories 19 and 32. TCN asks the Commission to strike Interrogatories 19 and 32 on the grounds that they are so overbroad, unduly burdensome, unreasonable, and oppressive that TCN would not be able to certify that its responses are complete. Interrogatory 19 seeks TCN's customer information, including name, contact information, products purchased, payments, complaints and cancellations, exam passage, and college enrollment. TCN objects to Interrogatory 19 because it "demands that TCN identify all of its customers during the responsive period." Pet. at 10. In addition, Petitioner objects to

[16] In discussions with FTC staff, TCN estimated that it has 100 to 150 employees.

Interrogatory 19 because the demand to identify complaints "would require a manual review of over 200,000 customer files, which would likely consist of millions of pages of documents." Pet. Exh. I (Fair Affidavit) ¶ 5.

Interrogatory 32 seeks information about the number of customers who, among other things, enrolled at degree-granting institutions, obtained degrees, or withdrew before earning a degree. TCN claims that this specification would also require a manual review of customer records, which "would be impossible for the company to undertake without ceasing normal operations, or would require . . . months or years to complete, depending on the manpower devoted to the project." Pet. Exh. A (Ivory Affidavit) ¶ 8.

These Interrogatories are not overly burdensome because, by their own terms, they can be satisfied either by "a narrative response" *or* by production of materials "in an electronic database format." TCN thus need not compile a new list of all of its customers or conduct the manual review of which it complains. Its electronic customer database likely contains all the responsive information and materials. Indeed, the petition indicates that it contains the 200,000 customer files. *See* Pet. Exh. J (Sallee Affidavit) ¶ 7. If TCN produces the databases, it need not manually review the files in the databases to address the interrogatories. We now address TCN's objection to producing the databases.

Document Specifications 10, 11, 12, 13, 22, and 27. TCN seeks to strike the word "databases" from Document Specifications 10, 11, 12, 13, 22 and 27 on the grounds that the word renders the specifications overbroad, unreasonable, oppressive, vague, ambiguous, unduly burdensome, and that TCN would be unable to certify that its response was complete. *See* Pet. at 15. Document Specifications 10, 11, and 12 seek accounting data; Document Specification 22 seeks documents that summarize advertising dissemination schedules; and Document Specifications 13 and 27 call for databases (such as the customer database) used to respond to Interrogatories 19 and 32.

There is nothing vague or ambiguous about those specifications. They are not rendered vague or ambiguous merely because the CID does not provide a definition of the term "database." That term is commonly used and has a generally accepted meaning. TCN should easily be able to identify responsive materials. In fact, in objecting to the burden of producing them, TCN appears already to have identified that material.

To support its claim of unreasonable burden, TCN estimates that producing a copy of TCN's accounting database would cost $10,000-$15,000 to purchase a server, software and licenses and that it would need a vendor to install and configure the database and provide access at an addition $2,000-$5,000 cost. *See* Pet. Exhibit J (Sallee Affidavit) ¶ 9. Additionally, TCN asserts that production of the customer database would cost approximately $30,000 and take weeks to complete because TCN would need new servers to house the database and a vendor to create a mirror image of the database and application. *See id.* ¶ 7.

Petitioner's claimed burden of responding to the document specifications for accounting data is overstated. The CID provides TCN with a number of options for providing the requested accounting data. A database is one of several types of responsive documents that TCN may provide to satisfy the specifications. Document Specifications 10, 11, and 12 also allow TCN to respond by providing "spreadsheets, statements, memoranda, reports, or any summarizing document." *See* Pet. Exh. A, CID attached as Exh. 1.

Even if the Commission were to accept TCN's claims regarding the process for and cost of producing the accounting and customer databases,[17] Petitioner has not established that this

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[17] FTC experience in other investigations suggests reason to question TCN's estimated cost and burden. First, accounting databases are typically located in programs specifically designed for accounting, and prior investigations have shown that extracting files from Peach Tree Accounting, the common accounting program that TCN uses, is neither difficult nor costly. Second, businesses typically store data within an industry standard database system and most businesses create regular backups of their databases to ensure there is another copy in case the original is corrupted or accidentally deleted. In discussions with FTC staff, TCN indicated that it uses an Onyx SQL database,

production threatens to seriously impair or unduly disrupt the normal operations of TCN's business.[18] Some cost of complying with an investigation is expected; the burden of that cost must be evaluated in relation to the size and complexity of a recipient's business operations. Here, TCN's estimated $50,000 cost for equipment and vendor services to provide the two databases is evaluated in light of gross sales revenue that exceeded $73 million in 2012 and $48 million in 2013. In similar circumstances, courts have found that far greater compliance costs – ranging from $392,000 to $4,000,000 – did not impose unreasonable burden.[19] In sum, Petitioner has not shown that its costs are excessive.

Document Specification 7. Document Specification 7 seeks documents sufficient to show TCN's policies, practices, and procedures for creating and revising substantive CLM content. Petitioner contends that this document specification (which relates to Interrogatory Specification 8) requires TCN to produce or review documents it does not control because the underlying interrogatory specification asks for the number of independent contractors, affiliates, and others involved in developing CLMs. Pet. at 17. This argument is untenable. Document Specification 7 seeks information that plainly belongs to TCN. If it put that responsibility for developing CLMs information in the hands of its vendors, it can get that information back in order to respond to the CID.

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with a third-party cloud service. If TCN has a recent backup copy of its database, it could easily make a copy of this backup to an external hard drive, which the FTC could provide. If TCN has not recently run a backup, it could create a backup manually using the database's backup function, which is normally not costly and might be completed in one day, depending on the quantity of data. Finally, in other investigations, FTC technical support personnel have copied materials themselves if they are provided access to a petitioner's facilities. This alternative is also available to Petitioner to copy the database at FTC expense.

[18] *See Texaco*, 555 F.2d at 882.

[19] *See FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) (citing *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974) ($392,000 cost for a bank with net income of $178 million); *Texaco*, 555 F.2d at 922 ($4,000,000)).

In any event, TCN has offered no factual support for its assertion that it would be unduly burdensome to obtain documents in the hands of its independent contractors and lead vendors. TCN does not provide a reason to believe that its contractors and lead vendors, who solicit customers or buy advertising space, would have responsive documents related to the creation or revision of substantive CLM content. In addition, to the extent there is any burden, it is minor, because TCN is required to produce only documents "sufficient to show" TCN's policies, practices and procedures for creating and revising substantive content for CLMs (rather than all documents relating to the creation or revision of CLMs). Thus, TCN has some flexibility in assembling its response. We conclude that Petitioner has not demonstrated that Document Specification 7 is unduly burdensome.

Document Specification 16. TCN objects to Document Specification 16, which seeks communications, including internal email and responses to customers, that refer or relate to issues raised in customer complaints. TCN contends that the specification is "overbroad, oppressive, unreasonable, unduly burdensome, and not subject to certification." Pet. at 16. TCN argues that the specification is overbroad because TCN receives at least five categories of complaints that do not have "anything to do with the company."[20] *See* Pet. Exh. I (Fair Affidavit) ¶ 3. We disagree with TCN's conclusion about the relevance of some complaints. The affidavit discounts some categories of complaints – such as subject matter that is "too hard" – which may be relevant to the Commission's need to determine whether TCN is providing consumers with the types of test preparation materials that it advertises. While there may be instances where a complaint relates to a customer's personal circumstances, Petitioner does not show these complaints are so prevalent that they present an obstacle to complying with the CID.

[20] The affidavit explains that TCN has received complaints that "(a) the location where a particular end-of-course equivalency examination is being offered by a third party testing agency is too far away from the customer's home; (b) the subject matter of a particular CLM is 'too hard'; (c) the customer's spouse has left them and therefore they cannot afford the materials they have purchased; (d) the customer has moved to another state; [and] (e) the customer has taken ill[.]" Pet. Exh. I (Fair Affidavit) ¶ 3.

Regarding the burden of Document Specification 16, the Fair affidavit states that compliance would require a manual review of customer files. *Id.* at ¶ 5. As noted above, however, in lieu of manual review, TCN may produce the customer database. As for the objection to providing email or other documents that discuss complaints and responses to complaints, a wide-ranging search throughout the company for responsive documents is unnecessary because Mr. Fair's affidavit states that he oversees the "department within the company which receives, responds to, and if possible, resolves various customer complaints or issues." *Id.* at ¶ 2. A search for responsive documents can reasonably be focused on one department.

Document Specifications 20, 21, 22, and 28. TCN objects to the burden created by Document Specification 20, which seeks "all disseminated advertisements" relating to products and services offered by TCN to individual consumers. TCN also objects to the burden created by other document specifications that seek information about the ads demanded by Document Specification 20.[21] As support for its claimed burden of review and production, Petitioner states that approximately 3,000 to 6,000 links[22] or advertisements are generated daily when TCN's lead vendors and independent contractors are included and the ads "appear on an unknowable number of websites and webpages." *See* Pet. Exh. H (Eyler Affidavit) ¶ 5. In his affidavit, Mr. Eyler states that the production of all websites and webpages, including screenshots, archived versions, source code programs, log files, scripts, and dissemination schedules that include dates and times for the 3,000 to 6,000 daily links "is simply impossible." *Id.*

It appears that TCN has misconstrued the specifications. Document Specification 20 directs TCN to produce copies of all ads. An ad is the "written or verbal statement, illustration, or

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[21] Document Specification 21 seeks all documents relating to the creation and development of the advertising. Document Specification 22 seeks documents about dissemination schedules and visitor volume for each ad. Document Specification 28 seeks documents relating to consumers' interpretations and perceptions of the ads.

[22] Website links are often distributed via Internet search, keyword, sponsored, pop-up, and banner ads.

depiction . . . that is designed to effect a sale or create interest in the purchasing of goods or service." *See* Pet. Exh. A, CID attached as Exh. 1, at Definition B (Advertisement). The definition includes ads that are "displayed or accessible as Web pages." *Id.* Each link that is generated is not a separate advertisement that must be produced. If two consumers who click on links that they found at two different places (*e.g.*, two different third-party websites) arrive at the same webpage or otherwise see the same ad copy, TCN need only to produce one ad.[23] The same requirement applies to Document Specifications 21, 22, and 28.

In addition, we note that, after TCN filed its Petition, FTC staff modified Document Specifications 20 and 22.[24]

Document Specification 17. The specification seeks all documents relating to TCN's marketing policies, practices, and procedures for consumer phone calls, Internet chats with consumers, email communications with consumers, and in-person communications with consumers. Petitioner contends that Specification 17 imposes undue burden, Pet. at 16-17, but the only facts it provides to support its objection appear to relate to Document Specification 20, which we have already addressed.[25] Given the absence of facts to support its claim, it is not possible for us to fully assess Petitioner's proposed limitation to the specification. We note, however, that limiting the production to "any TCN marketing policies and procedures" likely would omit documents relating to the implementation of the policies and procedures, as well as formal and informal "practices" for

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[23] The analysis is similar to other advertising; TCN needs to produce print advertising only once even if it has been distributed to 1000 households.

[24] An April 1, 2014 letter from Thomas N. Dahdouh to Jeanne M. Cors modified the specifications. The modification to Specification 20 eliminates the need for TCN to produce source code, programs, log files, scripts, and past or archived versions of websites and webpages for websites and webpages not operated by TCN. Document Specification 22 was modified to reduce the burden regarding dissemination schedules for Internet advertising; Specification 22, as modified, seeks only summarizing documents sufficient to show dates and numbers of dissemination, visitor volume, and click-through rates for Internet ads. *Id.* at 2-3.

[25] *See* Pet. Exh. H (Eyler Affidavit) ¶¶ 5-6.

marketing TCN products and services to consumers. Pet. at 17. Such materials are highly relevant to the purpose of the investigation, and TCN, therefore, must produce them.

Document Specification 29. TCN objects to Document Specification 29, which seeks documents referring or relating to the target audience of TCN's advertising. TCN argues that a demand for "all documents" "referring or relating to the target audience" would require producing all TCN documents. Pet. at 14-15.

FTC staff modified this specification after the Petition was filed.[26] The modified text provides TCN with flexibility to determine how it can best produce the requested materials and ameliorate any burden by reducing the number of responsive documents.

Document Specification 35. TCN petitions to strike this specification, which seeks complaints, inquiries, and communications from third-party organizations such as the Better Business Bureau, state attorneys general, universities, and nursing organizations. Although it contends that this request imposes undue burden, TCN provides no factual support for this claims. For example, it has not provided the Commission with an estimate of the number of organizations that have complained, the number of third-party complaints received, or the number of document custodians. In addition, contradicting Petitioner's claimed burden, TCN's Vice President of Call Center Operations has stated that producing certain third-party complaints is "more manageable" because TCN's customer database "contain[s] a field to capture certain types of 'complaints' including those received from a state attorney general, the Better Business Bureau, or even an attorney." Pet. Exh. I (Fair Affidavit) ¶¶ 5, 7. Thus, it appears that Petitioner can comply with the specification by producing its customer database and, as we previously explained, production of the customer database is not an

[26] As modified by an April 1, 2014 letter from Thomas N. Dahdouh to Jeanne M. Cors, Document Specification 29 requires the production of all documents, including consumer research, media research analysis, and relevant portions of media plans "sufficient to show" the target audience for each TCN ad produced pursuant to Document Specification 20.

unreasonable burden. We therefore deny Petitioner's request that we strike this specification.

Email and Document Specifications 2-4, 15-18, 20-23, 29-31, and 35. Petitioner seeks leave to file a future petition to quash regarding email if it encounters additional objections after it reviews its emails. TCN explains that it "was working with FTC investigators to reach consensus regarding a universe of custodian accounts to retrieve and search and a listing of search terms to apply. That process was necessarily halted by the deadline for the filing of this Petition[.]" Pet. at 12.

As Petitioner has acknowledged, Commission Rule 2.10(a)(1) provides one opportunity for a CID recipient to file a petition to quash. 16 C.F.R. §2.10(a)(1) ("petition shall set forth *all* assertions of protected status or other factual and legal objections to the Commission's compulsory process") (emphasis added). As we have explained, "[t]he rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID."[27]

Petitioner has not sufficiently availed itself of the meet-and-confer process required by the FTC's Rules of Practice and the CID itself.[28] The meet-and-confer requirement "provides a mechanism for discussing adjustment and scheduling issues and resolving disputes in an efficient manner."[29] Here, Petitioner did not engage in an exchange with staff to resolve the issues surrounding email and limits on custodians whose files would be retrieved and searched. Petitioner received the CID on January 21, 2014, Pet. Exh. A (Ivory Affidavit) ¶ 3, but as late as March 17, Petitioner had not yet provided FTC staff with a list of

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[27] *Wellness Support Network*, File No. 072-3179 at 2 (FTC Apr. 24, 2008) (letter ruling dismissing appeal from denial of petition to quash CID).

[28] 16 C.F.R. § 2.7(k); Pet. Exh. A, CID attached as Exh. 1, at Instruction B.

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

relevant custodians.[30] Given that Petitioner did not provide the very information that staff needed to properly consider and resolve any lingering issues regarding TCN's obligations to search for emails, we disagree that a refusal to allow another petition to quash is an "arbitrary action" that would "raise[] a question of due process."

B. TCN's Claim that Particular Information is Proprietary is Not a Reason to Limit the CID or Avoid Production

Petitioner objects to Interrogatory 12 to the extent that it seeks the number and percentage of TCN customers in default, because "the identity of TCN's present and past customers is proprietary . . . [and] contact [with these customers could] adversely affect TCN's business." Pet. at 7. With respect to Interrogatory 12, Petitioner's concern is misplaced because the modified definition of "identify," does not require personal or contact information to the extent that the specification seeks numerical information. *See* discussion at note 2, *supra*.

Because Petitioner's argument that disclosure of TCN's customers also arises with respect to the production of TCN's customer database and materials demanded by other specifications,[31] we address the substance of Petitioner's claim. Concerns about customer reactions to a Commission investigation do not excuse an obligation to comply with investigative process unless "compliance threatens to unduly disrupt or seriously hinder normal operations of a business."[32] The same allegations were

[30] *See* Pet Exh. F (March 17, 2014 letter from Yan Fang to Jeanne M. Cors) at 8 ("TCN proposes to forward a list of relevant custodians this week."); Pet. Exh. D (March 13, 2014 letter from Yan Fang to Jeanne M. Cors) at 2 ("We are generally amenable to custodian limits and search terms [to retrieve and search e-mail], but before we can agree to any limits, TCN would first need to provide us sufficient information to identify those custodians likely to possess responsive documents.").

[31] *See* Interrogatories 3, 19, and 32 and Document Specifications 13, 16, 27, and 29.

[32] *Texaco*, 555 F.2d at 882.

made in *Invention Submission Corp.*, 965 F.2d 1086 (D.C. Cir. 1992), but were not accepted by the D.C. Circuit as a basis for excusing noncompliance with a CID. The D.C. Circuit did not lighten or change the standard just because disclosing the identity of clients might place the respondent under a "cloud of suspicion and speculation" if the potential witnesses were contacted.[33] If the mere creation of a cloud of suspicion were sufficient to quash a CID or excuse a failure to comply, then, as the D.C. Circuit recognized, "it could be made with respect to almost any investigation."[34]

C. The CID Specifications Seek Information that is Reasonably Related to the Investigation

Finally, TCN objects to Interrogatories 12 and 19 and Document Specification 29 on the ground that the requests constitute improper "fishing expeditions." Pet. at 7, 11, 14. Interrogatory 19 seeks TCN's customer information, including names, contact information, products purchased, payments, refunds, and complaints. Interrogatory 12 seeks information about customers in default. TCN argues that Document Specification 15 already identifies 29 individuals who are customers of TCN so the "only reason for the FTC requiring the names of other TCN's customers can be for the FTC to contact those customers as the FTC sees fit." Pet. at 11. The Petition also objects to Document Specification 29, which demands documents relating to the targeted audience of TCN's ads.

The information responsive to these specifications is highly relevant to the investigation.[35] Indeed, Petitioner does not argue

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[33] *See FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992).

[34] *Id.*

[35] *See, e.g., id.* at 1089 (D.C. Cir. 1992) ("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"); *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, 9 (D.D.C. 2010) (rejecting claim that "FTC [must show] like any litigant, that the document demanded will lead to reasonably relevant and ultimately admissible evidence" as mischaracterizing

that the information is irrelevant, but instead objects to the Commission using that information to contact those customers. As we discussed above, this concern does not provide a basis to excuse Petitioner's obligation to comply with the CID. The challenged specifications seek information that is relevant to the purpose of the investigation and we deny Petitioner's request that we strike the specifications.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of The College Network, Inc. to Strike or Limit the Civil Investigative Demand be, and it hereby is, DENIED; and

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to The College Network, Inc. must now be produced on or before May 19, 2014.

By the Commission.

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the nature of the FTC's investigative authority) (citing *Morton Salt*, 338 U.S. at 642, and *Texaco*, 555 F.2d at 874).

POLICE PROTECTIVE FUND, INC.

FTC File No. 132 3239 – Decision, May 22, 2014

RESPONSE TO POLICE PROTECTIVE FUND, INC.'S PETITION TO QUASH CIVIL INVESTIGATIVE DEMAND DATED MARCH 19, 2014

By WRIGHT, Commissioner:

Police Protective Fund ("PPF") has filed a petition to quash a Civil Investigative Demand ("CID") issued by the Commission on March 19, 2014.[1] For the reasons stated below, the petition is denied.

I. INTRODUCTION

PPF is organized as a not-for-profit corporation under state law and is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code.[2] In its 2012 IRS Form 990, PPF states that its mission is to "promote the safety and well being of law enforcement officers through educational programs and public awareness campaigns."[3] In recent years, PPF has been the subject of various state and federal investigations and, in 2007, received a letter from the IRS pointing out deficiencies in its operations that, if not corrected, could threaten its status as a 501(c)(3) organization.[4] Additionally, the Commission has received numerous consumer complaints relating primarily to PPF's telephone solicitations.

The Commission is conducting an investigation to determine whether PPF is engaged in "unfair or deceptive acts or practices"

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[1] "Pet." refers to PPF's Petition to Quash; "Pet. Ex." refers to the exhibit attached to PPF's petition; "Int." refers to specific interrogatories from the CID; "Doc. Req." refers to specific document requests from the CID.

[2] *See* Pet. Ex. G, I-K.

[3] *See* Pet. Ex. B.

[4] *See* Pet. Ex. L.

in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Among other matters, the Commission is investigating whether PPF is misrepresenting the level of financial support it provides for its programs and whether it is making false statements to potential donors concerning any financial support it may provide to the families of fallen officers in the donors' home states. The Commission is also inquiring whether PPF is violating the Do Not Call provisions of the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310. In addition, the Commission is examining whether PPF, notwithstanding its representations to potential donors, has used the funds they contribute to confer pecuniary benefits on private persons who are not the claimed beneficiaries of its campaigns.

On March 19, 2014, under the authority of a Commission resolution authorizing the use of compulsory process,[5] the Commission issued a CID to PPF seeking, *inter alia*, information and materials relating to PPF's finances, oversight, and employee compensation; its fundraising and telemarketing practices; and the level of support PPF provides to programs and individuals. The Commission issued this CID pursuant to Section 20 of the FTC Act, which authorizes the Commission to issue compulsory process to any "person," and "person" is defined broadly as "any natural person, partnership, corporation, association or other legal entity."[6]

The return date for the CID was April 21, 2014. On April 10, 2014, PPF's counsel offered to make a limited production of documents in exchange for an extension to May 12 of the

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[5] The purpose of the investigation is:
"To determine whether unnamed persons, partnerships, corporations, or others, in connection with soliciting charitable contributions, donations, or gifts of money or any other thing of value, have engaged in or are engaging in (1) deceptive or unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310."
Pet. Ex. P.

[6] 15 U.S.C. § 57b-1 (a)(6).

deadline for filing a petition to quash.[7] In response, FTC staff offered to defer certain specifications, to accept a rolling response as to certain non-deferred items, and to grant the extension until May 12.[8] On April 21, however, PPF filed a petition asking the Commission to quash the CID in its entirety.

PPF's principal objection is that the Commission "lacks personal and subject matter jurisdiction . . . because [PPF] is a tax-exempt, nonprofit corporation."[9] According to PPF, that status means that it is not a "corporation" within the Commission's jurisdiction because, it claims, it is not "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. Additionally, PPF asserts that the CID violates the First, Fourth, and Fourteenth Amendments.[10] As discussed below, all of these contentions are unfounded.

II. ANALYSIS

A. The Commission is Authorized to Use Compulsory Process to Conduct The Present Inquiry

PPF principally asserts that its tax-exempt status and form of organization relieve it of any obligation to comply with FTC compulsory process. PPF's objections confuse the Commission's investigatory authority (under Section 20 of the FTC Act) with its enforcement authority (under Section 5). The Commission's authority to enforce the prohibitions of Section 5 applies to corporations that are "organized to carry on business for [their] own profit or that of [their] members," 15 U.S.C. § 44. Moreover, PPF's status does not preclude an alternative finding that PPF constitutes a "person" subject to the prohibitions of Section 5 of the FTC Act.[11] In any case, Section 20 authorizes the FTC to

[7] *See* Pet. Ex. M.

[8] *See* Pet. Ex. O.

[9] Pet. at 1.

[10] Pet. at 8-16.

[11] The Commission has previously maintained that its jurisdiction over "persons" under Section 5 of the FTC Act extends to state-chartered nonprofit

issue a CID "[w]henever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce."[12]

Courts have consistently held that "an individual may not normally resist [investigative process] on the ground that the agency lacks regulatory jurisdiction …."[13] As the Ninth Circuit has explained,

> [E]ach independent regulatory administrative agency has the power to obtain the facts requisite to determining whether it has jurisdiction over the matter sought to be investigated. After the agency has determined its jurisdiction, that determination may be reviewed by the appropriate court.[14]

Thus, the Commission is not required to take at face value an organization's claim that it is a charitable organization, and can require it to produce documents and other information to enable the Commission to make that determination itself. As we have

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municipal corporations such as the City of New Orleans and the City of Minneapolis. *See* Federal Trade Commission, *Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007: Notice of Proposed Rulemaking and Request for Public Comment*, 73 Fed. Reg. 48317, 48324 & n.86 (Aug. 19, 2008) (*citing In re City of New Orleans*, 105 F.T.C. 1, 1-2 (1985); *In re City of Minneapolis*, 105 F.T.C 304, 305 (1985)).

[12] 15 U.S.C. § 57b-1(c)(1).

[13] *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) ("… 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." (citing *United States v. Sturm, Roger & Co*, 84 F.3d 1, 5 (lst 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).

[14] *FMC v. Port of Seattle*, 521 F.2d 431, 434 (9th Cir. 1975).

previously observed, "[j]ust as a court has the power to determine whether it possesses jurisdiction to address and resolve any given case, the FTC has the power to determine whether it possesses jurisdiction over a given matter or entity."[15] PPF may not foreclose that inquiry simply by asserting that, *if* conducted, the inquiry would yield facts favorable to PPF.

As part of the present inquiry, the Commission will conduct a careful examination to determine whether PPF "is organized to carry on business for its own profit or that of its members."[16] While the Commission may take into account PPF's form of organization and its tax exemption in making an initial determination of regulatory coverage, these factors are not dispositive.[17] Rather, the Commission will conduct a fact-intensive inquiry into how the corporation actually operates. Such an inquiry encompasses a broad array of factors, including the

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[15] Commission Letter Denying Petition to Limit and/or Quash Civil Investigative Demand Directed to Firefighters Charitable Foundation, Inc., FTC File No. 102 3023 (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627 (1973)); s*ee Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-09 (1942); *Ken Roberts Co.*, 276 F.3d at 583 ("[A]s a general proposition, agencies should remain free to determine, in the first instance, the scope of their own jurisdiction when issuing investigative subpoenas.").

[16] 15 U.S.C. § 44.

[17] *See, e.g., Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1019 (8th Cir. 1969) ("mere form of incorporation does not put them outside the jurisdiction of the Commission"); *FTC v. Ameridebt, Inc*., 343 F. Supp. 2d 451, 460 (D. Md. 2004) ("Although Ameridebt is incorporated as a non-stock corporation with tax-exempt status, the Court finds this insufficient to insulate it from the regulatory coverage of the FTC Act."); *In re Daniel Chapter One*, 2009 WL 5160000 at *12 (F.T.C. 2009) ("As recognized by the ALJ, however, 'courts and the Commission look to the substance, rather than the form, of incorporation in determining jurisdiction under the FTC Act.'"), *aff'd*, 405 Fed. Appx. 505 (D.C. Cir. 2010) (unpublished opinion); *In re College Football Association*, 117 F.T.C. 971, 1004 (1994) (IRS determinations are not binding on the Commission); *In re Am. Medical Ass'n*, 94 F.T.C. 701, 990 (1979) ("status as . . . tax-exempt organization does not obviate the relevance of further inquiry"), *enforced as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982); *In re Ohio Christian College*, 80 F.T.C. 815, 949-50 (1972) ("Notwithstanding the fact the [defendant] had been afforded an exemption certificate . . . it was not in fact an exempt corporation.").

primary purpose of the organization, the extent to which funds or other benefits may have been conferred on related for-profit companies or individuals, and the extent to which the organization may have been used by individuals or for-profit entities as a device to seek monetary gain.[18] The extent to which an entity confers benefits on private interests is relevant even if those benefits are not in the form of "profits," as that term is traditionally understood.[19]

The specifications of the CID are designed to elicit precisely that information. PPF contends "that everything the FTC needs [to determine its jurisdiction] is readily available to it in the public domain."[20] That is plainly incorrect. Most of the CID requests ask for nonpublic materials and information that are highly relevant to the question whether charitable donations are being diverted to insiders or affiliated entities.[21] Other such requests will elicit detailed information on PPF's financial affairs and the degree of oversight it receives from an independent board.[22]

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[18] *See Community Blood Bank,* 405 F.2d at 1019-20; *Ameridebt,* 343 F.Supp. 2d at 460 (factors include "the manner in which it uses and distributes realized profit; its provision of charitable purposes as a primary or secondary goal; and its use of non-profit status as an instrumentality of individuals or others seeking monetary gain." (citing *Community Blood Bank*, 405 F.2d at 1019-20 and *In re Ohio Christian College*, 80 F.T.C. 815, at 849-850)).

[19] *See, e.g., FTC v. Gill*, 183 F.Supp. 2d 1171, 1184-85 (C.D. Cal 2001) (FTC had jurisdiction where individual defendant lived in corporate office, paid personal expenses from corporate accounts, and otherwise comingled business and personal items); *In re Ohio Christian College*, 80 F.T.C. at 23-24 ("profit" for purposes of FTC Act is not limited to dividends; corporation provided individual defendants "much of their subsistence and shelter" and expensive automobiles).

[20] Pet. at 17.

[21] *See*, *e.g.*, Int. 47, 50, 53, 60-61; Doc. Req. 9, 16-28, 41.

[22] *See*, *e.g.*, Int. 3-9, 13-30; Doc. Req. 6-9, 12-28.

B. PPF's First Amendment Challenge to the Commission's Jurisdiction Is Meritless

PPF also challenges the CID on First Amendment grounds. In particular, PPF assumes that the Commission will merely compare PPF's fundraising costs to its program expenditures, as reported unfavorably by the media.[23] Based on that assumption, PPF then contends that the solicitation of charitable donations is fully-protected speech under the First Amendment, that "using percentages to decide the legality of the fundraiser's fee or the minimum amount that must reach the charity is constitutionally invalid," and that "the FTC [therefore] cannot rely on high percentages of fundraising fees alone to satisfy the definition of profits necessary to trigger jurisdiction."[24] PPF concludes that the Commission must undertake some additional (though unspecified) "threshold inquiry" before it can obtain the information requested by the CID. We find no merit in these contentions.

First, the First Amendment's protection extends only to truthful solicitations.[25] Thus, in *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), the Supreme Court held that states may maintain fraud actions where fundraisers make false or misleading representations designed to deceive donors. The Court reiterated that the First Amendment protects the right to engage in charitable solicitations, but that, like other forms of deception, fraudulent charitable solicitations do not enjoy any such protection.[26]

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[23] Pet. at 10-11.

[24] Pet. at 9-10.

[25] *See* Pet. at 8-12. Those cases—*Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State of Maryland v. Munson Co., Inc.*, 467 U.S. 947 (1984), and *Riley v. Federation of the Blind*, 487 U.S. 781 (1988), involved statutes and regulations that prohibited or limited certain kinds of truthful speech. They do not support the proposition that there are First Amendment constraints on Commission actions seeking to prohibit deceptive speech.

[26] *Madigan*, 538 U.S. at 611-27.

In any event, PPF's concern about a possible infringement of its First Amendment rights is also premature. The Commission has not found that PPF has engaged in unlawful conduct, nor has the Commission ordered it to do, or refrain from doing, anything. The Commission is merely conducting an investigation, the very purpose of which is to determine whether PPF may have engaged in conduct that lacks any protection under the First Amendment. Thus, PPF's reliance on cases involving prior restraints on protected speech is misplaced.[27]

Moreover, as the D.C. Circuit has made clear, "in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case."[28] We emphasize, again, that the investigation is at an early stage. Much of PPF's petition is devoted to anticipating and addressing possible theories it believes the Commission may wish to pursue. Such arguments are at best premature. At this stage, the Commission is clearly entitled to all the materials that it has requested in the CID so that it may make its initial determination of jurisdiction on a complete record.

C. PPF's Objections to the Scope of the CID are Also Unfounded

Finally, PPF objects to the CID as being "overbroad, overreaching and overly burdensome."[29] In particular, PPF points to a "sheer volume of requests issued for an alleged determination of jurisdiction," asserts that Commission staff declined PPF's offer to provide a more limited production as to its non-profit status, and complains that a "significant amount of time and resources" would be required to comply with the CID.[30] According to PPF, "everything the FTC needs to affirm its lack of jurisdiction . . . is readily available to it in the public domain,"[31]

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[27] *Id.* at 623-24.

[28] *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

[29] Pet. at 16.

[30] Pet. at 16-17.

[31] Pet. at 17.

"[the CID] constitutes nothing more than a fishing expedition,"[32] and "such searches are constitutionally repugnant under the Fourth and Fourteenth Amendments to the United States Constitution."[33] We disagree.

The recipient of a CID bears the burden of showing that the request is highly disruptive and, therefore, unduly burdensome or unreasonably broad. That burden is not easily satisfied,[34] and the recipient must make a specific showing of disruption.[35] It is not enough merely to assert, as PPF does here, that the request is overbroad and burdensome and that "gathering, copying and scanning all documents and responses [to the CID] would take a significant amount of time and resources that the organization simply does not have."[36] PPF has made no effort to identify the information requests it considers overly broad or burdensome, nor has PPF made any showing of business disruption. Instead, it has made a blanket objection to all the requests. That does not satisfy PPF's burden.

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[32] Pet. at 15.

[33] Pet. at 16.

[34] *See, e.g., Texaco*, 555 F.2d at 882 (if the agency inquiry is pursuant to a lawful purpose, and the requested documents are relevant to that purpose, the burden of proof is on the subpoenaed party and "is not easily met"); *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971) (FTC should be accorded "extreme breadth" in conducting its investigations).

[35] *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981), citing *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979) (quoting *Texaco*, 555 F.2d at 882).

[36] Pet. at 17; *see, e.g., FDIC v. Garner*, 126 F.3d 1138, 1145-46 (9th Cir. 1997) (mere allegation that subpoena called for thousands of financial documents and one million other documents was not sufficient to establish burden; a party claiming a "fishing expedition" must establish how); *FTC v. Standard American, Inc*., 306 F.2d 231, 235 (3d Cir. 1962) (recipient must demonstrate the unreasonableness of the Commission's demand and make a record to show the measure of its grievance instead of just assuming it).

Furthermore, a "sheer volume of requests"[37] does not itself establish that the CID is overbroad or imposes undue burden. In particular, the *number* of requests, by itself, says little or nothing about the burden of compliance because complying with many of the specifications would require little time, effort, or money. Furthermore, many of the requests relate both to the subject matter of the investigation and PPF's status as a charitable organization.

We likewise find no merit in PPF's assertion that the CID constitutes an unconstitutional search and seizure.[38] As courts have recognized, "[a]n administrative subpoena is not self-executing and is therefore technically not a 'search.' It is at most a constructive search, amounting to no more than a simple direction to produce documents, subject to judicial review and enforcement."[39]

III. CONCLUSION

For all the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Police Protective Fund to quash the Civil Investigative Demand be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Police Protective Fund comply in full with the Commission's Civil Investigative Demand on or before June 12, 2014.

By the Commission.

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[37] Pet. at 16.

[38] *See* Pet. at 16-17.

[39] *Sturm*, 84 F.3d at 3.

STAR PIPE PRODUCTS LTD

FTC File No. 131 0214 – Decision, May 27, 2014

RESPONSE TO STAR PIPE PRODUCTS LTD.'S PETITION TO LIMIT SUBPOENA *DUCES TECUM* DATED APRIL 4, 2014

By WRIGHT, Commissioner:

Star Pipe Products Ltd. ("Star Pipe") has filed a Petition to limit the subpoena *duces tecum* ("Subpoena") issued by the Commission on April 4, 2014. For the reasons stated below, the Petition is denied as moot.

On July 17, 2013, the Commission commenced an investigation to determine whether Star Pipe is violating or has violated the terms of a Consent Order approved by the Commission on May 8, 2012 ("the May 8, 2012 Order"). The May 8, 2012 Order resolved the Commission's allegations that Star Pipe had engaged in collusive conduct in the market for ductile iron pipe fittings, brought through an Administrative Complaint under Part 3 of the Commission's Rules of Practice.[1] The Complaint alleged that beginning in January 2008, Star Pipe and its two main competitors, McWane, Inc. and Sigma Corporation, conspired to raise and stabilize prices for ductile iron pipe fittings by exchanging information regarding pricing and output for these products.[2]

The May 8, 2012 Order settled the Commission's allegations against Star Pipe and provided for various types of injunctive relief. Among them, Star Pipe agreed to cease and desist from

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[1] *See* Complaint, *In re McWane, Inc. and Star Pipe Products Ltd.*, Docket No. 9351 (Jan. 4, 2012) [hereinafter "Complaint"]. Ductile iron pipe fittings are a component of systems for transporting drinking and waste water under pressurized conditions in municipal distribution systems and treatment plants. These fittings are typically used by municipal and regional water authorities to join pipes, valves and hydrants in straight lines, and to change, divide, or direct the flow of water. *See* Complaint, ¶14.

[2] Complaint, ¶¶ 28-38.

entering into "any combination, conspiracy, agreement, or understanding between or among" the competitors in the ductile iron pipe fittings market.[3] Star Pipe further agreed to cease and desist from communicating with competitors regarding cost, pricing, output, and customers for these products.[4]

Subsequently, FTC staff received information to suggest that Star Pipe might be violating the terms of the May 8, 2012 Order by communicating with representatives of its competitors about competitively sensitive topics. Accordingly, on September 20, 2013, the Commission issued a compulsory process resolution "[t]o determine whether Star Pipe Products Ltd. is violating or has violated the May 8, 2012, Decision and Order[,]" and, on April 4, 2014, the Commission issued the Subpoena to Star Pipe pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49. The Subpoena contains nine specifications that request documents and information on various topics including: (1) Star Pipe's compliance with the requirement that it distribute the May 8, 2012 Order to relevant personnel; (2) Star Pipe's communications with its competitors, including Sigma; (3) Star Pipe's pricing; and (4) Star Pipe's document retention policies. The Subpoena provides a return date of May 5, 2014. The deadline for Star Pipe to file a petition to limit or quash the Subpoena was April 29, 2014.

FTC staff and counsel for Star Pipe engaged in a meet-and-confer process, but because they were unable to resolve the company's objections sufficiently in advance of the April 29 deadline to file a petition to limit or quash the Subpoena, Star Pipe filed the instant Petition on April 24, 2014.

Following Star Pipe's filing of its Petition, however, FTC staff and counsel for Star Pipe continued to confer and, on May 14, 2014, FTC staff formally modified the Subpoena to respond to Star Pipe's objections, based on information proffered by Star Pipe. FTC staff informed the Commission of the agreed-upon modification and a comparison of the modified Subpoena to Star

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[3] May 8, 2012 Order, ¶¶ II.A., II.C.

[4] May 8, 2012 Order, ¶¶ I.D., II.B., II.D.

Pipe's Petition shows that the claims raised by the Petition have been resolved. As a result, Star Pipe's Petition is now moot.

We note that Star Pipe did not avail itself of the opportunity to withdraw its Petition despite FTC staff's modification of the Subpoena. In fact, rather than withdraw its Petition, Star Pipe filed an untimely supplement to its Petition on May 22.[5] We are under no obligation to consider untimely motions and merely observe that the issues raised in Star Pipe's supplemental petition have been resolved. We urge Star Pipe to comply with relevant Commission deadlines and to avoid unnecessary Commission review and action when disagreements with FTC staff have been resolved.

For all the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Star Pipe Products Ltd. to Limit the Subpoena Duces Tecum be, and it hereby is, **DENIED** as moot;

IT IS FURTHER ORDERED THAT the Supplement to Petition of Star Pipe Products Ltd. to Limit the Subpoena Duces Tecum be, and it hereby is, **DENIED** as untimely and moot; and

IT IS FURTHER ORDERED THAT Star Pipe Products Ltd. comply in full with the Commission's Subpoena consistent with FTC staff's May 14, 2014, modification, or as otherwise amended pursuant to Rule 2.7(l) of the Commission's Rules of Practice, 16 C.F.R. § 2.7(l).

By the Commission.

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[5] *See* Supplement to Petition of Star Pipe Products Ltd. to Limit Subpoena Duces Tecum (May 22, 2014). The Commission's Rules of Practice require that, with respect to a Subpoena such as this one, a petition setting forth "*all* assertions of protected status or other factual or legal objections" shall be filed within 20 days after service of process, which in this case was April 29, 2014. 16 C.F.R. § 2.10(a) (emphasis added).

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