

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**     **Edith Ramirez, Chairwoman**  
                          **Julie Brill**  
                          **Maureen K. Ohlhausen**  
                          **Joshua D. Wright**

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<b>In the Matter of</b>	)	
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<b>FEBRUARY 11, 2014 CIVIL INVESTIGATIVE</b>	)	<b>File No. 1310206</b>
<b>DEMAND ISSUED TO ZIEGLER</b>	)	<b>April 21, 2014</b>
<b>SUPERSYSTEMS, INC.</b>	)	
	)	

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**ORDER DENYING PETITION TO LIMIT  
OR QUASH CIVIL INVESTIGATIVE DEMAND**

**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.<sup>1</sup> 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,<sup>2</sup> and that he was recognized for "spear-heading the Anti-TrueCar movement."<sup>3</sup> 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,<sup>4</sup> 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, 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.

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

<sup>2</sup> 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%3ABlogPost%3A250154&commentId=5283893%3AComment%3A254205&xg\\_source=activity](http://www.dealerelite.net/profiles/blog/show?id=5283893%3ABlogPost%3A250154&commentId=5283893%3AComment%3A254205&xg_source=activity).

<sup>3</sup> *Id.* at Feb. 9, 2012 comment.

<sup>4</sup> See Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, File No. 1310206 (Jan. 17, 2014).

## 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.<sup>5</sup> 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.<sup>6</sup> 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."<sup>7</sup> Furthermore, if the recipient of compulsory process asserts an evidentiary privilege, it has the burden to establish that the privilege applies.<sup>8</sup>

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.

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<sup>5</sup> *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).

<sup>6</sup> *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.”).

<sup>7</sup> *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).

<sup>8</sup> *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*).

## 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.<sup>9</sup> 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.<sup>10</sup> 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 investigation, and unavailable from other sources.<sup>11</sup> 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.”<sup>12</sup>

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.”<sup>13</sup> 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

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<sup>9</sup> 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).

<sup>10</sup> *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).

<sup>11</sup> *See, e.g., United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

<sup>12</sup> *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.”).

<sup>13</sup> 16 C.F.R. § 2.10(a)(1).

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."<sup>14</sup> 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 intent existed at the inception of the newsgathering process."<sup>15</sup> 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.<sup>16</sup> Instead, the privilege is reserved for "persons whose purposes are those traditionally inherent to the press; persons gathering news for publication."<sup>17</sup>

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.<sup>18</sup> 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).<sup>19</sup> Statements such as this suggest that Mr. Ziegler, who describes himself as an "advis[or to] more than 500 [car] dealerships throughout the country,"<sup>20</sup> was functioning more like an industry facilitator than like

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<sup>14</sup> *Madden*, 151 F.3d at 129.

<sup>15</sup> *von Bulow*, 811 F.2d at 144.

<sup>16</sup> *Id.* at 143; *see also Chevron*, 629 F.3d at 307.

<sup>17</sup> *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).

<sup>18</sup> Pet. 8.

<sup>19</sup> Ziegler, *supra* note 2, at Nov. 27, 2011 comment.

<sup>20</sup> Pet. 2.

a journalist. Although the purpose 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.”<sup>21</sup> 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.<sup>22</sup>

## 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 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.”<sup>23</sup>

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<sup>21</sup> *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.

<sup>22</sup> See Part II.D.2, *infra*.

<sup>23</sup> *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

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, 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,<sup>24</sup> 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.

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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").

<sup>24</sup> Ziegler, *supra* note 2, at Dec. 3, 2011 comment.

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.

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.<sup>25</sup> The Privacy Protection Act is inapposite, too, because that statute “applies only when there is a criminal investigation or prosecution.”<sup>26</sup>

### **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.<sup>27</sup> 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.”<sup>28</sup>

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 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.

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<sup>25</sup> 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).

<sup>26</sup> *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)).

<sup>27</sup> Pet. 9-10.

<sup>28</sup> 16 C.F.R. 2.7(k).

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.”<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

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

[t]o determine whether firms in the retail automobile industry, including automobile dealers 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.<sup>32</sup>

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.<sup>33</sup> In the context of an administrative CID, “relevance” is defined broadly and with deference to an

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<sup>29</sup> Pet. 10.

<sup>30</sup> *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).

<sup>31</sup> *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)).

<sup>32</sup> Pet. Exh. 1.

<sup>33</sup> Pet. 10.

administrative agency's determination.<sup>34</sup> An administrative agency is accorded "extreme breadth" in conducting an investigation.<sup>35</sup> As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is "more relaxed" than in an adjudicatory proceeding.<sup>36</sup> 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.<sup>37</sup>

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 . . . ."<sup>38</sup> 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.<sup>39</sup> 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."<sup>40</sup> Thus a recipient of process must produce the materials unless the request is unduly burdensome or unreasonably

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<sup>34</sup> *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).

<sup>35</sup> *Linde Thomson*, 5 F.3d at 1517.

<sup>36</sup> *Invention Submission*, 965 F.2d at 1090.

<sup>37</sup> *Id.* at 1089; *Carter*, 636 F.2d at 788.

<sup>38</sup> Pet. 10.

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

<sup>40</sup> *Texaco*, 555 F.2d at 882.

broad.<sup>41</sup> In other words, the recipient must make a record to show the “measure of their grievance rather than [asking the court] to assume it.”<sup>42</sup>

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.<sup>43</sup> 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.

Donald S. Clark  
Secretary

SEAL:  
ISSUED: April 21, 2014

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

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

<sup>43</sup> 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”).