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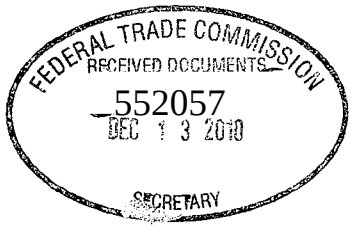

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FILE NO: 74395.000003

December 13, 2010

BY HAND

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, H-159
Washington, D.C. 20580

Re: Hannaford Bros. Company
Petition To Quash Or, Alternatively, Limit Civil Investigation Demands

Dear Secretary Clark:

Enclosed please find one original and twelve copies of the Petition to Quash or, Alternatively, Limit Civil Investigation Demands submitted on behalf of Hannaford Bros. Co. and Kash n' Karry Food Stores, Inc. We have also included a CD containing a full and complete copy of the Petition to Quash. I certify that the CD contains a true and complete of the accompanying Petition to Quash. In addition, pursuant to your conversation with Mel Orlans, we are providing you with a copy by email as well.

Pursuant to 16 C.F.R. § 4.2(b), we are labeling the document "PUBLIC." However, we have been informed that the United States Department of Justice believes that the Petition may contain law enforcement sensitive information and has asked for the opportunity to review and redact the Petition before it is made public. Petitioners have no objection to the Department of Justice's request, and accordingly, we understand that the document will not be publicly filed until the Department of Justice completes any redactions. We ask that you provide the Department of Justice's redacted version to us so that we can review it and, if necessary, address any concerns we may have before the document becomes public.

We also understand that Commissioner Brill currently serves as the motions Commissioner and this Petition will likely be assigned to Commissioner Brill in the first instance. If that is the case, we ask that you point out to Commissioner Brill the information contained in footnote 8.

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If you have any questions concerning this filing, please do not hesitate to contact the undersigned at 202-955-1674.

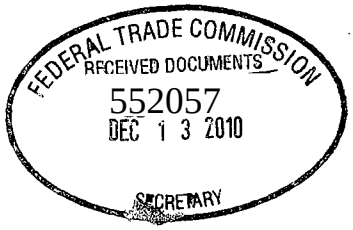
Sincerely,

Neil K. Gilman

Enclosures

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



IN THE MATTER OF HANNAFORD BROS. CO.	File No. 0823152
IN THE MATTER OF KASH N' KARRY FOOD STORES, INC.	

HANNAFORD BROS. CO. AND KASH N' KARRY FOOD STORES, INC.'S PETITION TO QUASH OR, ALTERNATIVELY, LIMIT CIVIL INVESTIGATIVE DEMANDS

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Hannaford Bros. Co. ("Hannaford") and Kash n' Karry Food Stores, Inc. ("Sweetbay")[1] hereby file their Petition to Quash or, Alternatively, Limit the Civil Investigative Demands ("CIDs") issued by the Federal Trade Commission ("FTC") and served on November 8 and 9, 2010, respectively.[2] The CIDs suffer from the same flaws recognized by a federal district judge with respect to another recent FTC CID:

> The court agrees with plaintiff that the CID appears on its face to be unconscionable, overburdensome and abusive. The CID is so broad that it indicates that no meaningful discretion was exercised by the FTC officials who prepared it. As plaintiff suggests, the CID appears to have the potential to cause plaintiff to suffer intolerable financial and manpower burdens and an inexcusable disruption of its normal business activities.

D.R. Horton, Inc. v. Jon Leibowitz, Chairman, No. 4:10-CV-547-A, 2010 WL 4630210, at *3 (N.D. Tex. Nov. 3, 2010).

The CIDs at issue here are particularly problematic because they were issued almost three years after the FTC first contacted Hannaford, after Hannaford has already provided more than 130,000 pages of documents and responded to over 40 written questions (including subparts), after Staff told Hannaford that its investigation was complete, and after Staff demanded that Hannaford agree to a settlement or face a complaint recommendation. Now, after all of this, Staff has served CIDs that require

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[1] The FTC's original CID was issued to "Sweetbay Supermarkets," a non-existent legal entity. After counsel explained this to Staff, a replacement CID was served on Kash n' Karry Food Stores, Inc., the legal entity that does business under the name Sweetbay Supermarkets, on December 6, 2010. Kash n' Karry agreed that the service date of the replacement CID would relate back to the date that the "Sweetbay Supermarkets" CID was served. As confirmed with Staff, the original "Sweetbay Supermarkets" CID no longer exists, and this Petition addresses the two Hannaford CIDs and the one Kash n' Karry Food Stores, Inc., CID.

[2] All three CIDs are attached at Exhibit 1. On November 18, 2010, Maneesha Mithal, Associate Director for the Division of Privacy and Identity Protection, agreed to extend the time for filing this Petition to Quash to December 13, 2010. Accordingly, this Petition is timely filed.

Hannaford to respond to 46 interrogatories (89 including sub-parts) and 26 document requests, and its affiliated company, Sweetbay, to respond to 23 interrogatories (46 including subparts) and 13 document requests.

These overbroad and unduly burdensome CIDs are not based on a proper Commission resolution, seek information related to various issues that are outside the FTC's jurisdiction, and appear to have been issued for an improper purpose. The CIDs are fundamentally flawed and should be quashed in their entirety or, at the very least, significantly limited.[3]

I. INTRODUCTION

In early 2008, Hannaford was victimized by a group of cyber-criminals that the Department of Justice ("DOJ") considers to be among the most sophisticated it has ever pursued.[4] The financial losses incurred by Hannaford and its affiliates as a direct result of this criminal incident have exceeded $10 million. Fortunately, the leader of this criminal group and several of his co-conspirators have pled guilty to various computer crimes and are now serving criminal sentences ranging from two to twenty years. These guilty pleas were based in part upon significant voluntary assistance provided by Hannaford and its affiliates to the DOJ at a cost of

[3] Sweetbay is the trade name for the supermarket chain that shares the same ultimate parent company as Hannaford. Hannaford provides certain back-office services to Sweetbay. Staff has informed counsel that Sweetbay is not a target of the investigation and confirmed that in writing, but has nonetheless served an overbroad and unduly burdensome CID on Sweetbay that is similar to the CIDs served on Hannaford. The arguments in this Petition therefore apply equally to the very similar Sweetbay CID. Indeed, these arguments apply with even more force given Sweetbay's status as a non-target of Staff's investigation.

[4] For example, the former U.S. Attorney for New Jersey, Ralph J. Marra, described the operation as a "cutting edge hacking scheme" by individuals who "devised a sophisticated attack to penetrate [the victim companies'] networks." *See* Jason Ryan, *Three Charged in Largest Ever Credit Card Data Breach*, ABC News (Aug. 17, 2009), *available at* http://abcnews.go.com/Blotter/story?id= 8348543.

more than $2 million. Representatives of the DOJ have at various times described Hannaford and its affiliates' role as "critical" and "vital" to the overall prosecution effort.

One of Hannaford's core concerns throughout this incident has been the well-being of its customers. Indeed, Hannaford gave early and broad public notice of the intrusion, even though no law required such notice because no names or personally identifiable information were implicated. Moreover, to the extent that published reports about the scope of Gonzalez's activities are correct, dozens, if not hundreds, of other companies similarly victimized appear to have avoided scrutiny from the FTC by deciding not to provide public notice. By providing notice, Hannaford enhanced its customers' ability to review statements, dispute any fraudulent charges not otherwise caught by the various issuing card associations or issuing banks, and invoke the zero liability protections now almost universally offered by card issuers.

More importantly, based on the DOJ's representations to Hannaford, this criminal group focused solely on the collection and exploitation of credit card data for their financial gain. Based on the DOJ's more than four-year investigation of this group's criminal intrusions into the networks of many corporations, the DOJ has stated that it is not aware of any evidence that this group targeted, much less exploited, personally identifiable information or protected health information from Hannaford's or any of the other corporate victims' computer networks. The fact that Gonzalez did not target non-credit card data is consistent with the contemporaneous findings of the incident response group retained on behalf of the various credit card companies to investigate the Hannaford incident.

Four days after Hannaford's public announcement, the FTC sent its first voluntary access letter requesting information relating to the intrusion. Now, almost three years later, the FTC has issued two CIDs to Hannaford and one to Sweetbay. Because these CIDs are legally flawed and

unreasonable in many respects, and because Staff has not agreed to reasonable limitations on the CIDs, Hannaford and Sweetbay have no choice but to file this Petition to Quash.

A. Criminal Data Intrusion and DOJ Cooperation

In November of 2007, a criminal hacking group led by Albert Gonzalez, several other Americans, and two Russian hackers targeted Hannaford's network.[5] Hannaford was not the first victim of this group. By the time they had managed to access Hannaford's network, they had already victimized TJX, Dave & Buster's, and, according to published reports, many other companies.[6]

The attack vector used against Hannaford—the targeting of data in flight—was not a well-recognized risk at the time of the intrusion into Hannaford's network. *See, e.g.*, Clarke Canfield and Brian Bergstein, *Hannaford Breach Raises New Fears,* MSNBC.com (Mar. 20, 2008), *available at* www.msnbc.msn.com/id/23729815. However, according to reports about the prosecution of Mr. Gonzalez published in 2009 and 2010, the United States Government had seen this attack vector used in the Summer of 2007 at Dave & Buster's, and was familiar with both the risk to in-flight payment card data and the particular malware used by Gonzalez and his gang. But, for reasons still unknown to Hannaford, no one from the United States

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[5] *See* James Verini, *The Great Cyberheist*, The New York Times Magazine (Nov. 10, 2010), *available at* http://www.nytimes.com/2010/11/14/magazine/14Hacker-t.html.

[6] The indictments of Albert Gonzalez list a number of corporations that the Gonzalez cyber-gang victimized, including TJX Corp., Dave & Buster's Inc., J.C. Penney, Target Corporation and Heartland Payment Systems, Inc. *See* Criminal Indictments of Albert Gonzalez, *United States v. Maksym Yastremskiy, Aleksandr Suvorov and Albert Gonzalez*, 2:08-cr-00160-SJF-AKT (S.D.N.Y. May 14, 2008); *United States v. Albert Gonzalez*, No. 1:08-cr-10223-PBS (D. Mass. Aug. 2, 2008); *United States v. Albert Gonzalez*, 1:09-cr-00626-JBS-1 (D.N.J. Aug. 17, 2009) (attached at Exhibit 2). Published statements by members of this cyber-gang indicate that there are many other corporations that were also victims, but whose identities have not been disclosed. *See* James Verini, *The Great Cyberheist*, The New York Times Magazine (Nov. 10, 2010), *available at* http://www.nytimes.com/2010/11/14/magazine/14Hacker-t.html.

Government alerted retailers about this risk to in-flight card data, and leading commercial anti-virus providers had not updated the signature profiles in their anti-virus software to detect this particular malware. Moreover, the leading publicly available security standard focused on payment transaction data had not been modified to address the risk to in-flight payment card data.[7]

In the aftermath of the intrusion, Hannaford, as part of the card associations' mandated post-incident investigation, hired VeriSign to engage in a massive evidence-gathering and preservation endeavor, which ultimately captured approximately 7.1 Terabytes of forensic images. VeriSign conducted a largely non-privileged investigation, and its reports have previously been produced to Staff.

In addition to the non-privileged VeriSign work, Hannaford also retained counsel to provide legal advice related to the intrusion, various disputes with third parties, and the current investigation. Hannaford's outside counsel retained expert consultants to assist in counsel's privileged investigation and to provide specialized technical knowledge to advise Hannaford regarding various legal issues associated with information security. In the Spring of 2009, while some investigative work already had been conducted by Hannaford, representatives of the DOJ and the United States Secret Service ("USSS") approached the management of Hannaford and Sweetbay's Belgian-based parent company, Delhaize Group, with information recovered as part of their ongoing Gonzalez investigation. The specifics of the information shared with Delhaize Group representatives were at the time deemed law enforcement sensitive, and were disclosed to

[7] It is unknown to Hannaford when the FTC Staff learned of this attack vector, which we now understand was used in the Dave & Buster's incident. This subject, as well as other issues arising from the FTC's investigation into various data security incidents (and especially those involving Gonzalez's victims), certainly would be an important area of discovery if this matter proceeds to litigation.

those representatives because of the common legal interest that existed between Delhaize Group and the DOJ in capturing and bringing to justice the individuals who perpetrated the crimes against Hannaford and many other corporations. Based on information provided by the USSS, and at the request of the DOJ, additional deep forensics were conducted and substantial additional evidence was gathered to address the DOJ's request. This work was conducted expressly at the direction and under the supervision of counsel, and is protected by the attorney-client privilege and work product doctrine. Certain results of that work were shared with the DOJ and the USSS, again pursuant to the common legal interest that existed between the DOJ and Delhaize Group to identify and prosecute Gonzalez and his cyber-gang. As noted above, the lead prosecutor described Delhaize Group's work product as "critical" and "vital" to the overall prosecution of Gonzalez and his criminal co-conspirators, including two co-conspirators who remain at large. The cost associated with the investigation to the Delhaize Group and its subsidiaries totaled over $2 million, and was spent almost exclusively on outside security consultants specifically retained by counsel for the purpose of analyzing information and responding to inquiries from the DOJ.

This work is relevant to the CIDs because the Staff has now targeted the privileged work product performed at the specific request of the DOJ. Hannaford understands that in November of 2010, members of the FTC "Hannaford Trial Team" told members of the current DOJ Gonzalez prosecution team that they believed the work of Delhaize's consultant, General Dynamics, would reveal that Gonzalez had targeted Personal Health Information ("PHI") and Personally Identifiable Information ("PII") as part of the intrusion. But the DOJ prosecutors in charge of the investigation of Gonzalez have repeatedly told representatives of Hannaford that they have observed nothing to indicate that Gonzalez or his gang targeted this kind of

information at Hannaford or at any of the companies that they victimized. Notably, representatives of the DOJ reportedly told the representatives of the FTC Hannaford Trial Team that their theory is entirely inconsistent with the history of the Gonzalez criminal organization, which was solely focused on credit card data.

B. Background of FTC Investigation

On March 21, 2008, four days after Hannaford's public announcement that an unauthorized criminal intruder accessed its computer network, the Commission opened a non-public inquiry into this incident through the issuance of a voluntary access letter.[8] Several more letters followed. *See* Exhibit 3.

For almost three years, Hannaford has cooperated with Staff in its protracted investigation. During this time, Hannaford produced more than 130,000 pages of documents and responded to over 40 written questions (including subparts). From Hannaford's first production on May 2, 2008, until June of 2010, Staff raised no questions concerning the completeness or thoroughness of Hannaford's production. Nor did Staff make any inquiry about the production, other than to ask follow-up questions to which Hannaford promptly responded, providing more information where requested.

In addition to producing documents and other responsive information, Hannaford repeatedly sought information from Staff as to the standard being applied to assess whether Hannaford's security was "reasonable and appropriate." This issue was—and continues to be—highly relevant to the investigation because on the very day it learned of the criminal intrusion,

[8] Several states, through the offices of their attorneys general, also inquired about or investigated issues related the intrusion to varying degrees. One such state was Vermont, in which Hannaford currently operates 17 supermarkets. Current Commissioner Julie Brill was, at the time, the Assistant Attorney General for Vermont. Commissioner Brill was personally involved, had discussions with Hannaford's General Counsel and received information concerning the intrusion.

Hannaford was re-certified by Cybertrust, an independent and highly respected third party now known as Verizon Business, as compliant with the Payment Card Industry Data Security Standards ("PCI DSS").[9] Moreover, Hannaford was the first PCI DSS-certified company to publicly announce that it had suffered a network intrusion and loss of credit card data. Despite the Commission's repeated statements that it favors industry self-regulation in the area of data security, and despite the acceptance at the time of the Hannaford intrusion of PCI DSS as the industry standard, Staff has repeatedly rejected the relevance of the PCI DSS standard in its communications with Hannaford. Instead, Staff has informed Hannaford that its prior consent decrees involving privacy and data security established the relevant legal standards to which businesses must conform.[10]

In early June of 2010, Staff told counsel for Hannaford that their more than two-year investigation was concluded, that they had made a determination that there was reason to believe that Hannaford had committed an unfair business practice under Section 5 of the FTC Act, and

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[9] PCI DSS is "a set of [more than 230] requirements for enhancing payment account data security, [that] was developed by the founding payment brands of the PCI Security Standards Council, including American Express, Discover Financial Services, JCB International, MasterCard Worldwide, and Visa Inc. International, to help facilitate the broad adoption of consistent data security measures on a global basis. The PCI DSS is a multifaceted security standard that includes requirements for security management, policies, procedures, network architecture, software design and other critical protective measures. This comprehensive standard is intended to help organizations proactively protect customer account data." PCI Security Standards Council, *About the PCI Data Security Standard (PCI DSS), available at* https://www.pcisecuritystandards.org/security_standards/pci_dss.shtml (last visited Dec. 9, 2010).

[10] The Commission's Office of General Counsel apparently takes a much different view than Staff. In a brief filed on November 16, 2010 in *POM Wonderful LLC v. Federal Trade Commission,* No. 10-1539 (D.D.C.), the Commission explained that consent decrees are not intended to provide legal guidance to anyone other than the party that signed the agreement, and that a contrary view (*i.e.,* Staff's position) would be inconsistent with the Administrative Procedure Act. *See* Memorandum in Support of Motion to Dismiss by the Federal Trade Commission at 12-13.

that Staff had received consent authority from the Director of the Bureau of Consumer Protection ("BCP"). Staff then prepared and provided Hannaford with a draft complaint and consent decree. Like other complaints filed by the FTC in the data security context, the draft complaint contained a number of allegations regarding Hannaford's data practices, including that those practices failed to meet the relevant standard of care, and that those acts or practices resulted in "substantial consumer injury." The draft complaint also included allegations that Hannaford engaged in deceptive conduct in violation of the FTC Act, and violated the Gramm-Leach-Blilely Act ("GLBA") and the Fair Credit Reporting Act ("FCRA"). Furthermore, the draft consent decree contained a demand for the payment of an undetermined amount of monetary relief. In a meeting with Staff shortly after the draft complaint was received, Hannaford's counsel was told that "this matter will not settle without payment of money damages," and was later told that Staff was seeking $9.6 million.

Hannaford vehemently disagrees with the allegations in the draft complaint, and contested the legal justification and evidence relied upon by Staff through the submission of a white paper.[11] Hannaford's white paper demonstrated the factual flaws in Staff's draft complaint and presented significant legal authority demonstrating why the BCP should not move forward with a complaint recommendation. Specifically, the white paper demonstrated, among other things, that: (a) Hannaford was the victim of a crime committed by a sophisticated hacking group; (b) Hannaford was certified as compliant with the industry standard (PCI DSS) by an independent third party at the time of the intrusion; (c) Hannaford was not aware of any economic loss by consumers because any monetary loss was paid by Hannaford through the

[11] Hannaford does not object to its white paper being provided to the Commissioners at this time and, in fact, believes it would be helpful to the Commissioners in their consideration of this Petition to Quash.

commercial loss allocation scheme operated by the various card associations; (d) rulings in a class action lawsuit brought before Judge D. Brock Hornby in the United States District Court for the District of Maine, as well as other cases that followed criminal data intrusions, helped highlight the lack of any legally cognizable consumer injury (under either the common law or under the FTC's Unfairness Policy Statement); and (e) Hannaford's business activities did not subject the Company to regulation under the FCRA or the GLBA.

Hannaford met with BCP Director Vladeck in August of 2010 to discuss Hannaford's white paper and Staff's complaint recommendation. During this meeting, Hannaford again sought information from Staff and BCP management about the factual basis presented in the draft complaint that consumers had suffered "substantial injury" as a result of the actions that third parties had perpetrated on Hannaford's network. But despite Hannaford's repeated requests that Staff share any evidence supporting its substantial consumer injury contentions, there was a steadfast refusal to share or even to acknowledge whether any actual evidence existed. Indeed, Director Vladeck made clear during the meeting that Hannaford was being targeted as a test case for a new enforcement regime by the BCP, both as to the nature of the underlying injury and as to the remedy being sought. Director Vladeck stated during the meeting that prior enforcement actions "were not having the desired policy effect," and that the earlier consent decrees "did not go far enough." Furthermore, although Hannaford was described in the federal indictment of

Albert Gonzalez as a victim of Gonzalez's hacking ring,[12] Director Vladeck stated that he was "offended" that Hannaford referred to itself as a "victim" in this matter."[13]

At the conclusion of the meeting, Hannaford's representative and its counsel were informed that the BCP would request that the Commission authorize the filing of a complaint against Hannaford, and indicated that Hannaford should prepare for meetings with individual Commissioners that were likely to occur in late September of 2010. However, on September 1, 2010, Hannaford's counsel received a call from Staff stating that they now had authority to agree to a settlement that did not require Hannaford to pay any money. Staff gave Hannaford one week to respond to this offer, after which Director Vladeck told them to "prepare for litigation." Hannaford rejected this offer because, among other things, Hannaford again asked for evidence supporting the contention of substantial consumer injury recognized under Section 5, but none was forthcoming.

Hannaford fully expected that the BCP would then proceed with its complaint recommendation and that Hannaford would be able to defend itself to the Commissioners and, if necessary, in litigation. But that is not what happened. Instead, Staff reversed course, apparently deciding that contrary to its earlier statements to Hannaford's counsel, it could not appropriately recommend to the Commissioners that the FTC file the proposed complaint. But Staff's apparent conclusion that it could not properly recommend the filing of a complaint did not result in an end to the investigation that had started in March of 2008. Rather, Staff—for the first time—began to attack Hannaford's prior voluntary production, which was voluminous and did

[12] Criminal Indictment of Albert Gonzalez, *United States v. Albert Gonzalez*, 1:09-cr-00626-JBS-1, at ¶ 1.k. (D.N.J. Aug. 17, 2009).

[13] Hannaford has been very concerned that Staff's treatment of it evidences a complete rejection of the concept of fair treatment that the FTC, as a law enforcement agency, is bound to provide under the Federal Crime Victims Rights Act. *See* 18 U.S.C. § 3771 (2004).

not elicit any questions for more than two and a half years. Staff demanded that Hannaford certify its prior voluntary production under oath as "complete and accurate." Given that many of the voluntary access requests sought "documents sufficient to show," Hannaford offered to sit down with Staff and explain the steps it took and the methodologies it followed so that the parties could reach a mutual understanding about the completeness of the production. Staff flatly refused.[14] Instead, in what appears to be an attempt to punish Hannaford for rejecting Staff's inappropriate settlement demand and to force Hannaford to settle to avoid the staggering costs of compliance, Staff caused the CIDs to be issued.[15]

C. The CIDs

On November 8, 2010, Hannaford was served with the First and Second Civil Investigative Demands. Sweetbay was served on November 9, 2010, with its First Civil Investigative Demand.[16] Sweetbay is not a target of any investigation.

These CIDs seek a broad range of information. Between the First and Second CIDs to Hannaford and the First CID to Sweetbay, there are 69 Interrogatory Specifications (135 inclusive of sub-parts) and 39 document requests (72 inclusive of sub-parts). The number of

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[14] Attached at Exhibit 4 is the correspondence between Hannaford and Staff on this issue, including Hannaford's recent letter providing Staff the information that Staff refused to consider before serving the CIDs.

[15] As Judge Posner said in a recent decision granting an injunction to prevent one party's "threat to turn the screws" using costly discovery, "[T]he pressure on [defendant] to settle on terms advantageous to its opponent will mount up if [opposing] counsel's ambitious program of discovery is allowed to continue." *Thorogood v. Sears, Roebuck and Co.*, 624 F.3d 842, 850 (7th Cir. 2010).

[16] As noted in footnote 1, *supra*, this CID was replaced with a proper CID issued to Kash n' Karry Food Stores, Inc., on December 6, 2010, but pursuant to Kash n' Karry's agreement, the service date related back to November 8, 2010.

requests alone suggests the overbreadth of the CIDs and how enormous the task of responding would be.

Accordingly, as required by the Commission's rules, Hannaford and Sweetbay met and conferred with Staff on November 16, 2010.[17] Hannaford presented its numerous concerns with the CIDs (including its various legal objections that are discussed in the Argument section of this Petition). Staff listened but would not commit to narrow the CIDs during the meeting. Staff later responded with a letter narrowing a limited number of the specifications and definitions.[18] The letter did not address any of the legal issues raised by Hannaford or Sweetbay. For example, the letter did not address Hannaford and Sweetbay's argument that the resolutions were insufficient to support the CIDs. Nor did the letter address the case law provided to Staff on this issue. Likewise, the letter did not address the legal basis by which Staff is contending that "employees" are "consumers." And the letter did not address the concerns Hannaford raised about the Federal Crime Victims Rights Act.

The primary change was to limit the applicable time period. Other requests were slightly narrowed. However, the CIDs still contained a combination of unclear definitions and overbroad requests that, as discussed below, make compliance difficult, costly, and unduly burdensome. This is in part because the CIDs seek information that is outside of the FTC's jurisdiction and in part because they seek an extremely large volume of information and documents in addition to

[17] Hannaford's Statement Pursuant to 16 CFR § 2.7(d)(2) is attached at Exhibit 5.

[18] *See* Letter from Maneesha Mithal to Michael Oakes, dated November 23, 2010, attached at Exhibit 6.

the 130,000 pages and responses to over 40 written questions (including subparts) previously provided by Hannaford.[19]

For example, Document Request No. 5 in the first Hannaford CID, which Staff declined to modify, seeks "all documents that describe, evaluate, or analyze the purchasing practices of Hannaford's customers."[20] But this request would essentially include all sales data because that is the data that describes customer's purchasing practices. Accordingly, the information sought by this request is potentially enormous, and most of it has no relation whatsoever to anything Staff can legitimately claim to be investigating.

Because the oral meet and confer did not result in a satisfactory response, Hannaford and Sweetbay have provided Staff with a letter outlining various problems with and inconsistencies in the CIDs. *See* Letter from Michael Oakes to Alain Sheer, dated December 7, 2010, attached at Exhibit 7. Late in the afternoon on December 10, 2010 (one business day before this Petition was due to be filed), Staff responded. *See* Letter from Maneesha Mithal to Micheal Oakes, dated December 10, 2010, attached at Exhibit 8. Although that letter addressed some of the most obvious inconsistencies created by Ms. Mithal's previous letter, it either ignored or rejected most of Hannaford and Sweetbay's expressed concerns. The changes included in that letter therefore do not affect the arguments in this Petition to Quash.

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[19] The letter also demonstrates the inconsistent manner in which Staff has approached the CIDs, and the compliance challenges that presents to Hannaford and Sweetbay. For example, Staff narrowed Interrogatory Request No. 8 from the First Hannaford CID, but did not narrow the identical request (No. 20) in the Sweetbay CID. Because there was no discussion, we simply did not know whether this was reasoned or simply a mistake. Similarly, the letter changed the definition of "security practice" in the Hannaford CID, but did not make the change in the Sweetbay CID.

[20] The Sweetbay CID includes an identical request at Document Request No. 12.

II. Legal Objections

A. Relevant Legal Standards

Although the FTC has broad statutory authority under 15 U.S.C. § 45(a) to investigate practices that it determines may be deceptive or unfair when used in the course of trade, it is well established that the FTC's subpoena power is not unfettered. Although Congress has provided the FTC with authority to conduct reasonable investigations through the use of CIDs, those CIDs are not self-enforcing, and federal courts stand as a safeguard against abusive CIDs. *See, e.g.*, *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) ("The federal courts stand guard, of course, against abuses of their subpoena-enforcement processes....") (citing *U.S. v. Powell*, 379 U.S. 48, 58 (1964) and *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 216 (1946)); *D.R. Horton, Inc. v. Jon Leibowitz, Chairman*, No. 4:10-CV-547-A, 2010 WL 4630210, at *2 (N.D. Tex. Nov. 3, 2010). ("As the government notes in its motion documents, the CID is not self-executing, and may only be enforced by a district court in an enforcement proceeding.").

The Supreme Court in *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950), established the standard for determining whether a CID should be quashed or limited. Although the Court enforced the decree, it recognized that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *Id.* at 652. Accordingly, the Court instructed that agency subpoenas or CIDs should not be enforced if they demand information that is: (a) not "within the authority of the agency," (b) "too indefinite," or (c) not "reasonably relevant to the inquiry." *Id.* This standard has been consistently applied by the courts. *See, e.g.*, *SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980) (citing *Morton Salt*, 338 U.S. at 653) (confirming that "[t]o obtain judicial enforcement of an administrative subpoena, an agency must show that the

inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met"); *Arthur Young & Co.*, 584 F.2d at 1030-31 (noting that the subpoena request must "not [be] so overbroad as to reach into areas that are irrelevant or immaterial;" and that specifications must not exceed the purpose of the relevant inquiry) (internal quotation marks and citation omitted).

The costs and burdens imposed also must be considered. *See, e.g., FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (a party challenging the subpoena can do so by showing the compliance costs are overly burdensome or unreasonable); *Phoenix Bd. Of Realtors, Inc. v. Dep't of Justice*, 521 F. Supp. 828, 832 (D. Ariz. 1981) (the government should negotiate to narrow scope of a CID when compliance may be overly burdensome). Indeed, administrative agencies may not use their subpoena powers to go on fishing expeditions. *FDIC v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997); *FTC v. Nat'l Claims Serv., Inc.*, No. S. 98-283, 1999 WL 819640, at * 1 (E.D. Cal. Feb. 9, 1999). *See also* S. Rep. 96-500 at 4, 96th Congress 1st Session (1979) ("The FTC's broad investigatory powers have been retained but modified to prevent fishing expeditions undertaken merely to satisfy its 'official curiosity.'"). "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924).

B. The CIDs Should be Quashed Because They are Not Authorized by Valid Resolutions and are Therefore Also Indefinite, Overbroad, and Prevent Any Determination as to the Relevance of Any of the Specifications

The FTC may not demand any information through a CID unless the demand is signed by a Commissioner acting pursuant to a Commission resolution. 15 U.S.C. § 57b-1(i). Under 16 C.F.R. § 2.6, "[A]ny person under investigation compelled or requested to furnish information or documentary evidence shall be advised of the purpose and scope of the investigation and of the

nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation."

Courts measure the validity of FTC CIDs against the purpose and scope of the investigation and the nature of the conduct constituting the alleged violation as stated in the authorizing resolution. *See, e.g., F.T.C. v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980). Indeed, a court can look ***only*** at the resolutions (and not any outside communications) to evaluate the scope of an investigation. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992). Thus, the FTC Operating Manual provides:

> Investigational resolutions must adequately set forth the nature and scope of the investigation. The statement may be brief, but it must be specific enough to enable a court in an enforcement action to determine whether the investigation is within the authority of the Commission and the material demanded by the compulsory process is within the scope of the resolution.

O.M. 3.3.6.7.4.1.

The two resolutions that purportedly support the CIDs here fail that test. One of the resolutions, dated April 15, 1999, is a non-specific template from over a decade ago that mentions the FCRA, but does not explain any acts or practices that are the subject of the investigation. This resolution states that "the nature and scope" of the FTC's investigation is:

> To determine whether unnamed persons, partnerships, or corporations may be engaging in, or may have engaged in, acts or practices in violation of Title V of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, and/or Section V of the FTC Act, 15 U.S.C. § 45 as amended [and continues to paraphrase the Fair Credit Reporting Act].

The other resolution, dated July 16, 2009, states that the nature and scope of the investigation is: "To determine whether unnamed persons, partnerships, corporations, or others have engaged in or are engaging in acts or practices in violation of Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, 6821-6827, and/or Section V of the FTC Act, 15 U.S.C.

§ 45 as amended." This resolution is so broad that it apparently would allow the Commission to investigate any person with respect to anything. Such a broad resolution is inconsistent with the Congressional resolution requirement.[21]

In upholding a resolution that was more specific than the resolutions at issue here, the D.C. Circuit made clear that there are limits to the FTC's use of broad, non-specific resolutions, and that the resolutions cited in the CIDs issued to Hannaford and Sweetbay would not pass muster.

> The Commission equaled this standard, and allowed our examination of the relevance of their subpoena requests, by identifying the specific conduct under investigation — cigarette advertising and promotion — and specific statutory provisions that confer authority and duties upon the Commission. Section 8(b) of the Cigarette Labelling and Advertising Act, under which the Commission must report to Congress on the effectiveness of cigarette labeling and current practices and methods of cigarette advertising and promotion, is self-expressive of several purposes of this investigation. We can therefore say that recitation of the statutory authority itself alerts the respondents to the purposes of the investigation. ***Section 5's prohibition of unfair and deceptive practices, which, standing broadly alone would not serve very specific notice of purpose***, is defined by its relationship to section 8(b), as is the extremely broad and non-specific statutory authority to compile information and make reports to Congress conferred upon the Commission in section 6 of the FTC Act. The Commission additionally defined the application of section 5 in the Resolution by relating it to the subject matter of the investigation "the advertising, promotion, offering for sale, sale, or distribution of cigarettes...." We thus feel comfortably apprised of the purposes of the investigation and subpoenas issued in its pursuit, and suspect that respondents, who may feel less comfortable, are also quite aware of the purposes of the investigation.

F.T.C. v. Carter, 636 F.2d 781, 788 (D.C. Cir. 1980) (emphasis added).

Here, the bare recitation of Section 5's "prohibition of unfair and deceptive practices . . . stands broadly alone," as does the invocation of the FCRA and GLBA. Accordingly, the

[21] The resolutions here cannot be justified as "blanket resolutions." As the FTC Operating Manual states, those are appropriate only "in a limited number of instances," such as to authorize second requests in antitrust investigations. O.M. 3.3.6.7.4.3.

resolutions are insufficient to justify the CIDs. *C.f., e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992) (resolution stating that the corporation "may be engaged in unfair or deceptive acts or practices . . . including but not limited to false or misleading representations made in connection with the advertising, offering for sale and sale of its services relating to the promotion of inventions or ideas"); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (resolution named the specific conduct being investigated — reporting the natural gas reserves for Southern Louisiana or engaging in the exploration and development, production, or marketing of fossil fuels — and indicated the relevant statutory authority).[22]

The CIDs were not issued pursuant to a resolution that reasonably defines the nature and scope of the investigation. Accordingly, the CIDs are not authorized and should be quashed in their entirety.

C. The CIDs Do Not State the Nature of the Conduct Constituting the Alleged Violation and the Provisions of Law Applicable to Such Violation

The FTC Operating Manual incorporates the requirement from the FTC Act, 15 U.S.C. § 57b-1(c)(2), that CIDs issued by the Commission must "state in the demand, 'the nature of the conduct constituting the alleged violation . . . and the provisions of law applicable to such violation.'" O.M. 3.3.6.7.5.3. Here, the demand says that Hannaford and Sweetbay will learn about the challenged conduct in "Item 3." But Item 3 simply says "See attached resolutions,"

[22] In 1999, Commissioner Swindle dissented from the issuance of a resolution on the grounds that the resolution was overbroad. *See* File No. 9923259 (resolution addressing the sale of goods or services over the internet). The other Commissioners responded that the resolution was not overbroad because "it does not cover all advertising by any company that also may advertise online, but covers only the online activities." Public Statements of Chariman Pitofsky and Commissioners Anthony and Thompson, Internet Omnibus Investigational Resolution, *available at* http://www.ftc.gov/os/1999/09/internetomnimajority.htm (last visited Dec. 9, 2010). Here, by contrast, the resolutions are unlimited—they cover all activity by anyone and thus can be used to support any CID issued by the Commission.

which, as demonstrated above, say nothing at all about any alleged conduct. Thus, nowhere is the conduct constituting the alleged violation made known.

Staff may claim that Hannaford knows what they are "really" looking for, and that this clear violation of FTC rules and procedures should be ignored. But the concern is not theoretical. For example, as discussed above, document request No. 5 in the First CID asks Hannaford to produce "all documents that describe, evaluate, or analyze the purchasing practices of Hannaford's customers." Hannaford is a grocery store chain that constantly analyzes its customers' purchasing practices. The volume of data and documents sought by this request is potentially enormous. But Hannaford should not be left to guess as to why the FTC Staff considers this information relevant. Moreover, with no description of the scope of the investigation in either the resolutions or the CIDs, there is no basis to assess the relevance of this or other requests, much less whether the burden of producing the documents is worth the cost. *See* S. Rep. 96-500 at 4, 96th Congress 1st Session (1979) ("The FTC's broad investigatory powers have been retained but modified to prevent fishing expeditions undertaken merely to satisfy its 'official curiosity.'").

The failure to describe adequately (or at all) the nature of the conduct constituting the alleged violation is yet another reason the CIDs should be quashed in their entirety.

D. Hannaford is Not a GLBA- or FCRA-Covered Entity, and the CIDs Should be Quashed to the Extent They Seek Information Related to Purported Violations of Those Statutes

The draft complaint provided to Hannaford included claims alleging violations of the FCRA and GLBA. But Hannaford already demonstrated to Staff in its white paper that these statutes do not apply to Hannaford. Moreover, Hannaford demonstrated that the D.C. Circuit rejected the GLBA regulation on which Staff purports to rely, and that this rejection was recently recognized by the FTC in the briefing related to another case. Accordingly, the CIDs should be

quashed to the extent that they seek information related to purported FCRA and GLBA violations.

1. The CIDs Are Irrelevant and Overbroad Insofar As They Seek Information In Connection With The Fair Credit Reporting Act

Staff has contended that Hannaford is a "consumer reporting agency" under the FCRA. This is wrong as a matter of law.

The FCRA defines a "consumer reporting agency" ("CRA") as

- Any person which, for monetary fees, dues, or on a cooperative non-profit basis;
- Regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers;
- For the purpose of furnishing consumer reports to third parties;
- Which uses any means or facility of interstate commerce for the purpose of preparing or using consumer reports.

15 U.S.C. § 1681a(f) (emphasis added). It is true that Hannaford uses information from a CRA to authorize checks presented by customers, and it pays a fee to the CRA for that information. It also provides information about its own experiences to a CRA. But that does not somehow transform Hannaford into a CRA. *See, e.g.*, 15 U.S.C. § 1681a(f); *see also DiGianni v. Stern's*, 26 F.3d 346,348 (2d Cir. 1994) (stores "that merely furnish information to consumer reporting agencies based on their experience with consumers are not consumer reporting agencies within the meaning of the FCRA"); *Ori v. Fifth Third Bank*, 603 F Supp. 2d 1171, 1175 (E.D. Wis. 2009) ("Obtaining and forwarding information does not make an entity a CRA.").

It is also true that Sweetbay and Shop 'n Save[23] stores run their check requests through Hannaford's EPS switch. The check requests then are compared to the third-party check verification service's records as well as Hannaford's own records related to that specific

[23] Shop 'n Save stores are independently-owned food retailers that operate in rural New England and for whom Hannaford provides wholesale brand-name and private-label products, as well as certain support services.

consumer. But Hannaford is not assembling or evaluating the information for Sweetbay or Shop 'n Save stores; the third-party check verification service assembles and evaluates the consumer's information. Thus, Hannaford is not a CRA on this basis either.[24]

Accordingly, to the extent that the CIDs concern the FCRA, the CIDs are overbroad and irrelevant, and they should be quashed on the ground that Hannaford is not a consumer reporting agency.[25]

2. The CIDs Are Irrelevant and Overbroad Insofar As They Seek Information In Connection With The Gramm-Leach-Bliley Act

Staff also asserted in the draft complaint that Hannaford violated the GLBA. But Hannaford is not subject to the GLBA because it is not a "financial institution."[26]

The GLBA statute defines "financial institution" as "any institution the business of which is engaging in financial activities as described in 12 U.S.C. § 1843(k)." 15 U.S.C. § 6809(3)(A). The FTC's regulation, on the other hand, defines "financial institution" as "an institution that is significantly engaged in financial activities." 16 C.F.R. § 313.3(k)(1).

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[24] The CID to Sweetbay is clearly not appropriate to the extent it concerns the FCRA. Sweetbay is not a target of the investigation and has not been accused of any violation. And there can be no doubt that, as a matter of law, any information provided to Sweetbay by Hannaford is irrelevant under the CIDs because they are affiliated companies under a common owner. *See, e.g.*, 5 U.S.C. § 1681a(d)(2)(A)(ii) (excluding from the definition of "consumer report" any communication of consumer information "among persons related by common ownership or affiliated by corporate control"). Thus, Sweetbay cannot have any information relevant to any FCRA investigation.

[25] Although the Commission can properly seek information to determine whether it has jurisdiction over a particular matter, it is important to remember that this investigation has been pending for almost three years and that Hannaford has produced 130,000 pages of documents and answered numerous written questions. All of the necessary facts were provided long ago, and Staff is surely at a point where it can determine the inapplicability of the FCRA. Thus, further requests on this issue are unduly burdensome and needlessly cumulative.

[26] Hannaford has previously demonstrated to Staff other reasons why the GLBA claims fail. Hannaford does not repeat those arguments here.

The tension between the actual words of the statute and the language of the regulation was not lost on the D.C. Circuit in *American Bar Ass'n v. F.T.C.*, 430 F.3d 457 (D.C. Cir. 2005). The court in that case recognized that the FTC's definition of "financial institution" is inconsistent with the statutory definition: "The statute after all defined a 'financial institution' as 'an institution the business of which is engaging in financial activities.' ***Congress did not adopt the approach of the Commission*** by covering 'an institution that is significantly engaged in financial activities.'" *Id.* at 471 (also referring to the regulation as a "slight distort[ion]" and a "stretch").

The Commission recently acknowledged that its definition of "financial institution" is fundamentally flawed. On July 21, 2010, the Commission filed its brief in the "Red Flags" case. *See* Brief for Appellant Federal Trade Commission in *American Bar Ass'n v. F.T.C*, Civ. Action No. 10-5057 (D.C. Cir. July 21, 2010). In that brief, the Commission's General Counsel, among others, attempted to distinguish the earlier *ABA* case. In doing so, the Commission reiterated the understanding of that decision as described above:

> In ABA-GLBA, the dispute revolved entirely around the term "financial institution." The Commission had attempted to give that term a broad, activity-based reading, under which it could encompass any entity that was significantly engaged in financial activities. But the Court rejected this reading of the language.

Id. at 34.

Even more telling, the Commission's brief went on to argue that the definition of "financial institutions" in the Fair and Accurate Transactions Act ("FACTA") was consistent with the D.C. Circuit's interpretation of GLBA: "As the quoted language reflects, there are two distinct aspects of the statute's coverage. The first—'financial institutions'—***is largely limited to particular types of entities***, in keeping with both this

Court's ruling in *ABA-GLBA* and with the statutory definition in 15 U.S.C. § 1681a(t) (referring to certain banks, savings and loan associations, ***and related institutions based primarily on their status as such***)." *Id.* at 35 (emphases added).

Under this approach, Hannaford cannot be considered to be a company "the business of which is engaging in financial activities" because Hannaford's business is selling groceries to customers. It is not a "financial institution" under GLBA, so the GLBA prong of this investigation is not within the statutory authority of the FTC. Accordingly, to the extent the CIDs and any individual requests are for the purpose of investigating purported GLBA violations, the CIDs should be quashed.

E. Staff's Attempt to Expand the FTC's Jurisdiction to Include Alleged Injuries to Hannaford's Employees Should be Rejected

To prove a Section 5 violation for unfair practices, the Commission must prove that the challenged practice "caused or is likely to cause substantial consumer injury." 15 U.S.C. § 45(n). As described above, despite numerous requests from Hannaford, Staff has provided no evidence from which it can claim that any action by Hannaford caused or is likely to cause substantial consumer injury. Perhaps recognizing this, Staff has informed Hannaford that it believes that Hannaford's data security practices ***could have*** caused injury to ***Hannaford's employees*** (and perhaps Sweetbay's employees).[27] Thus, two of the CIDs contain a definition of "personal information," the end of which states: "For the purpose of this provision, a 'consumer'

[27] Staff apparently initially believed that the Hannaford data intrusion actually resulted in the compromise of employee information (*e.g.*, social security numbers). Indeed, Staff contacted the DOJ seeking evidence in support of this belief. However, there never was any evidence to support Staff's theory, which the DOJ apparently confirmed, and Staff has now conceded that it no longer believes this occurred. While Staff's attempt to convert the statutory language "is likely to cause" to "could have caused" is also highly problematic, that distinction is not relevant to this Petition to Quash except insofar as it is yet another way in which Staff is attempting to stretch the substantive and procedural rules in its efforts against Hannaford.

shall include an 'employee' and an individual seeking to become an employee, where 'employee' shall mean an agent, servant, salesperson, associate, independent contractor, and other person directly or indirectly under the control of Hannaford, Sweetbay, or Shop 'n Save." *See, e.g.*, First Hannaford CID at 2; Sweetbay CID at 2.

This attempt to define "consumer" to include an "employee" is an improper attempt to expand the FTC's unfairness jurisdiction and to avoid the requirement to prove substantial ***consumer*** injury. Hannaford has been unable to find any support for Staff's contention that the definition of "consumers" includes "employees."

Hannaford previously has asked Staff where it finds support for the contention that "consumers" include "employees." Staff directed Hannaford to recent consent decrees. Just to be clear, Hannaford asked Staff if there was any other case law or support for Staff's position; Staff indicated there was not. However, these consent decrees are plainly insufficient for two reasons. First, consent decrees cannot announce Commission rules or serve as precedent. Indeed, on the very day that Staff answered Hannaford's inquiry by again pointing to the consent decrees (Tuesday, November 16), the FTC, through its General Counsel, filed a brief in D.C. federal court that emphatically refutes Staff's attempt to rely on those consent decrees. As noted in footnote 10, *supra*, the FTC argued in the *Pom* case that consent orders are irrelevant to anyone other than the party signing them. Indeed, the Commission made the point that consent decrees often "impose duties and restrictions on [the companies signing them] that may be more restrictive" than the law otherwise requires. *See* Memorandum in Support of Motion to Dismiss by the Federal Trade Commission at 12, in *Pom Wonderful LLC v. FTC*, Civ. Action No. 10-1539 (D.D.C. Nov. 16, 2010). Thus, the FTC's position is that consent decrees do not define the applicable law.

Second, the language in those consent decrees demonstrates that Staff's position cannot be correct. For example, the CVS Caremark consent order (which is one of the orders referred to by Staff) contains the same language that is contained in the Staff's definition of "personal information" in the Hannaford and Sweetbay CIDs. But the fact that the parties agreed "***for purposes of this provision***" that an "employee" is a "consumer" suggests that without that agreement, an employee would not be included within the definition of consumer. Indeed, if the commonly understood meaning of "consumer" included "employees," there would be no need to add that language. Thus, the very need for the added definition means an "employee" is not a "consumer" as that term is used in the FTC Act.

Staff apparently believes that if it could show that Hannaford's employees could have been injured, that would be sufficient to prove the "substantial consumer injury" required under the FTC Act to prove an unfair trade practice. This is not the law, and the CIDs should be quashed and/or limited to the extent they seek information regarding employees. The last sentence of the definition of "personal information" in the first Hannaford CID and the Sweetbay CID therefore should be stricken.

F. The CIDs' Specifications Are Irrelevant, Unduly Burdensome, And Violate Hannaford's Due Process Rights

Courts will quash FTC demands for information when the demands are for an improper purpose. *United States v. Powell*, 379 U.S. 48 (1964). Improper purposes include, among other things, "harass[ing] the [recipient] or . . . put[ting] pressure on him to settle," *FTC v. Bisaro*, No. 10-289, 2010 WL 3260042, at *5 (D.D.C. July 13, 2010) (*citing Powell*, 379 U.S. at 58), or attempting to force settlement when the investigating agency knows that it has no reasonable expectation of winning. *See SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126 (3d Cir. 1981). Given the history of this matter as outlined above, it is not unreasonable to conclude that

the CIDs were issued to allow the Commission to avoid two-way discovery overseen by an appropriate tribunal and to coerce Hannaford into settlement with the FTC where Staff does not reasonably believe that it could prevail in litigation.

The proper purpose of a CID is to investigate whether a violation has occurred. As discussed at some length above, in the almost three-year investigation, which included the voluntary production by Hannaford of more than 130,000 pages of documents, Staff never suggested that Hannaford's production was incomplete. Instead, Staff represented that it had sufficient information to conclude its investigation, stated that it had determined that there was reason to believe that Hannaford violated the FTC Act, and went so far as to prepare and provide to Hannaford a draft complaint and consent order in June of 2010. Staff's view was echoed by Director Vladeck. Indeed, Hannaford was told during its August of 2010 meeting with Director Vladeck that the complaint recommendation would be forwarded to the Commission "within a week." It was only after Hannaford rejected Staff's new settlement proposal made after the meeting with Director Vladeck that Staff decided to embark on its strategy of inundating Hannaford with extremely burdensome and costly discovery.

The use of the FTC's investigative authority ***after*** Staff represented that its then two-and-half year investigation was complete, ***after*** Staff told Hannaford it had reached a conclusion concerning Hannaford's conduct, and ***after*** it had drafted a complaint and provided it to Hannaford raises serious due process concerns. While Staff clearly has reached conclusions, its continuing investigation is preventing Hannaford from defending itself and achieving a final resolution. Staff can serve all the discovery it wants, but Hannaford has no vehicle for doing so. Hannaford believes that there are important documents and information in the possession of the FTC that would help its defense. And it knows that various third parties have significant

documents and information. But given the length of the investigation, which does not appear poised to end any time soon, these documents could disappear, people's memories will fade, and Hannaford's ability to defend itself will be severely prejudiced.

Put simply, almost three years is enough. It is time to allow the Commissioners to make a decision or for Staff to close the investigation. Either there is a case against Hannaford or there is not. If there is, the parties can appropriately litigate the case and accept ***mutual*** discovery obligations before an appropriate tribunal. If there is not, the investigation should end.

In light of the above and the facts outlined with respect to the investigation, it appears that Staff has little confidence that the Commission would accept its complaint recommendation. Thus, to avoid having to close an almost three-year investigation with nothing to show for it, Staff appears to be trying to force Hannaford to settle to avoid significant discovery and continued disruption of its business. This conclusion is practically mandated by the breadth of the CIDs, the refusal to negotiate seriously to limit them, and the unwillingness to discuss ways to limit the burden even though that is required by the FTC Operating Manual. *See, e.g.*, O.M. at 3.3.6.7.5.1.

Hannaford is further aware that Staff is required to prepare a memorandum outlining the costs and burdens of proposed CIDs. *Id.* Although Hannaford understands that such memoranda typically are not produced to CID recipients, Hannaford can only assume that Staff drastically underestimated the costs and burdens in order to obtain Commissioner approval. In fact, compliance with the CIDs would take a significant amount of time and Hannaford and Sweetbay estimate that compliance would more than $2 million. Declaration of Gregory M. Amoroso ("Amoroso Dec."), dated Dec. 13, 2010, attached hereto as Exhibit 9, at ¶ 13.

The CIDs should be quashed on the basis that they were served for improper purposes and raise serious due process concerns about Hannaford's ability to defend itself. Staff should be directed to put forward its complaint recommendation or end the investigation now.

G The CIDs Are Unduly Burdensome, Overbroad and Improper, and Should Be Quashed in Their Entirety or, in the Alternative, Limited

The Federal Rules of Civil Procedure allow a party to a lawsuit to serve no more than 25 interrogatories on another party, "including all discrete subparts." Fed. R. Civ. P. 33(a)(1). Similarly, the Commission's own Rules of Practice for Adjudicative Proceedings state that [a]ny party may serve upon any other party written interrogatories, not exceeding 25 in number, including all discrete subparts." 16 C.F.R. § 3.35(a). The CIDs served on Hannaford contain ***89*** interrogatories. And the CID served on Sweetbay, which is not even a target of the investigation, includes ***46*** interrogatories. The CIDs thus are facially overbroad and unduly burdensome.

Additional evidence of the burden imposed by these CIDs is demonstrated by the efforts undertaken by Hannaford in response to the voluntary access letter document requests. As described in the letter from John Woods to Alain Sheer, dated December 3, 2010, attached at Exhibit 10, Hannaford collected more than 180GB of data (not including the 7.1TB of forensic images), ultimately reviewing electronic and physical documents from 20 custodians and two shared drives. Hannaford estimates that the costs of producing the 130,000 pages of documents in response to the voluntary access letter pursuant to the protocols and methodologies outlined in the letter was approximately $500,000. *See* Amoroso Dec., ¶ 7. Notably, this does not include the costs of responding to the written questions.

The Second Hannaford CID seeks to require Hannaford to redo that entire process, except for a longer period of time and, we have recently learned, for a greater number of custodians. *See* Letter from Alain Sheer to John Woods, dated December 9, 2010, attached at Exhibit 11.

Furthermore, the First Hannaford CID requests an entirely new set of documents, including the incredibly broad request asking for every document within Hannaford that "describe[s], evaluate[s], or analyze[s] the purchasing practices of Hannaford's customers." As a result of these overbroad CIDs, Hannaford and Sweetbay have more than 200 employees on a legal hold list, and absent further limitations could need to review and produce documents from more than 60 custodians. Amoroso Dec., ¶ 12. Hannaford and Sweetbay thus reasonably estimate that the gathering, review, and production of documents to comply with the CIDs could cost upwards of $2 million. *Id.*, at ¶ 13.[28] These costs do not include the legal fees associated with responding to the large number of questions seeking narrative responses, the disruption caused by the diversion of employees from their jobs, and the costs associated with the production of a privilege log (discussed in Section I, *infra*). *Id.*, at ¶ 14.

A recent communication from Staff suggests that this estimate may be very low. On December 9, 2010, Staff responded to Hannaford's letter explaining the detailed and costly steps it took to respond to the voluntary access letters. In that letter, Staff made clear—well more than two years after the fact—that it does not believe that "Hannaford's review processes were sufficient to identify responsive documents" and further believes that twenty custodians was insufficient. Thus, in response to the CIDs, Staff apparently not only expects Hannaford to re-respond to the voluntary access letters for an extended time period, but also apparently expects Hannaford to search for more documents from the same time period for which Hannaford already has produced documents. Hannaford and Sweetbay further assume that this represents Staff's expectations for the other CIDs as well. Thus, the $500,000 initial costs from which

[28] We note that Staff rejected out of hand "the use of staggered production schedules allowing [Hannaford and Sweetbay] to produce limited information initially and additional information if it is necessary," despite the fact that consideration of this option is mandated by the FTC Operating Manual. *See, e.g.*, O.M. at 3.3.6.7.5.1.

Hannaford extrapolated to estimate response costs severely underestimates the projected costs if Hannaford is required to respond in the manner Staff suggests is required.[29]

Hannaford and Sweetbay also believe that many of the individual definitions, instructions, and specifications in the CIDs are overbroad and place an undue burden on them. Some of Hannaford and Sweetbay's concerns have been described at various points in this Petition. However, rather than list all of the problems with the CIDs, Hannaford and Sweetbay refer the Commission to the following attached documents, which explain in detail the numerous problems with the CIDs and the reasons they pose an undue burden: (a) Letter from Michael Oakes to Alain Sheer, dated December 7, 2010; (b) Hannaford Bros. Co.'s Objections to the Federal Trade Commission's First Civil Investigative Demand; (c) Hannaford Bros. Co.'s Objections to the Federal Trade Commission's Second Civil Investigative Demand; and (d) Kash n' Karry Food Stores, Inc.'s Objections to the Federal Trade Commission's First Civil Investigative Demand.[30]

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[29] Staff's refusal to cooperate with Hannaford and Sweetbay on a response protocol further demonstrates the undue burden and excessive costs imposed by the CIDs. Hannaford and Sweetbay offered to confer with Staff and agree to a custodian list and key word search terms before beginning its review. This is consistent with best practices as endorsed by, among others, the Sedona Conference. *See* The Sedona Conference Cooperation Proclamation (2008) (*available at* http://www.thesedonaconference.org/content/tsc_cooperation_proclamation) (setting forth proclamation endorsed by over 100 federal and state judges calling for "cooperative, collaborative, transparent discovery" including the exchange of information on data sources and jointly developing search methodologies); *Dunkin' Donuts Franchised Rests. LLC v. Grand Cen. Donuts, Inc.*, No. 1:07-cv-04027-ENV-MDG, 2009 WL 1750348, at *4 (E.D.N.Y. June 19, 2009) (citing Sedona Cooperation Proclamation and ordering parties to meet and confer to develop a narrowed and "workable search protocol" and requiring requesting party to provide list of employee custodians to search against). However, Staff refused. This refusal to cooperate will obviously significantly increase Hannaford and Sweetbay's costs if it results in Hannaford and Sweetbay being required to engage in multiple searches and reviews.

[30] These written objection are attached to this Petition at Exhibit 12. They are intended to be illustrative, and Hannaford and Sweetbay reserve the right to modify these written objections.

In short, the volume of data, documents, and information sought in the CIDs is improper, overbroad, and places an undue burden on Hannaford and Sweetbay. Although this would be true of CIDs of this type issued at any stage in an investigation, they are especially inappropriate almost three years into an investigation in which Hannaford already has provided extensive written responses and 130,000 pages of documents.

H. The Contention Interrogatories are Inappropriate

The First CID to Hannaford and the Sweetbay CID include a combined thirteen "contention" interrogatories. *See* First Hannaford CID (Nos. 14-24); Sweetbay CID (Nos. 22-23). For example, Interrogatory No. 14 in the First Hannaford CID states:

> Do you contend that Hannaford was not the common point of purchase for payment cards that First Data advised Hannaford on February 27, 2008 had been subject to unauthorized account activity? If so, describe all facts, including fraud correlation information and analyses. Identify all witnesses, and identify all documents on which you base your contention. If your response is anything other than an unqualified yes, describe all facts, including the number of payment cards and the amount of fraudulent purchases made on them. Identify all witnesses, and identify all documents on which you base the qualification.

The amount of information and analysis requested by the FTC in this and in the other contention interrogatories is indisputably massive and costly. Moreover, the requirement in each contention interrogatory that Hannaford identify "all facts," "all witnesses," and "all documents" make these interrogatories facially overly broad and unduly burdensome. *See, e.g., W. Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2043-CM, 2001 WL 1723817, at *1 (D. Kan. Dec. 4, 2001) ("[A] contention interrogatory which seeks 'all facts'... is overly broad and unduly burdensome on its face.").

Perhaps more importantly, the Commission previously has taken the position that contention interrogatories are not appropriate in litigation until at least the close of discovery. Just as the FTC objected with respect to contention interrogatories served on it, the contention

interrogatories served on Hannaford and Sweetbay "seek information that is more properly sought after the completion of fact discovery, ***if at all***." FTC's Objections to Respondent's First Set of Interrogatories, at 2, In the Matter of North Texas Specialty Physicians, dated Oct. 16, 2003, FTC Docket No. 9312 (emphasis added). Hannaford agrees with the FTC that these contentions are untimely, and are overly burdensome at this stage in the proceeding. *See, e.g.*, *Poulos v. Summit Hotel Props., LLC*, No. 09-4062-RAL, 2010 WL 2640394, at *2 (D.S.D. July 1, 2010) (finding that the defendant's contention interrogatories were burdensome because they compelled the plaintiff to assist the defendant in preparing its case); *Vishay Dale Elecs., Inc. v. Cyntec Co.*, No. 8:07CV191, 2008 WL 4868772, at *5 (D. Neb. Nov. 6, 2008) (denying the motion to compel answers to contention interrogatories until the end of discovery); *Lucero v. Valdez*, 240 F.R.D. 591, 594 (D.N.M. 2007) ("[T]here is considerable support for deferring answers to contention interrogatories until after a substantial amount of discovery has been completed."); *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 348 (N.D. Cal. 1985) (denying motion to compel and ordering plaintiffs to answer contention interrogatories 60 days after completion of defendants' document production). Accordingly, the contention interrogatories should be quashed.

I. The CIDs Implicate Documents and Information Protected Under Various Applicable Privileges and the Privilege Log Requirement is Itself and Undue Burden Under the Facts of this Case

16 CFR § 2.7(d) states that Petitions to Quash "shall set forth all assertions of privilege." The scope of this requirement is unclear. Hannaford and Sweetbay obviously have not reviewed all of the documents that are potentially responsive to the CIDs and therefore cannot provide specific assertions as to specific documents. Moreover, Hannaford and Sweetbay recognize that the CIDs by their terms do not seek privileged information, but instead, expressly permit

Hannaford and Sweetbay to withhold production of privileged material subject to the production of a privilege log. (*See, e.g.*, Exhibit 1, Instruction D to the Sweetbay CID.)

However, in an attempt to comply with the rule and to ensure that no argument can be made later that Hannaford and Sweetbay have "waived" any privileges, Hannaford and Sweetbay have attached to this Petition their Objections to the Definitions, Instructions, and Specifications contained in each of the CIDs. Those objections include Hannaford and Sweetbay's privilege objections. As demonstrated therein, Hannaford and Sweetbay have concluded that documents responsive to the CIDs would include documents that are protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the common-interest privilege, and the self-evaluative privilege. If production under these CIDs ultimately is required, Hannaford and Sweetbay intend to withhold documents that are subject to these privileges.

Hannaford believes that the privilege log requirement alone places an undue burden on it. As noted above, Hannaford spent millions of dollars assisting the DOJ in its investigation of the Gonzalez cybercrime gang. The work done in connection with this investigation was both voluminous and privileged for the reasons described above. (*See* p.7, *supra.*) Hannaford believes that requiring it to review and log, on a document-by-document basis and consistent with the CID instructions, all of the documents generated in connection with this work, would alone likely cost several hundred thousand dollars. This would place an undue burden on Hannaford.

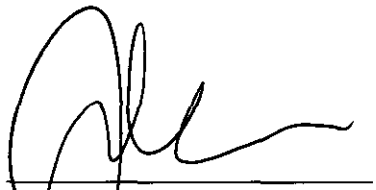
Moreover, the imposition of such a burden on Hannaford would be fundamentally unfair. These documents were generated solely at the request of the United States Government at a significant cost. Now, another arm of the United States Government is seeking to impose even more costs on Hannaford as a result of its cooperation. Accordingly, Hannaford requests that the

requirement to provide a privilege log be stricken from the CIDs or, alternatively, that the FTC Staff be required to meet and confer further as to means by which Hannaford's cost of producing a privilege log be reduced.[31]

III. CONCLUSION

For the reasons discussed above, Hannaford and Sweetbay request that the Commission quash the three CIDs. In addition, Hannaford and Sweetbay request that the Commission direct staff either to go forward with a complaint recommendation without engaging in further discovery or, in the alternative, close the investigation.

Dated: December 13, 2010



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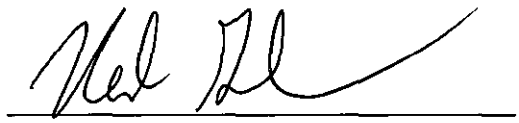
[31] This issue was discussed during the November 16, 2010, meet and confer, but Staff did not respond to Hannaford's expressed concern.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2010, I caused the original and twelve (12) copies of Hannaford Bros. Co. and Kash n' Karry Food Stores, Inc.'s Petition to Quash or, Alternatively, Limit Civil Investigative Demands with attached exhibits to be hand delivered to the Secretary of the Federal Trade Commission at the following address:

Federal Trade Commission
600 Pennsylvania Ave., NW, H-159
Washington, D.C. 20580



Neil K. Gilman