Complaint

IN THE MATTER OF

DICK'S SPORTING GOODS, INC.

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

Docket C-4240; File No. 071 0196
Complaint, November 18, 2008 – Decision, November 18, 2008

This consent order addresses an agreement between Golf Galaxy, Inc., a wholly owned subsidiary of Dick's Sporting Goods, Inc., and Golf Town Canada Inc. The original 1998 agreement between the two provided that Golf Galaxy would provide consulting services to Gulf Canada, which wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy stores in the United States. Golf Galaxy and Golf Canada entered into an amended agreement in 2004 that extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 agreement. The proposed order enjoins Golf Galaxy from dividing or allocating markets for the retail sale of golf merchandise. In addition, the order prevents Golf Galaxy from enforcing any non-compete provision beyond the date originally provided for in the 1998 agreement. More specifically, the provision of the 2004 agreement prohibiting Golf Canada from operating any retail store in the United States will no longer be enforceable as of October 8, 2009. The prohibition on Golf Canada's engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy will also no longer be enforceable. The order would not interfere with Golf Galaxy's ability to enter into written agreements to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of golf merchandise where such agreement is reasonably related to a lawful consulting arrangement or lawful joint venture agreement; and is reasonably necessary to achieve such agreement's procompetitive benefits.

Participants

For the *Commission*: *Jeffrey H. Fischer, Geoffrey M. Green, Melanie Sabo,* and *Melissa Westman-Cherry*.

For the *Respondent*: *Wendy Newton, Buchanan Ingersoll & Rooney PC.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Dick's Sporting Goods, Inc., a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint stating its charges in that respect as follows:

1. Respondent Dick's Sporting Goods, Inc. ("Dick's"), is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 300 Industry Drive, RIDC Park West, Pittsburgh, PA 15275. Golf Galaxy, Inc. ("Golf Galaxy"), a wholly owned subsidiary of Dick's, is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7275 Flying Cloud Dr., Eden Prairie, MN 55344. In 2007, Dick's acquired all of the issued and outstanding stock of Golf Galaxy.

2. The acts and practices of Respondent, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

3. Golf Galaxy operates a chain of golf superstores in the United States. Golf Galaxy stores offer a broad selection of golf merchandise and related services, including golf clubs, equipment, accessories, clothing, lessons, swing analysis, and golf club fitting.

4. In 1998, the founders of Golf Town Canada Inc. ("Golf Canada") wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy superstores.

5. In June 1998, Golf Canada and Golf Galaxy entered into a Consulting Agreement (the "1998 Agreement"). Golf Galaxy agreed therein: (i) to develop and present an initial training program for certain Golf Canada employees, (ii) to provide Golf Canada on an ongoing basis with useful business documents, including construction blueprints, merchandising plans, and sales reports, and (iii) to provide continuing consulting support to Golf Canada.

6. In consideration for these consulting services, Golf Galaxy received shares of Golf Canada, a seat on the company's board of directors, and cash payments.

7. The 1998 Agreement restrained Golf Canada from competing with Golf Galaxy. Specifically, Golf Canada was barred: (i) from operating any retail store in the United States during the term of the 1998 Agreement and for five years thereafter, and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy during the term of the 1998 Agreement and for two years thereafter.

8. Between 1998 and 2004, with the assistance of Golf Galaxy, Golf Canada opened thirteen retail locations in Canada.

9. In October 2004, Golf Galaxy and Golf Canada ended their consulting arrangement, and Golf Galaxy sold its shares of Golf Canada. Golf Galaxy and Golf Canada entered into a new contract (the "2004 Amended Consulting Agreement") that terminated all consulting obligations, effective immediately, but extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 Agreement.

10. The 2004 Amended Consulting Agreement bars Golf Canada: (i) from operating any retail store in the United States for nine years (until June 2013), and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy for six years (until June 2010). In addition, the 2004 Amended Consulting Agreement for the first time prohibits Golf Galaxy from opening a store in Canada (until June 2008). The agreement between Golf Galaxy and Golf Canada to extend the restraints on competition beyond the term specified in the 1998 Agreement is not reasonably necessary for the formation, efficient operation, or dissolution of the collaboration between the parties.

11. The effect of the agreement to extend the non-compete terms beyond what was originally contemplated in the 1998 Agreement, if implemented, would be to restrain competition unreasonably, to increase prices, and to injure consumers.

Violations Alleged

12. As set forth in Paragraph 9 above, Respondent agreed to restrain competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

13. The acts and practices of Respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of November, 2008, issues its complaint against Respondent.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Golf Galaxy, Inc., which is now a wholly owned subsidiary of Dick's Sporting Goods, Inc. (hereinafter "Respondent"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Dick's Sporting Goods, Inc., is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 300 Industry Drive, RIDC Park West, Pittsburgh, PA 15275.

2. Golf Galaxy, Inc., a wholly owned subsidiary of Respondent, is a corporation organized, and existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7275 Flying Cloud Dr., Eden Prairie, MN 55344.

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

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Respondent" means Dick's Sporting Goods, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and subsidiaries, divisions, groups, and affiliates controlled by Dick's Sporting Goods, Inc. (including Golf Galaxy, Inc.); and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "2004 Amended Consulting Agreement" means the October 8, 2004, "Amended and Restated Consulting Agreement" between Golf Galaxy, Inc. and Golf Town Canada Inc. (Attachment A hereto).

D. "Golf Canada" means Golf Town Canada Inc., a corporation organized, and existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at First Markham Place, 3265 Hwy 7 East, Unit 2, Markham, ON L3R 3P9, Canada.

E. "Sale of Golf Merchandise" means the sale of any product or service related to golf, including, but not limited to, golf clubs, equipment, accessories, clothing, lessons, swing analyses, and club fitting.

F. "United States" means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

II.

IT IS FURTHER ORDERED that:

A. Respondent cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any party engaged in the Sale of Golf Merchandise**,** to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the Sale of Golf Merchandise.

Provided, however, that it shall not of itself constitute a violation of Paragraph II.A. of this Order for Respondent to continue to implement and enforce the 2004 Amended Consulting Agreement, except to the extent prohibited by Paragraph II.B. of this Order.

Provided, further, however, that Respondent may enter into, attempt to enter into, or comply with a written agreement to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the Sale of Golf Merchandise that (1) is reasonably related to a lawful consulting arrangement, lawful joint venture agreement, or lawful merger, acquisition or sale agreement; and (2) is reasonably necessary to achieve such agreement's procompetitive benefits.

B. Respondent cease and desist from, directly or indirectly, or through any corporate or other device, implementing or enforcing:

1. Paragraph 2.3 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after October 8, 2009; and

2. Paragraph 4.1 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after thirty (30) days from the date on which this Order becomes final and thereafter.

III.

IT IS FURTHER ORDERED that within thirty (30) days of this Order becoming final:

A. Respondent shall execute a document that unilaterally waives:

1. Respondent's rights to enforce Paragraph 2.3 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after October 8, 2009; and

2. Respondent's right to enforce Paragraph 4.1 of the 2004 Amended Consulting Agreement with respect to conduct that takes place on or after thirty (30) days from the date on which this Order becomes final and thereafter.

B. Respondent shall submit to Golf Canada, with a return receipt, the executed original document required in Paragraph III.A.

IV.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date the Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order including, but not limited to, a copy of the document required in Paragraph III.A. and proof of Golf Canada's receipt of such document.

B. One (1) year after the date the Order becomes final, annually for the next two (2) years on the anniversary of the date the Order becomes final, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

V.

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

A. Any proposed dissolution of Respondent,

B. Any proposed acquisition, merger or consolidation of Respondent, or

C. Any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and

B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on November 18, 2028.

By the Commission.

NON-PUBLIC APPENDIX A
2004 AMENDED AND RESTATED CONSULTING AGREEMENT

[Redacted From The Public Record But Incorporated By Reference]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Dick's Sporting Goods, Inc. ("Dick's" or "Respondent"). Dick's, through its wholly-owned subsidiary Golf Galaxy, operates a chain of golf superstores in the United States. The agreement settles charges that Dick's violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by agreeing with a potential competitor to allocate markets. The proposed consent order has been placed on the public record for 30 days to receive comments

from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

Golf Galaxy operates a chain of golf superstores in the United States. Golf Galaxy stores offer a broad selection of golf merchandise and related services, including golf clubs, equipment, accessories, clothing, lessons, swing analysis, and golf club fitting. The founders of Golf Town Canada Inc. ("Golf Canada") wished to launch a chain of golf superstores in Canada similar to the Golf Galaxy stores.

In June 1998, Golf Canada and Golf Galaxy entered into a consulting agreement (the "1998 Agreement"). Golf Galaxy agreed therein: (i) to develop and present an initial training program for certain Golf Canada employees, (ii) to provide Golf Canada on an ongoing basis with useful business documents, including construction blueprints, merchandising plans, and sales reports, and (iii) to provide continuing consulting support to Golf Canada. In consideration for these consulting services, Golf Galaxy received shares of Golf Canada, a seat on the company's board of directors, and cash payments.

Certain provisions of the 1998 Agreement restrained Golf Canada from competing with Golf Galaxy. Specifically, Golf Canada was barred: (i) from operating any retail store in the United States during the term of the 1998 Agreement and for five years thereafter, and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy during the term of the 1998 Agreement and for two years thereafter.

Between 1998 and 2004, with the assistance of Golf Galaxy, Golf Canada opened thirteen retail locations in Canada.

In October 2004, Golf Galaxy sold its shares of Golf Canada and the parties terminated all consulting obligations effective immediately. Golf Galaxy and Golf Canada entered into a new contract (the "2004 Amended Agreement") that, *inter alia*, extended the duration of the restraints on competition beyond the expiration dates contemplated in the 1998 Agreement. The 2004 Amended Agreement bars Golf Canada: (i) from operating any retail store in the United States for nine years (until June 2013), and (ii) from engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy for six years (until June 2010). In addition, the 2004 Amended Agreement for the first time prohibits Golf Galaxy from opening a store in Canada (until June 2008).

II. Legal Analysis

There are two distinct sets of restraints in this matter.

One set was agreed upon by Golf Galaxy and Golf Canada in 1998 when their consulting relationship was launched. These restraints appear to have been reasonably necessary to the formation and/or efficient operation of the parties' collaboration. For example, Golf Canada's commitment not to compete in the United States during the term of the consulting relationship (and

for five years thereafter) may have been necessary in order to induce Golf Galaxy to share with Golf Canada certain valuable, confidential, and proprietary information.[1] The Commission therefore does not challenge these 1998 restrictions.

The parties entered into a second set of restraints in 2004, contemporaneous with the decision to terminate their collaboration. The 2004 restraints provide for a division of markets well beyond the term contemplated in the 1998 Agreement, and are the subject of the Commission's claim in this matter. Under the 1998 Agreement, Golf Canada's undertaking to forgo competing in the United States would have expired five years after termination of the consulting relationship; since the consulting relationship ended in 2004, the noncompete would have expired five years later in 2009. With the 2004 Amended Agreement the noncompete was extended from 2009 until 2013 – four years longer than what was contemplated under the original 1998 Agreement.

The 2004 Amended Agreement may be analyzed under the framework articulated by the Commission in the *PolyGram* case.[2] Agreements between competitors to divide markets are treated by the courts as presumptively anticompetitive, or inherently suspect. *E.g., Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (horizontal market division is unlawful per se); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (same); Timothy J. Muris, *The Rule of Reason After California Dental*, 68 Antitrust L. J. 527, 536 (2000) ("[C]ourts already consider price fixing and market division to be inherently suspect."). When an agreement is deemed inherently suspect, the parties can avoid summary condemnation under the antitrust laws by advancing a legitimate

[1] *See e.g., Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985).

[2] *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff=d*, 416 F.3d 29 (D.C. Cir. 2005). *See also N. Tex. Speciality Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

(cognizable and plausible) efficiency justification for the restraint.[3]

Here, the Commission found reason to believe that the 2004 restraints serve no pro-competitive purpose. This second set of restraints was *not* reasonably necessary for the formation or efficient operation of the collaboration between Golf Galaxy and Golf Canada. Significantly, the 2004 restraints cannot be said to induce or facilitate cooperation between Golf Galaxy and Golf Canada – for the simple reason that, after 2004, no further cooperation was contemplated. These restraints served only to provide Golf Galaxy's shareholders with additional protection from competition, with no advantage to U.S. consumers. Because there is no efficiency rationale for the 2004 agreement between Golf Galaxy and Golf Canada to divide markets, such agreement constitutes an unreasonable restraint on trade, and is properly judged to be illegal.

Application of the ancillary restraints framework leads to precisely the same conclusion. The D.C. Circuit has explained:

> To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extend, not ancillary.[4]

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[3] *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005).

[4] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986).

The legitimate and competitive purpose of the consulting arrangement, in place from 1998 through 2004, was to enable Golf Canada to benefit from Golf Galaxy's experience and expertise. However, as alleged in the Complaint, the 2004 restraints did nothing to encourage, facilitate, or promote this collaboration. (Again, after 2004, no ongoing cooperation was contemplated.) Certainly, the dissolution of a collaboration does not, of itself, provide a rationale for the ex-partners to adopt new and expanded limitations upon future competition. *See Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (market division agreement adopted by lawyers following dissolution of their partnership judged per se unlawful). In short, the challenged restraints are naked rather than ancillary.

III. The Proposed Consent Order

Dick's (the parent of Golf Galaxy) has signed a consent agreement containing a proposed consent Order. The proposed consent Order enjoins the company from dividing or allocating markets for the retail sale of golf merchandise. In addition, the proposed Order will prevent Golf Galaxy from enforcing any non-compete provision beyond the date originally provided for in the 1998 Agreement. More specifically, the provision of the 2004 Amended Agreement prohibiting Golf Canada from operating any retail store in the United States will no longer be enforceable as of October 8, 2009, and thereafter. The prohibition on Golf Canada's engaging in any business outside of Canada that competes with or is similar to the business of Golf Galaxy will no longer be enforceable as of thirty (30) days from the date on which the Order becomes final and thereafter.

The proposed Order would not interfere with the company's ability to enter into written agreements to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with the sale of golf merchandise where

such agreement is reasonably related to a lawful consulting arrangement or lawful joint venture agreement; and is reasonably necessary to achieve such agreement's procompetitive benefits.

The proposed Order will expire in 20 years.

Complaint

IN THE MATTER OF

PREMIER CAPITAL LENDING, INC.,
AND
DEBRA STILES

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

Docket C-4241; File No. 072 3004
Complaint, December 10, 2008 – Decision, December 10, 2008

This consent order addresses failures by Premier Capital Lending, Inc. (PLC) and Debra Stiles to provide reasonable and appropriate safeguards to protect personal information, as well as false or misleading representations respondents made about the security provided for such information. The order prohibits the respondents from misrepresenting the extent to which PLC maintains and protects the privacy, confidentiality, or security of personal information from or about consumers. The order requires the respondents to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to respondents' size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. The respondents are required not to violate any provision of the Gramm-Leach-Bliley Act Safeguards Rule and Privacy Rule. The order requires that the respondents obtain periodic assessments and reports from a qualified, objective, independent third-party professional, certifying, among other things, that PCL has in place a security program that provides protections that meet or exceed the protections required by the order and that PCL's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected. Other provisions require the respondents to retain documents relating to their compliance with the order and to disseminate the order to persons with responsibilities relating to the subject matter of the order. The order requires Stiles to notify the Commission of changes in her business or employment in connection with providing financial products and services. The respondents must also notify the FTC of changes in PCL's corporate status and submit periodic compliance reports.

Participants

For the *Commission*: *Laura Berger, Kandi Parsons, Jessica Rich,* and *Joel Winston*.

For the *Respondents*: *Not represented by counsel.*

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Premier Capital Lending, Inc. and Debra Stiles have violated the Commission's Standards for Safeguarding Customer Information Rule ("Safeguards Rule"), 16 C.F.R. Part 314, issued pursuant to Title V, Subtitle A of the Gramm-Leach-Bliley Act ("GLB Act"), 15 U.S.C. § 6801-6809; the Commission's Privacy of Consumer Financial Information Rule ("Privacy Rule"), 16 C.F.R. Part 313, issued pursuant to the GLB Act; and Section 5 of the FTC Act, 15 U.S.C. § 45(a), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Premier Capital Lending, Inc. ("PCL"), is a Texas corporation with its principal place of business at 901 W. Bardin Road, Suite 200, Arlington, Texas 76017.

2. Respondent Debra Stiles ("Stiles") is a co-owner of PCL, Secretary of the company, and Manager of PCL's headquarters office in Arlington, Texas. Individually, or in concert with others, she formulates, directs, or controls the policies, acts, or practices of PCL, including the acts or practices alleged in this complaint. Her principal office or place of business is the same as PCL's.

3. PCL is a mortgage lender that specializes in loans to fund the combined purchase by consumers of real estate and manufactured homes. As a lender, PCL routinely obtains sensitive personal information related to its customers and potential

customers, including the credit histories or consumer reports for these consumers.

RESPONDENTS' COURSE OF CONDUCT

4. As part of its process for evaluating consumer applicants for mortgage loans, PCL routinely obtains consumer reports from a consumer reporting agency ("CRA"). Under its agreement with the CRA, PCL obtains the consumer reports using an online portal through which authorized PCL employees can request the reports; PCL, in turn, issues each such employee a set of credentials, composed of a user name and password (together, a "CRA login"), with which the employee can log into a personal user portal within PCL's account. Stiles is an administrator of PCL's account, who enables and disables PCL's CRA logins.

5. Once logged into a user portal, a PCL employee requests a consumer report by entering a consumer name, address, and Social Security number ("SSN") into an online form that is transmitted to the CRA. New consumer reports are delivered to an "inbox" within the employee's user portal and, once they are opened, remain accessible to the employee for a period of at least 90 days, via links found in a "Report List" within the user portal. Each employee's Report List includes the name, address, and full SSN used to request the consumer report, as well as a link to the report that was obtained.

6. Stiles, as an administrator of PCL's account with the CRA, is able to review various management reports summarizing consumer report requests made through PCL's account. Among other things, Stiles can review: a chronological list of all consumer report requests made by PCL employees within the preceding 90 days, including the name of the employee who requested the report and the name, address, and SSN used to make the request (a "request list"); a request list limited to requests made using the CRA login of a particular PCL employee; and a request list showing requests made using a particular CRA login

during a limited time period, *e.g.*, "Today," "Yesterday," "Week to Date," "Month to Date," "Last Week," and "Last Month." Each of these reports also permits review of the actual consumer reports requested (via a link next to the consumers' names). PCL incurs no charge for accessing any of these management reports.

7. PCL receives monthly invoices from the CRA that list the requests for which PCL is being billed and include the user name of the employee who made each request, as well as the name of the consumer and the final four digits of the SSN that were used to make the request.

8. In March 2006, Stiles activated a CRA login under PCL's credentials for the principal of a seller of manufactured homes based elsewhere in the state. The purpose of this arrangement was to enable the seller to access consumer reports from his own workplace for prospective home purchasers that could be referred to PCL for loans. Neither Stiles nor any agent nor employee of PCL visited the seller's workspace or audited the computer network on which he used the PCL-issued CRA login, in order to assess that network's vulnerability to attack by a hacker or other unauthorized user. Further, PCL failed to take reasonable steps to assess the seller's procedures to handle, store, or dispose of personal information. In addition, in the five months that the CRA login issued to the seller was operational, PCL never conducted, or directed the seller to conduct, an inventory of the seller's computer to determine what personal information related to PCL's customers was stored there.

9. Working from a computer located in his office, the seller used the CRA login issued to him by Stiles from March through late July 2006. During those five months, he requested and obtained consumer reports on 83 consumers.

THE BREACH

10. In or around July 2006, an unauthorized person hacked into the seller's computer and obtained his PCL-issued CRA login. Over the course of about eight days, the hacker used such CRA login to request and obtain 317 new consumer reports on individuals who were not customers of PCL nor the seller. The hacker's requests combined consumers' accurate names and addresses with a suspect series of SSNs, the vast majority of which consisted largely of sequential and repeated numbers, with the final four digits identical (*e.g.*, 866-66-6666).

11. By using the CRA login issued to the seller by PCL, the hacker also gained unrestricted access to all of the 83 consumer reports that had been obtained by the seller for his customers, links to which were stored in his user-portal Report List, together with a list of the name, address, and 9-digit SSN for each of those 83 consumers.

RESPONDENTS' RESPONSE TO THE BREACH

12. PCL learned of the breach on July 25, 2006, after two consumers contacted PCL to ask why their consumer reports had been requested by PCL, a company with which the consumers had no relationship. After confirming that the requests were unauthorized, PCL terminated the seller's CRA login and notified law enforcement authorities and the CRA, which in turn notified the three nationwide CRAs. In August 2006, PCL mailed breach notification letters to the 317 noncustomers whose reports the hacker had obtained.

13. Due to the format of the user portal provided to PCL's users, the "Report List" showing (and providing a link to) the 83 consumer reports requested by the seller was clearly visible to the hacker. However, PCL failed to recognize that the hacker had access to those 83 consumer reports until August 2007, more than

a year after the breach. In September 2007, PCL mailed breach notification letters to these additional 83 consumers.

RESPONDENTS' SECURITY PRACTICES

14. From at least March 2006 until August 2007, respondents have engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for consumers' personal information. Among other things, respondents have failed to:

a. assess the risks of allowing a third party to access consumer reports through PCL's account;

b. implement reasonable steps to address these risks by, for example, evaluating the security of the third party's computer network and taking steps to ensure that appropriate data security measures were present;

c. conduct reasonable reviews of consumer report requests made on PCL's account, using readily available information (such as management reports or invoices) for signs of unauthorized activity, such as spikes in the number of requests made on the account or made by particular PCL users or blatant irregularities in the information used to make the requests; and

d. assess the full scope of consumer report information stored and accessible through PCL's account and, thus, compromised by the hacker.

15. The acts and practices of respondents as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

VIOLATIONS OF SAFEGUARDS RULE

16. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), was promulgated by the Commission on May 23, 2002, and took effect on May 23, 2003. The Rule requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including: (1) designating one or more employees to coordinate the information security program; (2) identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks; (3) designing and implementing information safeguards to control the risks identified through risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures; (4) overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and (5) evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances. 16 C.F.R. §§ 314.3, 314.4.

17. PCL is a "financial institution," as that term is defined in Section 509(3)(A) of the GLB Act, and is therefore subject to the requirements of the Safeguards Rule.

18. As set forth in **paragraphs 8-11** and **13-14**, respondents have failed to implement reasonable and appropriate security policies and procedures and thereby have engaged in violations of the Safeguards Rule, by, among other things:

a. failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and

b. failing to design and implement information safeguards to control the risks to customer information and to regularly test or monitor them.

VIOLATION OF THE FTC ACT

19. Since at least 2006, respondents have disseminated or caused to be disseminated to consumers privacy policies and statements, including but not limited to the following statement from PCL's Privacy Policy:

> We take our responsibility to protect the privacy and confidentiality of customer information very seriously. We maintain physical, electronic, and procedural safeguards that comply with federal standards to store and secure information about you from unauthorized access, alteration and destruction. Our control policies, for example, authorize access to customer information only by individuals who need access to do their work.

20. Through the means described in **paragraph 19**, respondents have represented, expressly or by implication, that they implement reasonable and appropriate measures to protect consumers' personal information from unauthorized access.

21. In truth and in fact, as set forth in **paragraphs 8-11** and **13-14**, respondents have not implemented reasonable and appropriate measures to protect consumers' personal information from unauthorized access. Therefore the representation set forth in **paragraph 20** was, and is, false or misleading, in violation of Section 5(a) of the FTC Act.

VIOLATION OF THE PRIVACY RULE

22. The Privacy Rule, which implements Section 503(a) of the GLB Act, 15 U.S.C. § 6803(a), requires a financial institution to "provide a clear and conspicuous notice that accurately reflects [its] privacy policies and practices" to its customers. 16 C.F.R. § 313.4.

23. As set forth in **paragraphs 19-20,** respondents disseminated a privacy policy that has contained false or misleading statements regarding the measures it implemented to protect customers' personal information. Therefore, respondents have disseminated a privacy policy that does not reflect accurately its privacy policies and practices, including its security policies and practices, in violation of the Privacy Rule.

24. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the FTC Act.

THEREFORE, the Federal Trade Commission this tenth day of December, 2008, has issued this complaint against respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft Complaint, which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq*. and the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*.; and

The respondents and counsel for the Commission, having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), including an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of the Agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such Complaint, or that any of the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comment, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent Premier Capital Lending, Inc. ("PCL") is a Texas Corporation with its principal place of business at 901 W. Bardin Road, Suite 200, Arlington, Texas 76017.

2. Respondent Debra Stiles ("Stiles") is a co-owner of PCL, Secretary of the company, and Manager of its headquarters office in Arlington, Texas. Individually or in concert with others, she formulates, directs, or controls the policies, acts, or practices of respondent PCL. Her principal place of business is the same as PCL's.

ORDER

DEFINITIONS

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

1. "Personally identifiable information" or "personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's email address; (d) a telephone number; (e) a Social Security number; (f) credit or debit card information, including card number, expiration date, and security code; (g) a persistent identifier, such as a customer number held in a "cookie" or processor serial number, that is combined with other available data that identifies an individual consumer; or (h) any information that is combined with any of (a) through (g) above.

2. "Gramm-Leach-Bliley Act" or "GLB Act" refers to 15 U.S.C. §§ 6801-6809, as amended, the "Safeguards Rule"

or the "Standards for Safeguarding Customer Information Rule" refers to 16 C.F.R. Part 314, issued pursuant to Title V, Subtitle A of the GLB Act, 15 U.S.C. §§ 6801-6809, and the "Privacy Rule" or the "Commission's Privacy of Consumer Financial Information Rule" refers to 16 C.F.R. Part 313, issued pursuant to the GLB Act.

3. "Financial institution" shall mean as defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

4. Unless otherwise specified, "respondents" shall mean Premier Capital Lending, Inc. and its subsidiaries, divisions, affiliates, successors and assigns ("PCL"), and Debra Stiles.

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

I.

IT IS ORDERED that respondents, and their officers, agents, representatives, and employees, shall not directly or through any corporation, subsidiary, division, website, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, misrepresent in any manner, expressly or by implication, the extent to which respondents maintain and protect the privacy, confidentiality, or security of any personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that respondents, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device, no later than the date of service of this order, shall

establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of consumers' personal information. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent PCL's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers, including:

A. the designation of an employee or employees to coordinate and be accountable for the information security program;

B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to, (1) employee training and management, (2) information systems, including network and software design, information processing, storage, transmission, and disposal, and (3) prevention, detection, and response to attacks, intrusions, or other systems failure;

C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;

D. the development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from

respondents and requiring service providers by contract to implement and maintain appropriate safeguards; and

E. the evaluation and adjustment of respondents' information security program in light of the results of the testing and monitoring required by subpart C, any material changes to respondents' operations or business arrangements, or any other circumstances that respondents know or have reason to know may have a material impact on the effectiveness of their information security program.

III.

IT IS FURTHER ORDERED that respondents, and their officers, agents, representatives, and employees, shall not, directly or through any corporation, subsidiary, division, website, or other device, violate any provision of:

A. the Safeguards Rule, 16 C.F.R. Part 314; or

B. the Privacy Rule, 16 C.F.R. Part 313.

In the event that either of these Rules is hereafter amended or modified, respondents' compliance with that Rule as so amended or modified shall not be a violation of this order.

IV.

IT IS FURTHER ORDERED that, in connection with their compliance with Parts II and III.A. of this order, respondents, and their officers, agents, representatives, and employees, shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional using procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (A) the first one hundred and eighty (180) days after service of the order for

the initial Assessment; and (B) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

A. set forth the specific administrative, technical, and physical safeguards that respondent PCL has implemented and maintained during the reporting period;

B. explain how such safeguards are appropriate to respondent PCL's size and complexity, the nature and scope of respondent PCL's activities, and the sensitivity of the personal information collected from or about consumers;

C. explain how the safeguards that have been implemented meet or exceed the protections required by the Safeguards Rule; and

D. certify that respondent PCL's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and, for biennial reports, has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies by: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission.

Respondents shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection,

Federal Trade Commission, Washington, D.C. 20580, within ten (10) business days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondents until three years after completion of the final Assessment and provided to the Associate Director of Enforcement upon request within ten (10) business days after respondents receives such request.

V.

IT IS FURTHER ORDERED that respondents shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of each document relating to compliance, including by not limited to:

A. for a period of five (5) years:

1. any documents, whether prepared by or on behalf of either respondent, that contradict, qualify, or call into question respondents' compliance with this order;

2. consumer complaints (whether received in written or electronic form, directly, indirectly or through any third party), and any responses to those complaints, whether in written or electronic form, that relate to respondents' activities as alleged in the draft Complaint and respondents' compliance with the provisions of this order;

3. copies of all subpoenas and other communications with law enforcement entities or personnel, whether in written or electronic form, if such documents bear in any respect on respondents' collection, maintenance, or furnishing of consumer reports or other personal information of consumers; and

4. all records and documents necessary to demonstrate full compliance with each provision of this order; and

B. for a period of three (3) years after the date of preparation of each Assessment required under Part III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of either respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondents' compliance with Parts II and III.A. of this order, for the compliance period covered by such Assessment. Respondents shall provide such documents to the Associate Director of Enforcement within ten (10) days of request.

VI.

IT IS FURTHER ORDERED that respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondents shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that respondent Stiles, for a period of ten (10) years after the date of issuance of the order, shall notify the Commission of the discontinuance of her current business or employment or of her affiliation with any new business or employment that provides financial products or services. The notice shall include respondent Stiles' new business address and telephone number and a description of the nature of the business or employment and her duties or responsibilities. All

notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondents learn fewer than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondents shall, within one hundred and eighty (180) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

X.

This order will terminate on December 10, 2028, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

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

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

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

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Premier Capital Lending, Inc., and Debra Stiles (collectively, "respondents").

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

According to the Commission's proposed complaint, Premier Capital Lending, Inc. ("PCL") is a mortgage lender headquartered in Arlington, Texas that specializes in loans to fund the combined purchase by consumers of real estate and manufactured homes. Debra Stiles ("Stiles") is a co-owner of PCL and has authority to control its policies, acts, or practices, including those acts or practices alleged in the proposed complaint. As a lender, PCL routinely obtains sensitive personal information pertaining to its customers and potential customers (hereinafter "personal information"), including the credit histories or consumer reports for these consumers. This matter concerns alleged failures by respondents to provide reasonable and appropriate safeguards to protect personal information, as well as false or misleading representations respondents made about the security provided for such information.

According to the proposed complaint, PCL obtains consumer reports from a consumer reporting agency ("CRA") via an online portal, which each authorized PCL employee logs into using personalized credentials (herinafter, a "CRA login"). Once logged into the portal, PCL employees request a consumer report by

entering a consumer's name, address, and Social Security number ("SSN") into an online form that is transmitted to the CRA. Consumer reports are delivered to an "inbox" within the employee's portal and, once opened, remain accessible to the employee for at least 90 days. Stiles enables and disables PCL's CRA logins, and can review, at no cost, all consumer reports received by PCL employees, as well as various management reports that summarize consumer report requests made on PCL's account. PCL also receives monthly invoices from the CRA that list the requests for which PCL is being billed, including the user name of the employee who made the request, as well as the consumer name and final four digits of the SSN that were used to make the request.

In March 2006, Stiles activated a CRA login under PCL's credentials for the principal of a seller of manufactured homes based elsewhere in the state. The purpose of this arrangement was to enable this seller to access consumer reports from his own workplace for prospective home buyers who could be referred to PCL for loans. Neither Stiles nor any agent or employee of PCL visited this seller's workplace or audited the computer network on which he used the PCL-issued CRA login, in order to assess that network's vulnerability to attack by an unauthorized person.

In or around July 2006, an unauthorized person hacked into the seller's computer and obtained his PCL-issued CRA login. Using the CRA login, the hacker requested and obtained 317 new consumer reports, submitting requests composed of actual consumer names and addresses, combined with a suspect series of SSNs, the vast majority of which consisted largely of sequential and repeated numbers, with the final four digits identical (*e.g.*, 866-66-6666). Using this CRA login, the hacker also gained access to 83 additional consumer reports that had been requested and obtained by the seller. PCL discovered the hacker's 317 unauthorized requests after two consumers whose reports the hacker had obtained contacted PCL to ask why their consumer reports had been requested by PCL, a company with which the

consumers had no relationship. PCL then terminated the seller's CRA login; notified law enforcement and the CRA; and, in August 2006, mailed breach notification letters to these 317 consumers. In August 2007, more than a year later, PCL recognized for the first time that the hacker also had access to the 83 consumer reports requested by the seller whose credentials the hacker used. PCL mailed breach notification letters to these additional 83 consumers in September 2007.

The Commission's proposed complaint alleges that respondents engaged in a number of practices that, taken together, failed to employ reasonable and appropriate security to protect consumers' personal information. In particular, the proposed complaint alleges that respondents failed to: (1) assess the risks of allowing a third party to access consumer reports through PCL's account; (2) implement reasonable steps to address these risks by, for example, evaluating the security of the third party's computer network and taking steps to ensure that appropriate data security measures were present; (3) conduct reasonable reviews of consumer report requests made on PCL's account, using readily available information (such as management reports and invoices) for signs of unauthorized activity, such as spikes in the number of requests made on the account or made by particular PCL users or blatant irregularities in the information used to make the requests; and (4) assess the full scope of consumer report information stored and accessible through PCL's account and thus compromised by the hacker.

According to the complaint, respondents' practices violated the Gramm-Leach-Bliley ("GLB") Safeguards Rule by, among other things (1) failing to identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information and (2) failing to design and implement information safeguards to control the risks to customer information and to regularly test or monitor them. In addition, the proposed complaint alleges that respondents misrepresented that

they implemented reasonable and appropriate measures to protect consumers' personal information from unauthorized access, in violation of Section 5 of the Federal Trade Commission Act. Further, the proposed complaint alleges that respondents disseminated a privacy policy that does not accurately reflect PCL's privacy policies and practices, in violation of the GLB Privacy Rule.

The proposed order applies to personal information that respondents collect from or about consumers. It contains provisions designed to prevent respondents from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits respondents, in connection with the collection of personal information from or about consumers, in or affecting commerce, from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or security of such information.

Part II of the proposed order requires respondents to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. The security program must contain administrative, technical, and physical safeguards appropriate to respondents' size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers. Specifically, the order requires respondents to:

1. Designate an employee or employees to coordinate and be accountable for the information security program.

2. Identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such

information, and assess the sufficiency of any safeguards in place to control these risks.

3. Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly test or monitor the effectiveness of the safeguards' key controls, systems, and procedures.

4. Develop and use reasonable steps to retain service providers capable of appropriately safeguarding personal information they receive from respondents, and require service providers by contract to implement and maintain appropriate safeguards.

5. Evaluate and adjust PCL's information security program in light of the results of the testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on the effectiveness of their information security program.

Part III of the proposed order requires that respondents not violate any provision of the GLB Safeguards Rule and Privacy Rule.

Part IV of the proposed order requires that respondents obtain, covering the first 180 days after the order is served, and on a biennial basis thereafter for twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that (1) PCL has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) PCL's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected.

Analysis to Aid Public Comment

Parts V through VIII of the proposed order are reporting and compliance provisions. Part V requires respondents to retain documents relating to their compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, respondents must retain the documents for a period of three years after the date that each assessment is prepared. Part VI requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VII requires Stiles to notify the Commission of changes in her business or employment in connection with providing financial products and services. Part VIII requires respondents to notify the FTC of changes in PCL's corporate status. Part IX mandates that respondents submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part X is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312 Order, August 5, 2008

Order granting the request of complaint counsel and the respondent to present views concerning how the Commission should modify subsection II.A.2 of the remedial order.

ORDER GRANTING JOINT MOTION FOR BRIEFING ON REMAND

On July 28, 2008, the Court of Appeals for the Fifth Circuit issued its Mandate remanding this action to the Federal Trade Commission "for modification of subsection II.A.2 of the remedial order in a manner consistent with this opinion." On August 1, 2008, Respondent and Complaint Counsel filed a Joint Proposal for Briefing on Remand (hereinafter "Joint Motion"). The Commission has determined to approve the Joint Motion, and also to place word limits on the briefs. Accordingly,

IT IS ORDERED THAT Complaint Counsel shall file its Proposed Modification and Brief, which shall not exceed 2,500 words in length, no later than August 13, 2008;

IT IS FURTHER ORDERED THAT Respondent shall file its Answering Brief, which shall not exceed 2,500 words in length, no later than August 29, 2008; and

IT IS FURTHER ORDERED THAT Complaint Counsel shall file its Reply Brief, which shall not exceed 1,250 words in length, no later than September 9, 2009.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.

Docket No. 9324 Order, August 8, 2008

Order on motion to vacate the stay of administrative proceedings issued August 7, 2007, pending the outcome of proceedings in the collateral federal district court case, and resume action under Part III.

ORDER RESCINDING STAY OF ADMINISTRATIVE PROCEEDING, SETTING SCHEDULING CONFERENCE, AND DESIGNATING PRESIDING OFFICIAL

On June 6, 2007, the Commission filed a complaint and motions for a temporary restraining order and a preliminary injunction against Respondents in the United States District Court for the District of Columbia. On June 7, 2007, the District Court issued a Temporary Restraining Order preventing Respondent Whole Foods Market, Inc., from consummating any acquisition of any stock, assets, or other interest, directly or indirectly, in Respondent Wild Oats Markets, Inc., pending the District Court's decision on the Commission's motion for a preliminary injunction.

On June 28, 2007, the Commission issued the complaint in this administrative proceeding. The Commission retained adjudicative responsibility for the matter. *See* Commission Rule 3.42(a), 16 C.F.R. § 3.42(a). On July 17, 2007, the Respondents in this matter filed their respective Answers to the Complaint. On August 7, 2007, the Commission -- in light of the pendency of the federal court proceedings and as a matter of discretion -- issued an Order Staying Administrative Proceedings, pursuant to Commission Rule 3.51, 16 C.F.R § 3.51.

On August 16, 2007, the District Court denied the Commission's motion for a preliminary injunction. On July 29, 2008, the Court of Appeals for the District of Columbia Circuit issued an Opinion reversing the Opinion and Order of the District Court and remanding the case to the District Court for further proceedings consistent with the Court of Appeals Opinion. In light of the Court of Appeals Opinion and Order -- and in order to effectuate the Commission policy enunciated in Commission Rule 3.1, 16 C.F.R. § 3.1, to conduct administrative proceedings as expeditiously as possible -- the Commission has determined to rescind the stay of the administrative proceeding; to set a Scheduling Conference; and to designate Commissioner J. Thomas Rosch as the Presiding Official for the Scheduling Conference. Accordingly,

IT IS ORDERED THAT the stay of this administrative proceeding effected by the August 7, 2007 Order be, and it hereby is, rescinded;

IT IS FURTHER ORDERED THAT a Scheduling Conference, pursuant to Commission Rule 3.21(b), 16 C.F.R. § 3.21(b), shall be held on Monday, August 18, 2008, at 4:00 p.m., on the record by videoconference and/or by telephone, with a transcript to be made available to the public through the Office of the Secretary;

IT IS FURTHER ORDERED THAT, pursuant to Commission Rule 3.42, 16 C.F.R. § 3.42, J. Thomas Rosch, a Commissioner of the Federal Trade Commission, be, and he hereby is, designated and appointed to preside over the Scheduling Conference set for August 18, 2008; and

IT IS FURTHER ORDERED THAT before appearing at the Scheduling Conference, counsel for the parties shall meet and confer about the substance of the action and the most expeditious means of resolving this litigation. In addition, counsel for the

parties are instructed to file with the Commission a joint case management statement, by Thursday, August 14, 2008, at 5:00 p.m., that includes the following information:

1. Facts: A brief chronology of the facts and a statement of the principal factual issues in dispute.

2. Legal Issues: A brief statement, without extended legal argument, of the disputed points of law, including reference to specific statutes and decisions.

3. Motions: The current status of pending motions. In addition, counsel shall address any anticipated motions, including but not limited to motions respecting Respondents' defenses challenging the legal viability of the Complaint.

4. Amendment of Pleadings: The extent to which parties, claims, or defenses are expected to be added or dismissed and a proposed deadline for amending the pleadings.

5. Evidence Preservation: Steps taken to preserve evidence relevant to the issues reasonably evident in this action, including interdiction of any document-destruction program and any ongoing erasures of e-mails, voice mails, and other electronically-recorded material.

6. Discovery: The scope of anticipated discovery, any proposed limitations of discovery, and a proposed discovery plan, including, without limitation, any issues relating to disclosure or discovery of electronically stored information.

7. Related Cases: Any related cases or proceedings pending before another court or administrative body.

8. Scheduling: Proposed dates for designation of experts, discovery cutoff, hearing of dispositive motions, pretrial conference and the hearing.

9. Hearing: The expected length and timing of the hearing.

10. Such other matters as may facilitate the just, speedy and inexpensive disposition of this matter.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.

Docket No. 9324 Order, August 12, 2008

Order granting Whole Food's motion to extend the deadline for submitting a joint case management statement and move the date of the Scheduling Conference.

ORDER CHANGING DATE OF SCHEDULING CONFERENCE AND DEADLINE FOR FILING JOINT CASE MANAGEMENT STATEMENT

On August 8, 2008, the Commission issued an Order in this matter (August 8 Order). That Order rescinded the stay of the administrative proceeding; set a Scheduling Conference; designated Commissioner J. Thomas Rosch as the Presiding Official for the Scheduling Conference; and directed the parties to file a joint case management statement by August 14, 2008. On August 11, Respondent Whole Foods Market filed a Motion to extend the deadline for submitting the joint case management statement until August 28, 2008, and to postpone the Scheduling Conference until September 2, 2008 or a later date. Complaint Counsel have advised that they do not intend to file an opposition to the Motion.

The Commission has determined to grant the Motion. Accordingly,

IT IS ORDERED THAT the Scheduling Conference scheduled for August 18, 2008 by the August 8 Order shall instead be held on Monday, September 8, 2008, at 10 a.m.; and

IT IS FURTHER ORDERED THAT the joint case management statement shall be filed on or before Thursday, August 28, 2008, at 5:00 p.m. rather than on August 14, 2008 as required by the August 8 Order.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

RAMBUS INCORPORATED

Docket No. 9302 Order, August 12, 2008

Letter approving Rambus' Application for Approval of Compliance Officer filed on June 16, 2008, pursuant to Paragraph III.A.1 of the Commission's Final Order issued February 2, 2007.

LETTER RESPONDING TO RAMBUS INC.'S APPLICATION FOR APPROVAL OF COMPLIANCE OFFICER

Dear Mr. Stone and Mr. Melamed:

This letter responds to the *Application for Approval of Compliance Officer* filed by respondent Rambus Inc. ("Rambus") on June 16, 2008. In that application, Rambus has sought, pursuant to Paragraph III.A.1 of the Commission's Final Order in the above matter ("*Order*"), Commission approval of the employment by Rambus of Laura Stark in the position of Compliance Officer.

After considering Rambus's application, the Commission has determined to approve Rambus's employment of Laura Stark as Compliance Officer. In according its approval, the Commission has relied upon the information submitted and representations made in connection with the filings and has assumed them to be accurate and complete.

This approval does not relieve Rambus from liability for any violations of the Order, including any violations for which the Compliance Officer is responsible. *See Order* at ¶ III.C. (as modified by *Order Granting in Part and Denying in Part Respondent's Petition for Reconsideration of the Final Order and Granting Complaint Counsel's Petition for Reconsideration of Paragraph III.C. of the Final Order* at ¶ 2 (April 27, 2007)).

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

WHOLE FOODS MARKET, INC.,
and
WILD OATS MARKETS, INC.

Docket No. 9324 Order, September 5, 2008

Order denying the Motion to Disqualify the Commission as Administrative Law Judge and to Appoint a Presiding Official Other Than a Commissioner made by Whole Foods Market, Inc., pursuant to Rule 3.42(g)(2).

ORDER DENYING RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION

Respondent Whole Foods Market, Inc., moves the Commission to recuse "itself as administrative law judge ("ALJ") and to appoint as presiding official a duly qualified ALJ who is not a Commissioner." See Respondent's Motion to Disqualify the Commission at p. 1 (April 22, 2008) *available at* http://www.ftc.gov/os/adjpro/d9324/080822respmodisqualifycomm.pdf. The Commission denies the motion.

In administrative litigation, a party may seek disqualification by a good faith filing "of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee." 5 U.S.C. §556(b). Whole Foods argues that statements the Commission made in seeking a preliminary injunction and in pursuing its appeal of the denial of a preliminary injunction create bias and prejudgment requiring the Commission to disqualify itself or any individual Commissioner from acting as the presiding officer.

Whole Foods does not challenge the Commission's authority to review the initial decision – a role in which the Commission has all the powers of the presiding officer. Whole Foods, however, argues that where the Commission seeks a preliminary

injunction and where the Commission pursues that relief vigorously, it would be inappropriate, or at least appear inappropriate, for the Commission to act as the presiding official. Whole Foods' position is flawed for at least three reasons: (1) Whole Foods' failure to challenge the Commission's ability to hear the appeal of the initial decision refutes its argument, (2) the statements themselves – taken out of context – do not show prejudgment and do not require disqualification, and (3) Whole Foods' argument, if accepted, would essentially prevent the Commission from ever seeking a preliminary injunction.

First, Whole Foods' claim fails on its own terms. In moving to recuse the Commission as the presiding officer, Whole Foods does not challenge the propriety of the Commission's hearing the appeal of the initial decision. In hearing such an appeal, the Commission exercises "all the powers which it could have exercised if it had made the initial decision." Rule 3.54(a). It reviews the evidence *de novo*, and the Commission – not the presiding officer – is the finder of fact. It follows that the Commission can undertake the subsidiary and derivative responsibility of acting as a presiding officer.

Second, the statements do not indicate any prejudgment or partiality as to the final merits of this action. Whole Foods urges the Commission to disqualify itself because, in Whole Foods' view, the Commission "pressed arguments" in the federal court proceedings "that, on their face, state that the Commission has reached judgments on key issues going to the merits of this administrative proceeding." See Respondent's Motion at p. 3. Whole Foods takes those "arguments" out of context. The question in "this administrative proceeding" is not the same one in the federal court proceeding. The question at the plenary trial (in the administrative proceeding) is whether the evidence adduced during the hearing constitutes a violation of Section 7. That was not the question in the federal court proceedings. As the D.C. Circuit decided, the question in the federal court proceeding was whether the evidence adduced in those proceedings raised

"questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation." *Fed. Trade Comm'n v. Whole Foods*, 533 F.3d 869, 875 (D.C. Cir. 2008). The statements about the evidence to which Respondent points were statements that the evidence before the federal district court satisfied that standard. The Commission did not express any opinion, and does not express an opinion now, as to whether the evidence adduced at the plenary trial will be sufficient to show a violation of Section 7. Indeed, the only opinion to which Respondent points that even refers to the plenary trial is the Commission's statement that the federal district court did not assess the evidence adduced in the federal court proceedings in a fashion that would be acceptable at a plenary trial. That is a statement about the way the district court decided whether to issue a preliminary injunction, not a statement about whether the evidence at the plenary trial will be sufficient to establish a Section 7 violation.

The burden on the movant seeking recusal here is high. Whole Foods argues that the standard is "whether a disinterested observer may conclude (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Mot. at 3 (*Citing Cinderella Career and Finishing Sch. Inc. v. Fed. Trade Comm'n* , 425 F.2d 583, 591). The test for recusal is different where the movant attacks statements made in the course of the agency's official duties. The Supreme Court has rejected disqualification where the Commission had made statements in the course of its designated responsibilities that were factually related to a later adjudication. *Fed. Trade Comm'n v. Cement Institute*, 334 U.S. 683 (1948). There, the Commission challenged industry-wide base point pricing in the cement industry. *Id.* at 688. Prior to issuing the complaint, the Commission, in reports and testimony to Congress, had stated that "the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint

of trade in violation of the Sherman Act." *Id.* at 701.[1] Forming such opinions did not prevent the Commission from deciding the adjudicatory matter:

> "[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.

Id. at 702-03.

The analysis would be different if a Commissioner made statements unrelated to the Commission's official duties. Disqualification is appropriate if a Commissioner gives a speech discussing the merits of a pending case. *See Cinderella Career and Finishing School v. Federal Trade Commission*, 425 F.2d 583 (D.C. Cir. 1970). In contrast, the statements Whole Foods relies on were made as part of the Commission's attempts to invoke relief under Section 13(b).

Third, the logic of Whole Foods' argument would destroy the utility of Section 13(b), which allows the Commission to pursue preliminary relief as plaintiff while it adjudicates the ultimate merits in administrative litigation. If Whole Foods' argument were accepted, the Commission would risk disqualification from

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[1] In its reports, the Commission also said it "regarded the cement industry in the same category, as far as price fixing was concerned, as steel and other industries." *Marquette Cement Mfg. Co. v. Fed. Trade Comm'n*, 147 F.2d 589, 591 (7th Cir. 1945) *aff'd sub nom. Fed. Trade Comm=n v. Cement Institute*, 334 U.S. 683 (1948).

pursuing administrative litigation – the administrative hearing as well as an appeal of an Initial Decision – each time the Commission decided to pursue preliminary relief under section 13(b) of the FTC Act in federal district court. Under Whole Foods' view, the Commission could not, or should not, participate in administrative proceedings at all if, on appeal from a denial of preliminary injunction under 13(b), it declared that the evidence before the federal district court was sufficient to satisfy the applicable standard. Such a result would nullify Section 13(b). If Whole Foods were correct, every time the Commission sought a preliminary injunction, it could not pursue administrative litigation, so there would be no need for a preliminary injunction pending the outcome of the adjudicative trial.

Respondent cites no authority for the proposition that the Commission, having sought preliminary relief, may not adjudicate the merits, and we are aware of none. To the contrary, the Administrative Procedure Act envisions agencies acting in the dual roles that Whole Foods objects to. The APA generally forbids a person from ruling on an adjudicative matter if that person engaged "in the performance of investigative or prosecuting functions for" the matter or a factually related matter. 5 U.S.C. §554(d)(2). This prohibition "does not apply . . . (C) to the agency or a member or members of the body comprising the agency." *Id*. So, the Commission may adjudicate a case while the agency prosecutes "a factually related case." 5 U.S.C. § 554(d)(2)(C). Because both the FTC Act and the APA contemplate the Commission acting precisely as it has, recusal is inappropriate.

Finally, Whole Foods also makes a number of arguments that relate to whether there is a reason for the Commission to act as a presiding officer. None is relevant to whether the Commission must disqualify itself. At this point, the Commission has not named Commissioner Rosch the presiding officer for all purposes

nor has it concluded that the Commission itself will retain jurisdiction during the initial proceedings.[2]

Conclusion

To be clear, the Commission has determined that it has reason to believe Whole Foods' acquisition of Wild Oats may substantially lessen competition. Further, the Commission did argue that the evidence in the preliminary injunction matter established questions so serious, so substantial as to require further study and that the District Court erred in not finding that the Commission had established a likelihood of success on the merits– a position the DC Circuit agreed with. None of that means the Commission has prejudged this case; indeed, the Commission has not made any determination on the ultimate merits of this litigation. Whether it acts as the presiding official or not, it will decide this matter, like all matters, based on the evidence in the case and the law, in an impartial and fair manner. Accordingly,

IT IS ORDERED THAT Respondent Whole Foods' Motion to Disqualify the Commission is **DENIED;** and

[2] Whole Foods did not follow the proper procedure for seeking disqualification of the presiding officer. The movant must file "a timely and sufficient affidavit" that shows "personal bias or other disqualification." 5 U.S.C. §556(b)(3). Whole Foods filed no such affidavit. Although not a basis for our decision here, the failure to file such an affidavit would be a sufficient reason to deny a motion to disqualify. *Gibson v. Fed. Trade Comm=n,* 682 F.2d 554, 565 (1982). As the *Gibson* court explained, the affidavit requirement is not a "mere formality;" rather, it "serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim." *Id.*

IT IS FURTHER ORDERED THAT Respondent Whole Foods' Motion for Oral Argument on its Motion to Disqualify the Commission is **DENIED.**

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

WHOLE FOODS MARKET, INC., and WILD OATS MARKETS, INC.

Docket No. 9324 Order, September 8, 2008

Order granting complaint counsel's motion to amend the complaint by incorporating Respondent's consummation of the acquisition and the procedural history in the federal district and appellate courts.

ORDER AMENDING COMPLAINT

The Commission issued the Administrative Complaint in this matter on June 27, 2007. On July 17, 2007, Respondent Whole Foods Market, Inc. and Respondent Wild Oats Markets, Inc. filed their respective Answers to the Complaint. On August 7, 2007, the Commission issued an Order Staying Administrative Proceedings. On August 8, 2008, the Commission issued an Order Rescinding Stay of Administrative Proceeding, Setting Scheduling Conference, and Designating Presiding Official. On August 26, 2008, Complaint Counsel filed a Motion to Amend Complaint to reflect a number of events that have transpired since the Complaint was issued. Counsel for the Respondents have advised that they do not intend to file an opposition to the Motion.

Upon consideration of the arguments made by Complaint Counsel in its Motion, the Commission has determined to amend the Administrative Complaint in a number of respects. Accordingly,

IT IS ORDERED THAT the Administrative Complaint the Commission issued in this matter on June 27, 2007, be, and it hereby is, amended to read as shown in the attached Amended Complaint; and

IT IS FURTHER ORDERED THAT Respondent Whole Foods Market, Inc. shall file its Answer to the Amended Complaint on or before September 26, 2008.

By the Commission.

AMENDED COMPLAINT

I. INTRODUCTION

Whole Foods Market, Inc.'s ("Whole Foods") acquisition of Wild Oats Markets, Inc. ("Wild Oats"), is likely to have substantially lessened competition and continues to substantially lessen competition, thereby causing significant harm to consumers. This merger, involving the two leading operators of premium natural and organic supermarkets, may increase prices and reduce quality and services in a number of geographic markets throughout the United States. Whole Foods' Chief Executive Officer John Mackey bluntly advised his Board of Directors of the purpose of this acquisition: "By buying [Wild Oats] we will . . . avoid nasty price wars in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm [Whole Foods'] gross margins and profitability. By buying [Wild Oats] . . . we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us. . . . [Wild Oats] may not be able to defeat us but they can still hurt us . . . . [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever."

To prevent this consumer harm, the Federal Trade Commission ("Commission"), pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, having reason to believe that Respondent Whole Foods and Wild Oats entered into an agreement pursuant to which Whole Foods acquired the voting securities of Wild Oats, that such agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its Amended Complaint, stating its charges as follows:

II. THE PARTIES AND JURISDICTION

Whole Foods Market, Inc.

1. Respondent Whole Foods is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 550 Bowie Street, Austin, Texas 78703.

2. Established in 1980, Whole Foods operates approximately 260 premium natural and organic supermarkets in more than 37 states and the District of Columbia.

3. Whole Foods is the largest operator of premium natural and organic supermarkets in the United States.

4. According to Whole Foods' Chief Executive Officer John Mackey, Whole Foods is "a company that is authentically committed to its mission of natural/organic/healthy foods. Its core customers recognize this authenticity and it creates a customer loyalty that will not be stolen away by conventional

markets who sell the same products. Whole Foods has created a 'brand' that has real value for millions of people."

5. Whole Foods is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

6. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods proposed to acquire all of the voting securities of Wild Oats through WFMI Merger Co., a wholly-owned subsidiary of Whole Foods (the "Acquisition"). The purchase was effected through a tender offer for all shares of Wild Oats common stock. The total cost of the Acquisition was approximately $671 million in cash and assumed debt.

7. Respondent Whole Foods is in the process of merging Wild Oats into Whole Foods; closing numerous Wild Oats stores; selling several Wild Oats stores; and operating the remainder as Whole Foods stores.

8. On June 5, 2007, the Commission authorized the commencement of an action under Section 13(b) of the Federal Trade Commission Act to seek a temporary restraining order and a preliminary injunction barring the Acquisition during the pendency of administrative proceedings to be commenced by the Commission pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. _ 45(b).

9. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and a

preliminary injunction were in the public interest and that it had reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because the Acquisition likely would substantially lessen competition in the relevant markets alleged in the complaint.

10. On June 7, 2007, United States District Court Judge Paul L. Friedman of the United States District Court for the District of Columbia issued an Order granting the Commission's motion for temporary restraining order. On August 16, 2007, Judge Friedman denied the Commission's request for a preliminary injunction and, on August 23, 2007, the United States Court of Appeals for the District of Columbia Circuit denied the Commission's emergency motion for an injunction pending appeal. As a result, Whole Foods' acquisition of Wild Oats was consummated on August 28, 2007. On July 29, 2008, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's conclusion that the Commission failed to show a likelihood of success in this proceeding and remanded the matter back to the district court to address the equities.

IV. NATURE OF COMPETITION

11. "Natural foods" are foods that are minimally processed and largely or completely free of artificial ingredients, preservatives, and other non-naturally occurring substances.

12. "Organic foods" are foods that are produced using: agricultural practices that promote healthy ecosystems; no genetically engineered seeds or crops, sewage sludge, long-lasting pesticides or fungicides; healthy and humane livestock management practices including use of organically grown feed, ample access to fresh air and the outdoors, and no antibiotics or growth hormones; and food processing that protects the healthfulness of the organic product, including the avoidance of irradiation, genetically modified organisms, and synthetic preservatives.

13. Pursuant to the United States Department of Agriculture's ("USDA") Organic Foods Production Act of 1990 (the "Organic Rule"), all products labeled "organic" must be certified by a federally accredited certifying agency as satisfying USDA standards for organic foods. The Organic Rule further requires that retailers of products labeled "organic" use handling, storage, and other practices to protect the integrity of organically-labeled products, including: preventing commingling of organic and non-organic ("conventional") products; protecting organic products from contact with prohibited substances; and maintaining records that document adherence to the USDA requirements.

14. Premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive way, all of which significantly distinguish premium natural and organic supermarkets from conventional supermarkets and other retailers of food and grocery items ("Retailers").

15. Premium natural and organic supermarkets are not simply outlets for natural and organic foods. Whole Foods' Chief Executive Officer John Mackey acknowledged that "Whole Foods isn't primarily about organic foods. It never has been. Organic foods is only one part of its highly successful business model." In announcing its fourth quarter results for 2006, Whole Foods stated that "Whole Foods Market is about much more than just selling 'commodity' natural and organic products. We are a lifestyle retailer and have created a unique shopping environment built around satisfying and delighting our customers." Specifically, Mr. Mackey has said that "[s]uperior quality, superior service, superior perishable product, superior prepared foods, superior marketing, superior branding, and superior store experience working together are what makes Whole Foods so successful." "[P]eople who think organic foods are the key don't understand the business model. . . ."

16. To begin with, premium natural and organic supermarkets focus on perishable products, offering a vast selection of very high quality fresh fruits and vegetables (including exotic and hard-to-find items) and other perishables. As Whole Foods stated in its 2006 annual report, "We believe our heavy emphasis on perishable products differentiates us from conventional supermarkets and helps us attract a broader customer base." Whole Foods' Chief Executive Officer John Mackey has also emphasized the importance of high quality perishable foods to Whole Foods' business model: "This [produce, meat, seafood, bakery, prepared foods] is over 70% of Whole Foods total sales. Wal-Mart doesn't sell high quality perishables and neither does Trader Joe's while we are on the subject. That is why Whole Foods coexists so well with [Trader Joe's] and it is also why Wal-Mart isn't going to hurt Whole Foods."

17. Relative to conventional supermarkets and most other Retailers, premium natural and organic supermarkets target shoppers who are, in the words of the Respondent or Wild Oats, "affluent, well educated, health oriented, quality food oriented people. . . ." The core shoppers of premium natural and organic supermarkets have a preference for natural and organic products, and premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable those shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip.

18. Premium natural and organic supermarkets are differentiated from other Retailers in that premium natural and organic supermarkets offer more amenities and service venues; higher levels of service and more knowledgeable service personnel; and special features such as in-store community centers.

19. Premium natural and organic supermarkets promote a lifestyle of health and ecological sustainability, to which a significant portion of their customers are committed. Through the

blending together of these elements and others, premium natural and organic supermarkets strive to create a varied and dynamic experience for shoppers, inviting them to make the premium natural and organic supermarket a destination to which shoppers come not merely to shop, but to gather together, interact, and learn, often while enjoying shared eating and other experiences. Premium natural and organic supermarkets expend substantial resources on developing a brand identity that connotes this blend of elements, and especially the qualities of trustworthiness (*viz.*, that all products are natural, that products labeled "organic" are properly labeled, that the store's suppliers practice humane animal husbandry, and that the store's actions are ecologically sound) and qualitative superiority to other Retailers.

20. Relative to most other Retailers, premium natural and organic supermarkets' products often are priced at a premium reflecting not only product quality and service, but the marketing of a lifestyle to which their customers aspire.

21. As Whole Foods' Chief Executive Officer John Mackey has acknowledged, "Safeway and other conventional retailers will keep doing their thing – trying to be all things to all people . . . . They can't really effectively focus on Whole Foods Core Customers without abandoning 90% of their own customers. . . . Whole Foods core customers will not abandon them because Safeway has made their stores a bit nicer and is selling some organic foods. Whole Foods knows their core customers well and serves them far better than any of their potential competitors do."

22. Mr. Mackey has also said that "[a]ll those [conventional supermarkets and club stores] you named have been selling organic foods for many years now. The only thing 'new' is that they are now beginning to sell private label organic foods for the first time. However, they've been selling organic produce and organic milk for many years now. Doing so has never hurt Whole Foods."

23. Wild Oats' 2006 10K filed with the Securities and Exchange Commission noted: "Despite the increase in natural foods sales within conventional supermarkets, [Wild Oats] believe[s] that conventional supermarkets still lack the concentration on a wide variety of natural and organic products, and emphasis on service and consumer education that our stores offer."

24. Premium natural and organic supermarkets are also very different from mass-merchandisers, such as Wal-Mart and Target. According to Mr. Mackey, "Wal-Mart does a particularly poor job selling perishable foods. Whole Foods quality is better, its customer service is far superior, and the store ambience and experience it provides its customers is fun, entertaining and educational . . . ."

25. With respect to Trader Joe's, Mr. Mackey stated: "TJ's is a completely different concept than WFMI. WFMI's business is all about perishables – fresh produce, fresh seafood, fresh meat, in store delis, juice bars, and bakeries. WFMI has stated that more than 50% of their sales are in these categories of products – categories which TJ's doesn't even have. TJ's is primarily a discount private label company with a large wine selection."

26. Unlike other natural and organic product retailers, premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip. As a result, premium natural and organic supermarkets are appreciably larger than other natural and organic retailers in square footage, number of products offered, inventory for each product offered, and annual dollar sales.

27. Prior to the Acquisition, Whole Foods and Wild Oats, respectively, were the largest and second largest operators of premium natural and organic supermarkets in the United States.

28. Prior to the Acquisition, Whole Foods and Wild Oats were the only two nationwide operators of premium and natural organic supermarkets in the United States.

29. Consumers spent a combined total of $6.5 billion in fiscal 2006 at Whole Foods and Wild Oats. Approximately 70% of that total was spent on perishable products, such as produce, meat, seafood, baked goods, and prepared foods.

30. Prior to the Acquisition, Whole Foods and Wild Oats were one another's closest competitors in 22 geographic markets. Consumers in these markets have reaped price and non-price benefits of competition between Whole Foods and Wild Oats. The markets where the two competed head to head are: Albuquerque, NM; Boston, MA; Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Colorado Springs, CO; Columbus, OH; Denver, CO; West Hartford, CT; Henderson, NV; Kansas City-Overland Park, KS; Las Vegas, NV; Los Angeles-Santa Monica-Brentwood, CA; Louisville, KY; Omaha, NE; Pasadena, CA; Phoenix, AZ; Portland, ME; Portland, OR; Santa Fe, NM; and St. Louis, MO.

31. Over the last five years prior to the Acquisition, Whole Foods targeted markets for entry where, in Whole Foods' words, Wild Oats enjoyed a "monopoly." Consumers in those markets benefitted from the new competition in those markets.

32. Prior to the Acquisition, there were other geographic markets in which only one or the other is present. In many of these markets, Wild Oats or Whole Foods planned, but for the Acquisition, to enter and offer direct and unique competition to the other. Each developed expansion plans that targeted the other's "monopoly" markets, as Whole Foods describes it. These markets include: Palo Alto, CA; Fairfield County, CT; Miami

Beach, FL; Naples, FL; Nashville, TN; Reno, NV; and Salt Lake City, UT.

33. Whole Foods' Mr. Mackey has said that "Whole Foods has taken significant market share from OATS wherever they have opened competing stores – Boulder, Santa Fe, Denver, Boca Raton, Ft. Lauderdale, and St. Louis." Each of the parties, in anticipation of entry by the other, has engaged in aggressive price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry in those geographic markets of other retailers. In addition, when Whole Foods or Wild Oats expected the other to enter one of its markets, it planned substantial improvements in quality, including renovations, expansions, and competitive pricing. As Mr. Mackey explained upon Whole Foods' entry into Nashville: "At least Wild Oats will likely improve their store there in anticipation of Whole Foods eventually opening and [customers will] benefit from that." Prior to the Acquisition, neither company responded in the same way to competition from conventional supermarkets or other Retailers.

34. Prior to the Acquisition, consumers benefitted directly from the price and quality competition between Whole Foods and Wild Oats. These benefits will be lost in the markets where the two competed before the Acquisition and they will not occur in those markets where each had planned to expand.

V. RELEVANT MARKETS

35. A relevant product market in which to analyze the effects of the Acquisition is the operation of premium natural and organic supermarkets.

36. A relevant geographic market in which to analyze the effects of the Acquisition is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan area.

VI. ENTRY CONDITIONS

37. Entry or repositioning into the operation of premium natural and organic supermarkets is time-consuming, costly, and difficult. As a result, entry or repositioning into the operation of premium natural and organic supermarkets in the relevant geographic markets is unlikely to occur or to be timely or sufficient to prevent or defeat the anticompetitive effects of the Acquisition.

VII. ANTICOMPETITIVE EFFECTS

38. The relevant markets are highly concentrated and are significantly more concentrated after the Acquisition. Premium natural and organic supermarkets' primary competitors are other premium natural and organic supermarkets. Shoppers with preferences for premium natural and organic supermarkets are not likely to switch to other retailers in response to a small but significant non-transitory increase in premium natural and organic supermarket prices.

39. The Acquisition is likely to have substantially lessened competition and continues to substantially lessen competition in the following ways, among others:

a. the Acquisition has already eliminated one of only two or three premium natural and organic supermarkets and has substantially increased concentration in the operation of premium natural and organic supermarkets in the relevant geographic markets, each of which already is highly concentrated;

b. the Acquisition has already eliminated substantial and effective price and non-price competition between Whole Foods and Wild Oats in the operation of premium natural and organic supermarkets in the relevant geographic markets,

substantially reducing or eliminating competition in the operation of premium natural and organic supermarkets in each of those geographic areas;

c. the Acquisition has already eliminated one of only two or three premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

d. the Acquisition has already eliminated the only existing company that can serve as a meaningful springboard for a conventional supermarket operator to enter the market for premium natural and organic supermarkets in each of the relevant geographic markets, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

e. the Acquisition has already eliminated Whole Foods' closest competitor in geographic and product space in each of the relevant geographic areas, resulting in the loss of direct and unique price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry of other retailers;

f. the Acquisition has already resulted in the closing of numerous Wild Oats stores, reducing or eliminating consumer choice in premium natural and organic supermarkets, and will result in the closing of additional Wild Oats stores and further disposition of assets;

g. the Acquisition has already enabled the combined Whole Foods/Wild Oats to exercise market power unilaterally; and

h. the Acquisition has already eliminated potential competition in numerous parts of the United States.

VIII. VIOLATIONS CHARGED

COUNT I – ILLEGAL ACQUISITION

40. The allegations contained in paragraphs 1-39 are repeated and realleged as though fully set forth here.

41. Whole Foods' acquisition of Wild Oats is likely to have substantially lessened competition and continues to substantially lessen in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION AGREEMENT

42. The allegations contained in paragraphs 1-41 are repeated and realleged as though fully set forth here.

43. Whole Foods, through the Agreement with Wild Oats as described in paragraph 6, has engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondent that the sixteenth day of February 2009, at 10 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, as the place when and where a hearing will be had on the charges set forth in this Amended Complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the Amended Complaint.

Pending further order of the Commission, the Commission will retain adjudicative responsibility for this matter. *See* § 3.42(a) of the Commission's Rules of Practice for Adjudicative Proceedings. The Commission hereby allows you until September 26, 2008, to file either an answer or a dispositive motion. If you file a dispositive motion within that time, your time for filing an answer is extended until 10 days after service of the Commission's order on such motion. If you do not file a dispositive motion within that time, you must file an answer.

An answer in which the allegations of the Amended Complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Amended Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Amended Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Amended Complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the Amended Complaint and, together with the Amended Complaint, will provide a record basis on which the Commission or the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the Amended Complaint and shall authorize the Commission or the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the Amended

Complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

Unless otherwise directed, further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Ave., N.W. Room 532, Washington, D.C. 20580. The final prehearing conference shall be held at that location, at 10:00 a.m. on a date to be determined. The parties shall meet and confer prior to the final prehearing conference regarding trial logistics, any designated deposition testimony, and proposed stipulations of law, facts, and authenticity.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition of Wild Oats by Whole Foods challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order preventing Whole Foods from consolidating any Wild Oats stores into the Whole Foods system, to the extent such consolidation has not occurred at the time of the Commission's decision;

2. An order preventing Whole Foods from selling or disposing of any owned or leased property that had been used as a Wild Oats store in any geographic market, or a Whole Foods store in any relevant geographic market;

3. An order preventing Whole Foods from discontinuing the use of the Wild Oats name at any store being operated as Wild Oats at the time of the Commission's decision;

4. Re-establishment of Wild Oats stores, with Whole Foods stores added as necessary, along with any associated or necessary assets in a manner that creates a group or system of stores that may be available for divestiture, including, but not limited to, re-opening closed Wild Oats stores, re-naming Wild Oats stores that had been changed to the Whole Foods name, reversing any consolidation of Wild Oats stores into the Whole Foods system and re-establishing the Wild Oats system, and re-establishing Wild Oats' distribution arrangements, private label products and supplier relationships;

5. The divestiture of Wild Oats stores, and Whole Foods stores, and any other associated or necessary assets, including the Wild Oats name, distribution systems or assets, and supplier relationships, in a manner that restores Wild Oats as a viable, independent competitor in the relevant markets, with the ability to offer such services as Wild Oats had offered prior to its acquisition by Whole Foods;

6. Maintenance of the Wild Oats stores pending divestiture, including operating the stores in the ordinary course and maintaining the inventory of the stores, the hours of operation of the stores and of each department in the stores;

7. Appointment of a monitor, or a divestiture trustee, to assure that the Wild Oats, Whole Foods, and related assets are re-established and divested within the time set forth in the Commission's decision;

8. A requirement that, for a period of time, Whole Foods provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its operations with any other company providing the operation of premium and natural organic supermarkets;

9. A requirement for Whole Foods to file periodic compliance reports with the Commission; and

10. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Wild Oats as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this Amended Complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this eighth day of September, 2008.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

LINDE AG,
AND
THE BOC GROUP PLC

Docket No. C-4163 Order, September 9, 2008

Letter granting the request of the Monitor to extend the 2-year time limit within which TNSC must complete construction of its Northern California Helium Transfill, and until which Linde must continue to provide Helium Transfill Tolling Services to TNSC at its Richmond, California, Escrow Transfill due to unanticipated delays in receiving the necessary local permits.

LETTER RESPONSE GRANTING THE REQUEST

Dear Mr. Klein:

This letter is in response to your August 11, 2008, request, which you filed as the Commission-appointed Monitor in the above-referenced matter, that the Commission extend the two-year time limit within which Taiyo Nippon Sanso Corporation ("TNSC") may construct a Helium Transfill, as that term is defined in the Order in Docket No. C-4163 ("Order"), in Northern California, until December 31, 2008. You also request that the Commission extend the two-year time limit during which Respondent Linde AG ("Linde") must provide Helium Transfill Tolling Services to TNSC at Linde's Richmond, California, Escrow Transfill, pursuant to Paragraph III.B.6. of the Order, until December 31, 2008.

Your request was filed pursuant to Paragraph *N.G.* of the Order and Linde supports your request for the extension regarding TNSC's construction of its Northern California Helium Transfill, and has consented to the extension of its obligation to provide Helium Transfill Tolling Services to

TNSC at its Richmond, California, Escrow Transfill, and to the Order's escrow procedures.

After consideration of your request, as well as other available information, the Commission has determined, pursuant to Rule 4.3(b) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 4.3(b), to extend the time within which TNSC may construct a Helium Transfill in Northern California, and the time during which Linde must provide Helium Transfill Tolling Services to TNSC at Linde's Richmond, California, Escrow Transfill, until December 31, 2008. In granting the extension, the Commission has relied upon the information submitted and representations made in connection with your request, and has assumed them to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.

Docket No. 9324 Order, September 10, 2008

Order approving the Scheduling Order.

SCHEDULING ORDER

In accordance with Federal Trade Commission rule 16 C.F.R. § 3.21(b) a Scheduling Conference with Complaint Counsel and counsel for Respondents was held September 8, 2008 at 10:00 a.m.[1] The schedule imposed by this order shall not be altered absent leave of the Commission.

1. Initial Disclosures: Complaint Counsel and Respondent have agreed that the parties will not produce any further material than what was exchanged in the federal court proceedings for the purposes of satisfying 16 C.F.R. § 3.31(b). Ten (10) days following Respondent's Answer to the Amended Complaint, the parties shall exchange the name, and if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations in the Amended Complaint, to the proposed relief or to the defense of the Respondent.

2. Statement of Facts. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods would acquire all the voting securities of Wild Oats. The FTC issued an administrative complaint on June 27, 2007 alleging that Whole Foods' acquisition of Wild Oats violates the antitrust laws. On

[1] The parties' positions on the discovery schedule and other matters were described in a Joint Case Management Statement on August 28, 2008. See Joint Case Management Statement (Aug. 28, 2008).

July 17, 2007, Whole Foods and Wild Oats each filed their Answers to the original Complaint. On August 7, 2007 the Commission ordered a stay of the administrative proceeding pending the proceedings in the collateral federal district court case. See no. 8 below (related cases). Whole Foods completed its acquisition of Wild Oats on August 28, 2007.

On August 8, 2008, the Commission issued its Order Rescinding Stay of Administrative Proceeding, Setting Scheduling Conference, and Designating Presiding Official. On August 26, 2008, Complaint Counsel filed a motion to amend the Complaint, and on September 8, 2008, the Commission issued an Order Amending the Complaint and an Amended Complaint. The Amended Complaint alleges that the relevant product market is the operation of premium natural and organic supermarkets and that the relevant geographic market is an area as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan statistical area, and that Whole Foods and Wilds Oats were each other's closest competitors in approximately 22 geographic markets.

3. Legal Issues. The principal legal issues in this case are as follows:

a. Complaint Counsel alleges that the acquisition of Wild Oats by Whole Foods is likely to have substantially lessened competition and continues to substantially lessen competition in violation of Section 7 of the Clayton Act 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

b. Respondent disputes the allegations in the Complaint and contends that the merger has not and does not violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act in any respect. Other principal legal issues include whether: (1) the complaint fails to state a claim upon which relief can be granted; (2) granting the relief sought is contrary to the public interest;

> (3) efficiencies and other procompetitive benefits resulting from the merger outweigh any and all proffered anticompetitive effects; and (4) the Commission is entitled to relief if it prevails, having stayed this proceeding for a year while Respondent consummated the merger and successfully integrated Wild Oats' business into its own. Whole Foods reserves the right to assert any other defenses as they become known to Whole Foods.

4. Motions. On August 11, 2008, Respondent filed its Motion to Extend the Deadline for Submitting a Joint Case Management Statement and the Scheduling Order seeking to extend the deadline for submitting a joint case management statement to August 28, 2008, and move the date of the Scheduling Conference. On August 12, 2008, the Commission granted Respondent's motion and ordered that the Scheduling Conference be held on September 8, 2008 and that the joint case management statement be filed on or before August 28, 2008. On August 22, 2008, Respondent Whole Foods filed a motion to disqualify the Commission as the Administrative Law Judge and to appoint a presiding official other than a Commissioner. The Commission denied that motion on September 5, 2008.

5. Amendment of the Pleadings. On August 26, 2008, Complaint Counsel filed a motion to amend the Complaint, and the Commission issued an Order Amending Complaint and an Amended Complaint on September 8, 2008. Respondent will file its Answer on September 26, 2008 or otherwise move with respect to the Amended Complaint.

6. Evidence Preservation. The Parties shall take steps necessary to preserve evidence relevant to the issues reasonably evident in this action, including the interdiction of any document-destruction program or ongoing erasures of emails and other electronically-recorded materials.

7. Discovery.

a. Interrogatories and Requests for Admissions. There is no limit to the number of sets of interrogatories the parties may issue, as long as the total number of interrogatories, including all discrete subparts, does not exceed twenty-five (25) to Complaint Counsel from Respondent and does not exceed twenty-five (25) to Respondent from Complaint Counsel. Only fifteen (15) of the twenty-five (25) interrogatories may be contention interrogatories. The interrogatories in separate sets shall be numbered sequentially. The number of requests for admissions, including all discrete subparts, shall not exceed twenty-five (25) to Complaint Counsel from Respondent and shall not exceed twenty-five (25) to Respondent from Complaint Counsel, except that the limit on requests for admissions shall not apply to requests relating to the authenticity or admissibility of exhibits. Additional interrogatories and requests for admissions will be permitted only for good cause.

b. Document Requests. There shall be no limit on the number of document requests. Respondent represented that it produced more than 20 million documents during the Second Request investigation. There was also three weeks of discovery during the preliminary injunction proceedings in federal district court. In an effort to reduce duplicative and burdensome discovery on the parties, the Commission imposes the following limits on document requests:

i. Documents created prior to April 1, 2007: party propounding discovery seeking documents created prior to April 1, 2007 shall make a showing of good cause. The burden then shifts to the responding party to either produce the documents or demonstrate that the relevant documents have already been produced.

ii. Documents created after April 1, 2007: there is no limit on discovery seeking documents created after April 1, 2007.

c. Timing of Requests. Document requests, requests for admission, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits, shall be served so that the time for a response to the discovery request shall be on or before the relevant discovery cut-off date.

d. Timing of Responses. For interrogatories, requests for production, and requests for admissions served after the issuance of the Scheduling Order, objections shall be due within ten (10) days of service of the discovery request, and responses, documents and materials shall be produced within thirty (30) days of service of the discovery request. Notwithstanding these limits, Complaint Counsel and Respondent are encouraged to respond on a rolling basis, particularly with respect to document requests.

e. Electronically-Stored Information. Except as otherwise provided herein, disclosure and discovery of electronically-stored information shall be governed by the Federal Rules of Civil Procedure, as amended on December 1, 2006.

f. Deposition Notices.

i) Timing. Service of a notice of deposition five (5) business days in advance of the date set for the taking of the deposition shall constitute reasonable notice, provided, however, that notwithstanding the date stated on any deposition notice, the parties reasonably cooperate with each other in setting deposition dates that accommodate the schedules of the deponent.

ii) Avoidance of Duplication. Complaint Counsel and Respondent are encouraged to take steps to avoid duplicative discovery. Several witnesses have already been deposed during the federal court proceedings. Respondent stipulated to the admissibility of this earlier testimony in these proceedings. A party witness deposed previously during the federal court proceedings shall not be deposed on subject matters that were the subject of examination absent a showing of good cause. This limitation should be interpreted narrowly and it should not be used to stymie the discovery.

iii) Duration of Depositions. Complaint Counsel and Respondent are encouraged to limit the duration of depositions in this matter to a single day with seven hours of testimony.

8. Related Cases. On June 5, 2007, the Commission filed a Complaint for Temporary Restraining Order and Preliminary Injunction in the United States District Court for the District of Columbia. On June 7, 2007, United States District Court Judge Paul L. Friedman issued an Order granting the Commission's motion for temporary restraining order. On August 16, 2007, Judge Friedman denied the Commission's request for a preliminary injunction and, on August 23, 2007, the United States Courts of Appeals for the District of Columbia Circuit denied the Commission's emergency motion for an injunction pending appeal. As a result, Whole Foods' acquisition of Wild Oats was consummated on August 28, 2007. On July 9, 2008, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's conclusion that the Commission failed to show a likelihood of success in this proceeding and remanded the matter back to the district court to address the equities. On August 26, 2008, Whole Foods filed a petition for a rehearing en banc. The United States Court of Appeals for the District of Columbia Circuit at this time has not decided whether to grant the petition for a rehearing en banc.

9. Scheduling. The following is the pre-hearing schedule:

September 19, 2008	Exchange Preliminary Witness List (not including experts) with description of proposed testimony.
September 19, 2008	Non-expert depositions can begin.
September 26, 2008	Respondent files response to Amended Complaint.
October 6, 2008	Exchange revised witness lists (not including experts), including preliminary rebuttal fact witnesses, with description of proposed testimony.
November 20, 2008	Deadline for serving document requests, requests for admission, and interrogatories, except discovery for purposes of authenticity and admissibility of exhibits
November 21, 2008	Status report due and, if requested by either party, conference with the presiding official.
December 19, 2008	Close of discovery, other than depositions and discovery permitted under FTC Rules of Practice § 3.24(a)(4) and discovery for purposes of authenticity and admissibility of exhibits.
	Status report due and, if requested by either party, conference with the presiding official.
January 5, 2009	Complaint Counsel serves expert witness list and expert witness reports other than rebuttal expert reports.

January 15, 2009	Respondent serves expert witness list and expert witness reports.
January 22, 2009	Exchange final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative, or summary exhibits), and a brief summary of the expected testimony of each witness. No witness not previously disclosed on a witness list may be added except for good cause shown. If a new witness is allowed, an opportunity for deposition must be afforded. For parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party, provide notice to the opposing party or non-party, pursuant to FTC Rules of Practice § 3.45 (b). Complaint Counsel serves rebuttal expert witness list and rebuttal expert reports. Any such report is to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking part or all of Complaint Counsel's rebuttal expert report(s) or seeking leave to submit sur-rebuttal expert reports).
January 27, 2009	Deadline for filing motions for summary decision, motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.

January 30, 2009	Deadline for completion of all depositions including those of experts.
February 4, 2009	Exchange and file with the presiding official objections to final proposed witness lists and exhibits lists. Exchange objections to the designated testimony to be presented by deposition and counter designations. Exchange proposed stipulations of law, facts, and authenticity. Parties file pretrial briefs, not to exceed fifty (50) pages. Deadline for filing motions for summary decision motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.
February 11, 2009	Deadline for filing reply to responses to motions for summary decision motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.
Date TBD	Final prehearing conference to be held at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW Washington D.C. The parties are to meet and confer prior to the conference regarding trial logistics, any designated deposition testimony, and proposed stipulations of law, facts, and authenticity. Stipulations of law, facts, and authenticity shall be prepared as a Joint Exhibit and offered at the final prehearing conference. Counsel may present any objections to the final proposed witness

	lists and exhibits, including the designated testimony to be presented by deposition. All trial exhibits must be offered at the final prehearing conference. The offered exhibits will be admitted or excluded at this conference to the extent practicable.
February 16, 2009	Commencement of Hearing, to begin at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW Washington, D.C.

10. Hearing. The hearing will take no more than thirty full trial days (i.e., 210 hours). Each side shall be allotted no more than half of the trial time within which to present its opening statements, *in limine* motions, all arguments excluding the closing argument, direct or cross examinations, or other evidence.

a. Opening Statements. Each side shall be permitted to make an opening statement that is no more than 2 hours in duration.

b. Closing Statements. Each side shall be permitted to make a closing argument no later than five days after the last filed proposed findings. The closing arguments shall last no longer than 2 hours.

11. Other Matters.

a. Service on the parties shall be deemed effective on the date of delivery by electronic mail (formatted in Adobe Acrobat) except in those instances where service by electronic mail is not technically possible, and three days shall be added to the time for any responsive action, consistent with the provisions of Fed. R. Civ. P. 6(e) regarding service by electronic mail. Absent leave of the Administrative Law Judge, this provision does not modify any of the dates set forth in Paragraph 9.

b. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed ten (10) pages, exclusive of attachments.

c. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with {**bold font and brackets**}. 16 C.F.R. § 3.45. Parties shall act in accordance with the rules for filings containing such information, including FTC Rules of Practice, 16 C.F.R. § 4.2. Public versions of the papers with the *in camera* or confidential material omitted shall be filed pursuant to 16 C.F.R. § 3.45(e).

d. The parties shall serve upon one another, at the time of service, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *duces tecum*, the party issuing the non-party subpoena shall provide copies of the subpoenaed documents and materials to the opposing party within five (5) business days of service. For subpoenas *ad testificandum*, the party seeking the non-party deposition shall consult with the other parties before the deposition date is scheduled. Additionally, the deposition of any person may be recorded by any means permitted by Fed. R. Civ. P. 30. Depositions shall be taken by stenographic means unless the party seeking the deposition notifies the deponent and the other party of its intention to record the deposition by other than stenographic means at least two (2) days in advance of the deposition.

e. No deposition of a non-party shall be scheduled between the time of production in response to a subpoena duces tecum and three (3) days after copies of the production are provided to the non-issuing party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, the documents are produced at the time of the deposition, or as agreed to by all parties involved.

f. Any declaration obtained by a party that the party intends to use affirmatively in the proceeding (e.g. for purposes other than strictly rebuttal, authenticity or evidentiary foundation) must be produced to the opposing party sufficiently before the close of fact discovery such that opposing counsel shall have a reasonable amount of time to subpoena documents for and to take the deposition of any such declarant.

g. The parties shall provide for each testifying expert witness a written report containing the information required by the FTC Rules of Practice § 3.31(b)(3). Drafts of expert reports and notes taken by expert witnesses need not be produced. Communications (oral, written and by e-mail) between expert witnesses and counsel or consultants need not be produced and are not discoverable unless relied upon.

h. The preliminary and revised witness lists shall represent the parties' good faith designation of all potential witnesses the parties reasonably expect may be called at the hearing. A party shall notify the other parties promptly of changes in preliminary and revised witness lists to facilitate completion of discovery within the dates specified by the scheduling order. After the submission of the final witness lists, additional witnesses may be added only: (a) by order of the Commission or the presiding official, upon a showing for good cause; (b) by agreement of the parties, with notice to the Commission or the presiding official; or (c) if needed to authenticate, or provide the evidentiary foundation for, documents in dispute, with notice to the other parties and the Commission or the presiding official. Opposing counsel shall have a reasonable amount of time to subpoena documents for and depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing.

i. The final exhibit lists shall represent the parties' good faith designations of all exhibits the parties reasonably expect may be used in the hearing, other than demonstrative, illustrative, or summary exhibits. Additional exhibits other than demonstrative, illustrative, or summary exhibits may be added after the submission of the final lists only: (a) by order of the Commission or the presiding official, upon a showing of good cause; (b) by agreement of the parties, with notice to the Commission or the presiding official; or (c) where necessary for purposes of rebuttal or impeachment.

j. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the hearing must comply with FTC Rules of Practice _ 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel. Oppositions to applications for issuance of subpoenas shall be due within three (3) business days after the filing of the application.

k. Complaint Counsel shall serve, with a courtesy copy to the presiding official, no later than forty-eight (48) hours in advance of the start of the case-in-chief, a schedule by day showing the best estimate of the expected witnesses to be called. Respondent shall serve, with a courtesy copy to the presiding official, no later than forty-eight (48) hours in advance of the start of the defense case, a schedule by day showing the best estimate of the expected witnesses to be called. At least forty-eight (48) hours in advance of Complaint Counsel's rebuttal case, Complaint Counsel shall provide Respondent, with a courtesy copy to the presiding official, a schedule of witnesses expected to be called each day during the rebuttal case. The parties further shall provide one another with copies of any demonstrative exhibits forty-eight (48) hours before they are to be used with a witness.

l. The procedure for marking of exhibits used in the adjudicative proceedings shall be as follows: (a) Complaint Counsel's exhibits shall bear the designation "CX", Respondent's exhibits shall bear the designation "RX", joint exhibits shall bear the designation "JX", and demonstrative exhibits shall bear the designation "DX"; and (b) the parties shall number the first page of each exhibit with a single series of consecutive numbers. For example, Complaint Counsel's first exhibit shall be marked "CX0001." When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number. Additionally, all exhibit numbers must be accounted for, even if a particular number is not actually used at the hearing.

m. At the final pre-hearing conference, the parties shall introduce all exhibits they intend to introduce at the hearing. The parties further shall give the originals of exhibits to the court reporter, which the court reporter will maintain as part of the record.

n. The parties shall endeavor to resolve any discovery disputes quickly and efficiently. If the parties are unable to reach an agreement resolving the disputes they should bring them promptly to the attention of the presiding official and arrange for a telephonic hearing with the presiding official on the dispute.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312 Order, September 12, 2008

Order amending Paragraph II.A.2 of the Commission's November 29, 2005, Final Order and Opinion to remove the language that the 5th Circuit determined to be "overly broad and internally inconsistent," and change the prohibition on refusals to deal (or threats to refuse to deal) to those taken in furtherance of otherwise prohibited conduct.

ORDER ON REMAND

This matter is before the Federal Trade Commission on remand from the United States Court of Appeals for the Fifth Circuit. On May 14, 2008, the Fifth Circuit affirmed the Commission decision -- embodied in its November 29, 2005 Final Order and Opinion -- that certain activities of Respondent North Texas Specialty Physicians (NTSP) constituted horizontal price fixing in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).[1] Specifically relevant to the issue before us, the Circuit Court identified concerted refusals to deal as one of the mechanisms NTSP used to increase its bargaining power and help achieve its collective price demands. The Commission's order prohibited NTSP from entering into agreements "to deal, refuse to deal, or threaten to refuse to deal with any payor." Paragraph II.A.2. Although approving most of the order provisions, the

[1] The Respondent and Respondent's counsel were served with the Final Order and the Opinion of the Commission on December 7, 2005, and the Final Order therefore became effective on the sixtieth day thereafter; that is, on February 6, 2006. *See* 15 U.S.C. § 5(g)(2); Commission Rule 3.56(a), 16 C.F.R. § 3.56(a) (2008). In an Order issued on January 20, 2006, the Commission stayed enforcement of the Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order until the Fifth Circuit issued its ruling disposing of the petition for review. In a second Order issued on January 20, 2006, the Commission modified the Opinion of the Commission in certain respects not relevant here.

Court found Paragraph II.A.2 to be "overly broad and internally inconsistent," and remanded the proceeding to the Commission for modification of Paragraph II.A.2 "in a manner consistent with [the Court's] opinion."[2] *Id.* at 371, 372. Both sides have filed briefs on this issue on remand. Upon consideration of the parties' submissions and the Commission's goals in enforcing this Order, the Commission will eliminate the language that gave rise to the possible internal inconsistency and limit the prohibition on refusals to deal (or threats to refuse to deal) to those taken in furtherance of otherwise prohibited conduct.

The Commission Final Order requires NTSP to cease and desist from engaging in the anticompetitive price-fixing conduct alleged in the complaint. Paragraph II of the Order contains the core cease and desist provisions. Paragraph II.A includes provisions that specifically address types of joint activity that the Commission and the Court of Appeals found NTSP used to carry out its unlawful conduct. Paragraph II.A. requires NTSP to cease and desist from:

> A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians with respect to their provision of physician services:

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[2] In its brief on remand, Respondent suggests that Federal Rule of Appellate Procedure 19, "Settlement of a Judgement Enforcing an Agency Order in Part," might apply here. Response of NTSP to Complaint Counsel's Proposal for Order Modification on Remand at 4 n. 11. As Complaint Counsel points out, that rule only applies when an agency brings a proceeding to enforce one of its orders. *See* 20 James Wm. Moore et al., Moore's Federal Practice – Civil § 319.10 (3d ed.)(noting that the rule does not apply in a proceeding to review an agency order). Complaint Counsel's Reply Regarding Order Modification on Remand at 4 n. 3. The Commission did not bring a proceeding to enforce its order in this case, and the Fifth Circuit in this case did not direct the Commission to follow the procedure set forth in Federal Rule of Appellate Procedure 19.

> 1. to negotiate on behalf of any physician with any payor;
>
> 2. to deal, refuse to deal, or threaten to refuse to deal with any payor;
>
> 3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or
>
> 4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent;

The Court of Appeals' first concern with regard to Paragraph II.A.2 is that it appears to be internally inconsistent. The Court stated that "[i]t is . . . difficult to see how NTSP can both deal and refuse to deal with any payor". 528 F.3d at 371. The prohibition in Paragraph II.A.2 against NTSP orchestrating agreements among physicians "to deal" with a payor concerning their provision of physician services also appears in Paragraph II.A.3, which bars NTSP's participation in agreements "regarding any term . . . upon which any physician deals or is willing to deal with any payor." In referencing the term "deal," Paragraphs II.A.2 and 3 are designed to make clear that NTSP's involvement in collective decisions by physician members on whether, or on what terms, to participate in a payor network is prohibited, regardless of whether such an agreement is implemented through acceptance or rejection of a payor offer. The Court of Appeals affirmed this aspect of the Commission's decision. For example, in discussing NTSP's use of member polls on prospective fees and communication of those results to members, the Court of Appeals agreed with the Commission that those activities effectuated an agreement on terms of *dealing* with payors, stating that "[t]he FTC reasonably concluded that the 'physicians anticipated that any individual response [to NTSP's poll] would help to raise or

lower the average fee for the group – an average that NTSP would then use in negotiating with payors.'" 528 F.3d at 363.

It is not necessary to prohibit this same type of conduct in two separate provisions. Accordingly, we have decided to delete the reference to agreements "to deal" from Paragraph II.A.2, as Complaint Counsel has suggested. This modification will eliminate the internal inconsistency in the provision to which the Court of Appeals refers, while leaving intact the prohibition against NTSP involvement in collective decisions by physician members on whether, or on what terms, to participate in a payor network in Paragraph II.A.3. Respondent does not take issue with this proposed modification (other than to argue more generally that the entire provision should be deleted, which we discuss below).

The Court of Appeals' second concern is that Paragraph II.A.2 is overbroad, stating that it could compel NTSP to messenger contracts or become a party to contracts sent to it by payors, regardless of any risks to NTSP, its patients, or members. 528 F.3d at 372. Complaint Counsel argues that the Commission should add the phrase "in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order" to the end of Paragraph II.A.2 to address the Court's concern about the provision otherwise imposing an absolute and unqualified duty to deal. Complaint Counsel states that the proviso will make it clear that the Order will not obligate NTSP to messenger contracts or become a party to contracts sent to it by payors, regardless of any risks to NTSP, its patients, or members, unless it would otherwise amount to a violation of the provisions of the Order. We agree with Complaint Counsel's proposal.

Respondent argues that Complaint Counsel's proposed "in furtherance" clause is ambiguous and "possibly in conflict with the Fifth Circuit's opinion." Response of North Texas Specialty Physicians to Complaint Counsel's Proposal for Order Modification on Remand at 4. We disagree. As the Commission

stated several times in its Opinion, the Final Order does not impose a general obligation to "messenger" all offers or to contract with all payors regardless of any risks to NTSP or its members and patients. Commission Opinion at 39 and n. 60. The "in furtherance" clause makes this point clear, by expressly linking the ban on refusals to deal to the conduct prohibited by the other provisions of Paragraph II. The Order thereafter cannot be interpreted as requiring NTSP to messenger contracts or become a party to contracts sent to it by payors, regardless of any risks to NTSP, its patients, or members, and the Court of Appeals' overbreadth concerns should be satisfied.

Respondent also argues that Paragraph II.A.2 should be deleted in its entirety. We reject that position because a prohibition on refusals to deal is an important aspect of the order. As the Commission found, and the Court of Appeals affirmed, NTSP used threats and refusals to deal to reinforce its collective demands on payors. 528 F.3d 366-67. The Court of Appeals further rejected Respondent's attempt to justify such refusals as mere avoidance of "risky situations." *Id.* at 369 (finding that concerns about risk had no bearing on NTSP's use of refusals to deal with payors to obtain higher fees for member physicians). Those findings justify a prohibition on the use of refusals to deal, or threats to refuse to deal, that are taken in furtherance of conduct that is illegal. Neither the Court of Appeals' remand language, nor any other part of the Court of Appeals opinion, indicates that it believed it necessary to delete Paragraph II.A.2 to cure its overbreadth concern. The Court of Appeals was aware that a similar concern by the ALJ prompted him to strike Paragraph II.A.2, but the Court instructed the Commission to modify the provision and did not direct that it be deleted. 528 F.3d at 372.

We agree with Complaint Counsel's proposal to modify Paragraph II.A.2 by adding the phrase "in furtherance of any

conduct or agreement that is prohibited by any other provision of Paragraph II of this Order."[3]

This matter having been heard by the Commission on remand from the United States Court of Appeals for the Fifth Circuit, the Commission, for the reasons stated above, has determined to modify Paragraph II.A.2 as follows, so as to be consistent with the Fifth Circuit opinion. Accordingly,

IT IS ORDERED THAT Paragraph II.A.2 be, and it hereby is, modified to read as follows:

> "to refuse to deal, or threaten to refuse to deal, with any payor, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;"

and

IT IS FURTHER ORDERED THAT the stay in enforcement of the Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order be, and it hereby is, rescinded.

By the Commission.

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[3] Complaint Counsel offered an alternative proposal to modify Paragraph II.A.2 that makes specific reference to the types of refusals to deal mentioned in the Court of Appeals opinion (refusals to contract with a payor or to messenger payor offers) and also includes the "in furtherance" clause. Complaint Counsel did not endorse this provision and expressed concern that it could create more ambiguity. While Respondent did not have as much objection to this proposal, it maintained its objection to the "in furtherance" language which we find necessary. We agree with Complaint Counsel that its second proposal could create more ambiguity.

Interlocutory Orders, Etc.

IN THE MATTER OF

WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.

Docket No. 9324 Order, October 10, 2008

Order granting complaint counsel and Whole Foods Market's joint motion for entry of a protective order governing confidential material.

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains non-public competitively sensitive information, including trade secrets or other research, development or commercial information, the disclosure of which would likely cause commercial harm to the producing party, or sensitive personal information. "Discovery Material" shall refer to documents and information produced by a party or third party in connection with this matter. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof produced or submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof) the designation "CONFIDENTIAL–FTC Docket No. 9324" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL–FTC Docket No. 9324" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on

which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for the respondent, their associated attorneys and other employees of their law firm(s), provided such personnel are not employees of the respondent or of any entity established by the respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including experts or consultants, provided such experts or consultants are not employees of the respondent, or any entity established by the respondent, or employees of any third party which has been subpoenaed to produce documents or information in connection with this matter, and provided further that each such expert or consultant has signed an agreement to abide by the terms of this protective order; and (e) any witness or deponent who authored or received the information in question, or who is presently employed by the producing party.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided,

however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; Sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Until such time as the Administrative Law Judge rules otherwise, the document or transcript shall be accorded *in camera* treatment. If the motion for *in camera* treatment is denied, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the

confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in another proceeding that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient of the discovery request shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation or hearing of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR § 4.12.

13. The inadvertent production or disclosure of information or documents produced by a party or third party in discovery that is subject to a claim of privilege will not be deemed to be a waiver of any privilege to which the producing party would have been entitled had the inadvertent production or disclosure not occurred, provided the producing party exercised reasonable care to preserve its privilege. In the event of such inadvertent production or disclosure, the party claiming inadvertence shall promptly notify any party that received the information of the claim and the basis for it. After being so notified, the receiving party must promptly return the specified information, and all copies of it, and may not use or disclose the information unless the claim is resolved such that no privilege applies to the information. Nothing in this Order presupposes a determination on the claim of privilege or of reasonable care in preserving privilege if challenged.

14. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

RAMBUS INCORPORATED

Docket No. 9302 Order, October 16, 2008

Order granting the joint motion seeking an order authorizing Rambus to receive excess consideration incurred by contingent contractual rights pursuant to Paragraph 1 of the Commission's March 16, 2007 Stay Order.

ORDER AUTHORIZING RESPONDENT TO RECEIVE EXCESS CONSIDERATION HELD PURSUANT TO CONTINGENT CONTRACTUAL OBLIGATION

Paragraph 1.c. of the Commission *Order Granting in Part and Denying in Part Respondent's Motion for Stay of Final Order Pending Appeal* (March 16, 2007) ("Stay Order") permitted Respondent to incur contingent contractual rights to consideration in excess of that permitted by the Final Order issued in this matter if the consideration were payable to Respondent only upon the issuance by the Commission of an order authorizing Respondent to receive such consideration. The Commission stated in Paragraph 1.c. of the Stay Order that it would issue an order authorizing Respondent to receive such consideration promptly after receiving a mandate from a court of appeals.

On April 22, 2008, the District of Columbia Circuit Court of Appeals ordered that the Commission's orders in this matter be set aside and that this matter be remanded for further proceedings consistent with the Court's opinion. On August 26, 2008, the Court denied the Commission's petition for a rehearing en banc. On September 9, 2008, the Court issued its mandate. Accordingly,

IT IS ORDERED THAT, as used herein, the term "Excess Consideration" shall mean fees, royalties, payments, judgments, and other consideration in excess of that permitted by Paragraphs IV, V.A., VI, and VII of the Final Order; and

IT IS FURTHER ORDERED THAT, within the meaning of Paragraph 1.c. of the Stay Order, Respondent may receive Excess Consideration (and accrued interest) payable pursuant to any contingent contractual obligation.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.

Docket No. 9324 Order, October 20, 2008

Order appointing an Administrative Law Judge for the remainder of the adjudicative proceeding.

ORDER DESIGNATING ADMINISTRATIVE LAW JUDGE

The Federal Trade Commission ("FTC") issued an administrative complaint on June 27, 2007, alleging that Whole Foods Market, Inc.'s agreement to acquire Wild Oats Markets, Inc. violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such an acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act. The Commission retained jurisdiction over the matter pursuant to its authority under the Administrative Procedure Act (APA)[1] and the Commission Rules of Practice.[2] On August 7, 2007 the Commission issued an Order staying the administrative

[1] Section 556(b)(2) of the APA permits the Commission to determine whether the Commission itself, one or more Commissioners, or an administrative law judge appointed under 5 U.S.C. § 3105 of the APA will "preside at the taking of evidence" in adjudications conducted under Section 554 of the APA -- such as this adjudicative proceeding -- and to carry out all the functions permitted by Section 556(c) of the APA and Part 3 of the Commission Rules of Practice. *See* 5 U.S.C. § 556.

[2] Part 3 of the Commission Rules of Practice governs the procedures used in Commission adjudicative proceedings. *See* 16 C.F.R. § 3.1 *et seq*. (2008). Commission Rule 3.42 gives the Commission full discretion to determine whether it should preside over a particular adjudicative proceeding itself; designate one or more Members of the Commission to preside over the proceeding; or refer the proceeding to an administrative law judge. *See* 16 C.F.R. § 3.42.

proceeding pending the proceedings in the collateral federal district court case. On August 8, 2008, the Commission issued an Order rescinding the stay of the administrative proceeding, setting a Scheduling Conference, and designating Commissioner J. Thomas Rosch as the Presiding Official for the Scheduling Conference. On September 8, 2008, the Commission issued an Order Amending Complaint and an Amended Complaint. Commissioner Rosch held the Scheduling Conference on that same day, and on September 10, 2008, the Commission issued a Scheduling Order imposing a fair and timely schedule in this matter. That Order provides, *inter alia*, that the administrative hearing shall begin on February 16, 2009.

The Commission has now determined to designate Acting Chief Administrative Law Judge D. Michael Chappell as the Administrative Law Judge in this matter. Chairman William E. Kovacic and Commissioners Pamela Jones Harbour, Jon Leibowitz, and J. Thomas Rosch are committed, subject to the bounds of reasonableness and fairness, to a just and expeditious resolution of any potential appeal from an Initial Decision filed by the Administrative Law Judge in this matter that may be taken to the full Commission. If such an appeal is filed, the Commissioners commit to make every effort to issue a Commission Opinion and Final Order within approximately 45 days after oral argument.

Accordingly,

IT IS ORDERED THAT Acting Chief Administrative Law Judge D. Michael Chappell be, and he hereby is, designated and appointed to serve as the Administrative Law Judge presiding over the adjudicative proceeding in this matter; and

IT IS FURTHER ORDERED THAT the Commission hereby transfers adjudicative responsibility for this matter to Judge Chappell, in his capacity as Administrative Law Judge presiding over the adjudicative proceeding in this matter.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

AGRIUM, INC.
AND
UAP HOLDING CORPORATION

Docket No. C-4219 *October 28, 2008*

Letter responding to Agrium's petition for approval of a proposed divestiture pursuant to Section 2.41(f) of the Commission's Rules of Practice and Procedure.

LETTER APPROVING DIVESTITURE

Dear Ms. Feinstein:

This is in reference to the Petition of Agrium, Inc. For Approval of Proposed Divestiture to Helena Chemical Company ("Helena"), filed by Agrium, Inc. ("Agrium") and received on August 18, 2008 ("Petition"). Pursuant to the Decision and Order in Docket No. C-4219, Agrium requests prior Commission approval of its proposal to divest certain assets to Helena.

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

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

LINDE AG,
AND
THE BOC GROUP PLC

Docket No. C-4163 Order, November 12, 2008

Letter informing Linde AG that the Monitor certified that the installations at Irwindale and Newark are "in accordance with the parameters established for a Standard Industry Transfill, and therefore (TNSC) is in compliance with that portion of the Order.

LETTER APPROVING RETENTION OF ASSETS

Dear Mr. Prince and Ms. Delbaum:

This letter is to inform Linde AG ("Linde") that it may retain the City of Industry and Richmond, California Escrow Transfills in accordance with Paragraph III.B.6.b. of the Order in the above-referenced matter. Linde also must return to Taiyo Nippon Sanso Corporation ("TNSC") the purchase price, including interest accrued in escrow, for these Escrow Transfills within 3 days following receipt of this letter.

The Commission's approval for Linde to retain the City of Industry and Richmond, California Escrow Transfills is based on the Monitor's August 19, 2008, and October 26, 2008, Certifications, pursuant to Paragraph IV.D.1.c. of the Order, that TNSC has constructed Standard Industry Helium Transfills in Irwindale and Newark, California.

In granting its approval, the Commission has relied upon the information submitted by the Monitor, and has assumed such information to be accurate and complete.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V., CHICAGO BRIDGE & IRON COMPANY AND PITT-DES MOINES, INC.

Docket No. 9300 Order, November 26, 2008

Letter responding to Chicago Bridge & Iron's application for approval of divestiture.

LETTER APPROVING DIVESTITURE

Dear Mr. Aronson:

This letter responds to the September 12, 2008, Application for Approval of Divestiture ("Application") to Matrix Service Company ("Matrix"), which you filed on behalf of Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company (collectively, "CB&I"). The Application requests that the Commission approve the proposed divestiture to Matrix pursuant to the requirements contemplated by the Final Order issued in this proceeding on December 21, 2004, as modified by two subsequent orders issued on August 30, 2005 ("Order"). The divestiture provisions of the Order are not currently in effect due to the automatic stay imposed by operation of Section 5(g)(4) of the Federal Trade Commission Act, as amended, 15 U.S.C § 45(g)(4). The application was placed on the public record for comments until October 15, 2008; one comment was received.

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

with the Application, and has assumed them to be accurate and complete.

The Commission has further determined that achievement of the remedial purpose of the divestiture to Matrix as contemplated by the Order will be fostered by a continued period of service by the Monitor Trustee, Mr. Paul J. Varello, who was retained by CB&I and approved by the Commission on July 20, 2005. Pursuant to the provisions of Paragraph II.C.3 of the Order, the Monitor Trustee's service terminates three (3) business days after the Monitor Trustee has completed a final report and submitted recommendations in connection with a divestiture application presented to the Commission for its approval, or "at such other time as directed by the Commission." Order ¶ II.C.3. The Commission has therefore determined that it would be in the public interest for the Monitor Trustee to continue to serve, or be available for service if needed, for a period of time coextensive with CB&I's provision of transition services to Matrix pursuant to the terms of the divestiture agreement hereby approved by the Commission, including in connection with the transfer of work by CB&I to Matrix under CB&I's existing contracts for Relevant Products, as defined in the Order.

Accordingly, the Commission hereby directs, pursuant to Paragraph II.D. of the Order, that the term of the Monitor Trustee, Mr. Paul J. Varello, shall be extended for an additional two (2) years from the date of divestiture by CB&I to Matrix on the following terms and conditions, and that CB&I shall modify the Monitor Trustee Agreement between it and Mr. Varello that was approved by the Commission on July 20, 2005, in compliance with this directive:

(i) for the initial six (6) month period immediately following the date of divestiture to Matrix, the Monitor Trustee shall continue to serve and to possess all powers, duties, authorities and responsibilities of the Monitor Trustee pursuant to the Monitor Trustee Agreement to monitor CB&I's compliance with the terms of each of the divestiture-related agreements (including all

amendments, exhibits, attachments, agreements and schedules thereto) approved by the Commission and incorporated by reference into the Order pursuant to Paragraph IV.B. of the Order (collectively, "divestiture agreement"), in a manner consistent with the purposes of the Order and in consultation with the Commission's staff; and

(ii) for the remaining eighteen (18) month period, the service of the Monitor Trustee may be reactivated as may be necessary and appropriate to assist Commission staff in determining or securing CB&I's compliance with the terms of the divestiture agreement upon five (5) days written notice by the Commission's staff to CB&I. Within five (5) days of receipt of such notice, CB&I shall take all steps as may be necessary to restore the power and authority of the Monitor Trustee to serve in accordance with the terms of the Monitor Trustee Agreement.

By direction of the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

RED SKY HOLDINGS LP,
AND
NEWPARK RESOURCES INC.

Docket No. 9333 Order, December 10, 2008

Order granting complaint counsel's and respondents' joint motion to dismiss the Complaint.

ORDER DISMISSING COMPLAINT

On October 22, 2008, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that respondents Red Sky Holdings LP ("Red Sky") [through its subsidiary CCS Corporation ("CCS")] and Newpark Resources Inc. ("Newpark") had entered into an acquisition agreement, in violation of Section 5 of the Federal Trade Commission Act; 15 U.S.C. § 45 – for the acquisition by Red Sky of Newpark – and having reason to believe that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act. Complaint Counsel and the Respondents have now filed a Joint Motion to Dismiss Complaint, on the grounds that the Respondents are abandoning the proposed acquisition by Red Sky of Newpark Environmental Services; that Red Sky has withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction; and that the complaint is now moot.[1]

The Commission has determined to dismiss the Administrative Complaint without prejudice, consistent with both Commission precedent and the current posture of this case. For

[1] *Joint Motion to Dismiss Complaint* (November 25, 2008) ("Joint Motion"), *available at* http://www.ftc.gov/os/adjpro/d9333/081125jointmodismisscmplt.pdf, at 1.

example, in *Inova Health System Foundation et al.*, the Commission recently issued an order dismissing the complaint on the grounds that the Respondents had abandoned the transaction and had withdrawn their Hart-Scott-Rodino Notification and Report Forms.[2] The Commission noted that

> the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation. In particular, the Respondents have publicly announced that they have abandoned the proposed merger at issue. Moreover, the Respondents have withdrawn the Hart-Scott-Rodino Notification and Report Forms they filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.[3]

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[2] *In the Matter of Inova Health System Foundation, and Prince William Health System, Inc.*, *Docket No.* 9326, Order Dismissing Complaint (June 17, 2008), available at http://www.ftc.gov/os/adjpro/d9326/080617orderdismisscmpt.pdf; *accord, In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company, Docket No. 9322*, Order Dismissing Complaint (January 31, 2008) (Public Version), available at http://www.ftc.gov/os/adjpro/d9322/080204complaint.pdf; *In the Matter of Swedish Match North America Inc., and National Tobacco Company, L.P., Docket No. 9296 (Swedish Match)*, Order Dismissing Complaint (January 4, 2001), available at http://www.ftc.gov/os/2001/01/swedishdismisscmp.htm; *In the Matter of H..J. Heinz Company, Milnot Holding Corporation, and Madison Dearborn Capital Partners, L.P., Docket No. 9295 (H..J. Heinz)*, Order Dismissing Complaint (December 4, 2001), available at http://www.ftc.gov/os/2001/12/heinzorder.pdf.

[3] *Inova Health System Foundation*, *supra* note 2, at 2.

Similarly, in this matter, the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation. In particular, the Respondents have announced that they are abandoning the proposed acquisition at issue, and Red Sky has withdrawn its Hart-Scott-Rodino Notification and Report Forms filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED THAT the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

REED ELSEVIER NV,
REED ELSEVIER PLC,
REED ELSEVIER GROUP PLC,
REED ELSEVIER INC.,
CHOICEPOINT INC.,
CHOICEPOINT SERVICES INC.,
AND
CHOICEPOINT GOVERNMENT SERVICES LLC

FTC File No. 081 0133 *Order, December 10, 2008*

Letter approving the appointment of the Interim Monitor and the November 18, 2008 Interim Monitor Agreement entered into between Mr. Pettit and the Respondents.

LETTER APPROVING MONITOR AGREEMENT

Dear Mr. Lipstein:

This letter notifies the proposed Respondents in the above-referenced matter that the Federal Trade Commission has approved the appointment of Mitchell S. Pettit of MSP Strategic Communications, Inc., as the Interim Monitor, and has approved the Interim Monitor Agreement by and among Mr. Pettit and Respondents dated November 18,2008, pursuant to Paragraph 18 of the Agreement Containing Consent Order and, when made final, Paragraph III of the Decision and Order, issued in the above-referenced matter.

In according its approval, the Commission has relied upon the information submitted and representations made by Respondents and has assumed them to be accurate and complete.

By direction of the Commission.

INTERIM MONITOR AGREEMENT

This Interim Monitor Agreement ("Monitor Agreement") entered into this 10th day of November, 2008 by and among Reed Elsevier PLC, Reed Elsevier NV, Reed Elsevier Group plc, and Reed Elsevier, Inc. (collectively "Reed Elsevier"); and ChoicePoint Inc. and ChoicePoint Services Inc. (collectively "ChoicePoint") (where "Respondents," as used herein, means Reed Elsevier and ChoicePoint, individually and collectively); and Mitchell S. Pettit ("Mr. Pettit") provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission"), *In the Matter of Reed Elsevier*, has accepted for public comment an Agreement Containing Consent Order ("Consent Agreement"), incorporating a Decision and Order ("Order") with Respondents, which, among other things, requires Respondents to divest certain defined assets pursuant to the Membership Interest Purchase Agreement By And Among Thomson Reuters (Legal) Inc., ChoicePoint Government Services LLC, ChoicePoint Services Inc., ChoicePoint Inc., Reed Elsevier Inc. and Thomson Reuters U.S. Inc., dated August 29, 2008, and those Ancillary Agreements referenced therein (collectively, the "Remedial Agreement"), and provide for the appointment of one or more Interim Monitors to ensure that Respondents comply with their obligations under the Order and the Remedial Agreement;

WHEREAS, the staff of the Commission has appointed Mr. Pettit as such monitor (the "Interim Monitor") pursuant to the Order to monitor Respondents' compliance with the terms of the Consent Agreement and Order and with the Remedial Agreement referenced in the Order, and Mr. Pettit has consented to such appointment;

WHEREAS, the staff of the Commission on November 12, 2008, notified Respondents of the selection of Mr. Pettit as the Interim Monitor, and Respondents on November 13, 2008 agreed to the selection of Mr. Pettit, and are executing this agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purpose of the Order;

WHEREAS, this Monitor Agreement, although executed by the Interim Monitor and Respondents is not effective for any purpose, including but not limited to imposing rights and responsibilities on Respondents or the Interim Monitor under the Order, until it has been approved by the Commission; and

WHEREAS, the parties to this Monitor Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Order.

2. The Interim Monitor shall have all of the powers and responsibilities conferred upon the Interim Monitor by the Order.

3. Respondents hereby agree that Respondents will fully comply with all terms of the Order requiring them to confer all rights, powers, authority and privileges upon the Interim Monitor, or to impose upon themselves any duties or obligations with respect to the Interim Monitor, to enable the Interim Monitor to perform the duties and responsibilities of the Interim Monitor thereunder.

4. Respondents further agree that:

   a. they will use their commercially reasonable best efforts to provide the Interim Monitor with prompt notification of significant meetings, including date, time and venue, scheduled after the execution of this Monitor Agreement, relating to the Service Supply Agreement and Transition Services Agreement and such meetings may be attended by the Interim Monitor or his representative, at the Interim Monitor's option, or at the request of the Commission or staff of the Commission;

   b. they will provide the Interim Monitor the minutes of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of the Respondents;

   c. they will provide the Interim Monitor with copies of all reports submitted to the Commission pursuant to the Order, simultaneous with the submission of such reports to the Commission, for the duration of the Interim Monitor's term under this Agreement;

   d. they will, subject to any demonstrated legally recognized privilege, grant the Interim Monitor full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets; and

   e. they will cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order.

5. Respondents shall promptly notify the Interim Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between the Commission and Respondents related to the Service Supply Agreement and Transition Services Agreement, together with copies of such communications.

6. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

7. Respondents shall pay the Interim Monitor, in accordance with the fee schedule attached hereto as Confidential Appendix A, for all reasonable time spent in the performance of the Interim Monitor's duties and responsibilities, including all monitoring activities, all work in connection with the negotiation and preparation of this Monitor Agreement, all work in the nature of final reporting and file closure, and all reasonable and necessary travel time.

   a. In addition, Respondents will pay (i) all out-of-pocket expenses reasonably incurred by the Interim Monitor in the performance of the Interim Monitor's duties and responsibilities, including any international telephone calls and any auto, train or air travel in the performance of the Interim Monitor's duties, and (ii) all fees and disbursements reasonably incurred by such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

   b. The Interim Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

8. The Interim Monitor shall maintain the confidentiality of all information provided to the Interim Monitor by Respondents. Such information shall be used by the Interim Monitor only in connection with the performance of the Interim Monitor's duties pursuant to this Monitor Agreement. Such information shall not be disclosed by the Interim Monitor to any third party other than:

a. persons employed by, or working with, the Interim Monitor under this Monitor Agreement, in which case such persons shall be informed of, and agree in writing to abide by, the confidentiality obligations applicable to the Interim Monitor, in accordance with Paragraph 12, below, or

b. persons employed at the Commission and working on this matter.

9. The Interim Monitor shall maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom confidential information related to this Monitor Agreement has been disclosed.

10. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

11. Upon termination of the Interim Monitor's duties under this Monitor Agreement, the Interim Monitor shall promptly return to Respondents all material provided to the Interim Monitor by Respondents and shall destroy any material prepared by the Interim Monitor that contains or reflects any confidential information of Respondents. Nothing herein shall abrogate the Interim Monitor's duty of confidentiality.

12. To the extent that the Interim Monitor wishes to retain any employee, agent, consultant or any other third party to assist the Interim Monitor in accordance with the Order, the Interim Monitor shall ensure that, prior to being retained, such persons execute a confidentiality agreement in a form agreed upon by the Interim Monitor and Respondents.

13. Nothing in this Monitor Agreement shall require Respondents to disclose any material or information that is subject to a legally recognized privilege or that Respondents are prohibited from disclosing by reason of law or an agreement with a third party.

14. Each party shall be reasonably available to the other to discuss any questions or issues that either party may have concerning compliance with the Order as they relate to Respondents.

15. Respondents hereby confirm their obligation to indemnify the Interim Monitor and hold the Interim Monitor harmless in accordance with and to the extent required by the Order. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any

liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

16. Upon this Monitor Agreement becoming effective, the Interim Monitor shall be permitted, and Respondents shall be required, to notify all current Commission-approved Acquirers and potential future Acquirers with respect to his appointment as Interim Monitor.

17. In the event of a disagreement or dispute between Respondents and the Interim Monitor concerning Respondents' obligations under the Order, and in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the Commission's Compliance Division to resolve this issue.

18. This Monitor Agreement shall be subject to the substantive law of the State of New York (regardless of the choice of law principles of New York or those of any other jurisdiction).

19. This Monitor Agreement shall terminate when the last obligation under Service Supply Agreement and Transition Services Agreement has been fully performed; provided, however, that the Commission may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purposes of the Order.

20. In the event that, during the term of this Monitor Agreement, the Interim Monitor becomes aware that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by the Interim Monitor of any of his duties under this Monitor Agreement, the Interim Monitor shall promptly inform both Respondents and the Commission of such conflict or potential conflict.

21. In the performance of his functions and duties under this Monitor Agreement, the Interim Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his or her own business affairs.

22. It is understood that the Interim Monitor will be serving under this Monitor Agreement as an independent contractor and that the relationship of employer and employee shall not exist between Interim Monitor and Respondents.

23. This Monitor Agreement is for the sole benefit of the Parties hereto and their permitted assigns and the Commission, and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.

24. This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces any and all prior agreements or understandings, whether written or oral.

25. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, facsimile (with acknowledgment of receipt of such facsimile having been received), or electronic mail, to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party):

If to the Interim Monitor, to:

Mitchell Pettit

Telephone:

Email:

If Respondents, to:

LexisNexis Risk & Information Analytics Group
Attention: Michael C. Lamb. VP & Legal Director - LexisNexis Risk & Information Analytics Group
Telephone:

Facsimile:
Email:

With copy to:

Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595

Attention: Robert A. Lipstein
Telephone: 202-624-2630 (work)

Facsimile: 202-628-5116
Email: RLipstein@crowell.com

If to the Commission, to:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.

Washington, DC 20580

Attention: Secretary
Telephone: (202) 326-2514
Facsimile: (202) 326-2496

With copy to:

Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Attention: Assistant Director for Compliance
Telephone: (202) 326-2526
Facsimile: (202) 326-3396

26. This Monitor Agreement shall not become binding until it has been approved by the Commission.

27. This Monitor Agreement may be signed in counterparts.

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

Reed Elsevier, Inc.

Andrew Prozes
Reed Elsevier, Inc.

INTERIM MONITOR

Mitchell Pettit

Interlocutory Orders, Etc.

IN THE MATTER OF

WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.

Docket No. 9324 Order, December 15, 2008

Order taking Whole Foods Market's motion to stay the proceeding under advisement.

ORDER

On December 3, 2008, Respondent filed a Motion To Stay the Proceeding, To Amend the Scheduling Order, and to Certify the Questions to the Commission for Determination in this matter ("Motion"). On December 8, 2008, Complaint Counsel filed an Opposition to that Motion. On December 11, 2008, the Administrative Law Judge issued an Order certifying Respondent's Motion to the Commission without a recommendation. The Commission has taken the Motion, the Opposition, and the Order under advisement; no further briefing is needed; and the Commission will shortly issue an appropriate Order.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

WHOLE FOODS MARKET, INC.
AND
WILD OATS MARKETS, INC.

Docket No. 9324 Order, December 19, 2008

Order granting Whole Foods Market's motion in part and denying in part.

ORDER AMENDING SCHEDULING ORDER AND DENYING RESPONDENT'S MOTION TO STAY PROCEEDING

Respondent Whole Foods Market, Inc. has filed a Motion to stay this administrative proceeding until the conclusion of the federal district court remand proceeding, and to amend the September 10, 2008 Scheduling Order to postpone the commencement of the administrative hearing until no earlier than September 14, 2009. The Commission has determined to deny Respondent's Motion, but to amend the Scheduling Order in certain respects.

The Scheduling Order currently provides that the administrative trial will begin on February 16, 2009. Respondent argues that (1) a stay is warranted because the remand proceeding "will result in findings of fact regarding the actual effects of the Whole Foods Market/Wild Oats merger and other important issues that necessarily will affect the conduct of the administrative proceedings" (Motion at 1); and (2) without a seven-month extension, it "will be unable to complete adequate third party discovery in advance of expert reports and the administrative hearing." *Id.* at 5. Although we find that Whole Foods has failed to adequately justify staying these proceedings or delaying trial for seven months, we nevertheless will delay the trial until April 6, 2009.

First, although the current rules allow for a stay of administrative proceedings while a collateral federal court proceeding is ongoing (see Rule 3.51), such a decision is discretionary. The circumstances here do not justify a stay. The Court of Appeals in reversing the district court's denial of a preliminary injunction determined that the Commission had established a likelihood of success on the merits. *Federal Trade Commission v. Whole Foods Market Inc.*, No. 07-5276, 2008 U.S. App. LEXIS 24092 at *32, *54 (Tatel, J.); *id*. at *10, *30 (Brown J.). As a result, the decision on remand will not determine whether the transaction is illegal.

In contrast, the district court's original decision denying a preliminary injunction effectively prevented any finding that the transaction was illegal. The district court found that the Commission had established no likelihood of success on the merits. If that finding– that there was no likelihood of success on the merits – was correct, it would have been virtually impossible for the Commission to find a violation, and the Commission, in all likelihood, would have dismissed this action. Therefore, for prudential reasons, the Commission did not lift the stay until the Court of Appeals reversed that district court's finding. The posture of the federal court action no longer supports staying this proceeding.

Three prudential reasons justify proceeding with this action. If the transaction is anticompetitive, there could be ongoing consumer harm. Moreover, should the Commission determine that the transaction is illegal, the longer it takes to make the decision, the more difficult it will be to fashion effective relief that would protect consumers. Although the Commission believes certain preliminary relief - such as a hold separate order - will help protect a potential remedy, the Commission should still attempt to resolve this matter as expeditiously as possible. Finally, should the district court grant some form of preliminary relief, resolving this matter quickly limits the intrusiveness of such a remedy.

In addition, Whole Foods is speculating on how the federal court action will proceed on remand. It is not obvious that there will be significant overlap and repetition between the two actions. The district court action is not a determination on the merits. Further, the district court weighs equities related to preliminary relief that are different than the factors related to the need for permanent relief. Although Whole Foods claims that the findings in the federal court action will be conclusive (or nearly so) on this matter, that argument is premature.

Second, with regard to Respondent's separate request for an extension of the administrative trial until September 14, 2009, the motion rests entirely on its unsupported assertion that, absent this extension, it will be unable to conduct necessary third-party discovery. Respondent claims that, in order to defend claims pertaining to the 29 separate geographic markets at issue in this case, it requires compliance with 96 third party subpoenas it has issued, but only 53 third parties have even partially complied with the subpoenas, and it cannot take the depositions of any third party until that compliance has occurred. Motion at 5-6. A party who encounters a problem in this respect is expected promptly to call the problem to the court's attention. The court normally either orders prompt compliance with the subpoena, or, if the subpoena is overly broad or unduly burdensome, the court modifies it and sets a date for the deposition. Respondent's motion makes no showing that any of this occurred. Among other things, Respondent has made no showing (by affidavit or otherwise) that it needed to issue 96 third party subpoenas to begin with, that a problem even exists with any of the 96 subpoenas, much less with all of them, or that it has taken any steps to attempt to resolve these problems.

Although it appears that Respondent has not yet taken a single third party deposition to date, it has failed to show good cause for not having done so. As Commissioner Rosch explains in his dissent, it appears that Part 11(e) may be creating some problems with scheduling third party depositions. The Commission will delete Part 11(e) from the scheduling order.

It is certainly true that the current discovery schedule is a demanding one. Notwithstanding that, when we issued the scheduling order in September, we believed that this schedule would be a feasible one. The Commission has made it clear – in issuing the September scheduling order and in its recent actions to revise its Rules of Practice relating to Part 3 proceedings – that it is committed to resolving adjudicative proceedings expeditiously as is required by law. We also recognize that this case is in a unique procedural posture because at the time it was filed there was no foreshadowing that the Commission would revise its rules to expedite proceedings, the transaction has since been consummated, and this administrative litigation was stayed for a year. Under these unique circumstances, we believe that the reasons for expedited deadlines do not apply with quite the same force as they will in future cases. Thus, although we find that Respondent has failed to support its assertion that a lengthy seven-month delay in the hearing is warranted, we will extend the commencement of the administrative hearing to April 6, 2009, with the attendant deadlines to be adjusted accordingly.[1] We wish to emphasize, however, that we will not lightly depart from this schedule, and if Respondent believes that any further extension is required it will need to make a particularized showing, with factual support rather than mere unsupported assertions. Accordingly,

IT IS ORDERED THAT Respondent's request to stay this administrative proceeding is **DENIED;**

IT IS FURTHER ORDERED THAT Respondent's request to amend the Scheduling Order to postpone the commencement of the administrative hearing until no earlier than September 14, 2009 is **DENIED**;

[1] With the new hearing date – which is approximately eight months from the date that the Commission lifted the stay in these proceedings, pretrial discovery and preparation will be longer than the roughly five months that the federal district courts allowed in the *Oracle* and *Microsoft* cases. *See*, *U.S. v. Oracle Corp.*, 331 F. Supp.2d 1098 (N.D. Cal. 2004); *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

IT IS FURTHER ORDERED THAT Part 9 of the September 10, 2008 Scheduling Order is amended in the following respects:

1. The Commencement of Hearing will occur on Monday, April 6, 2009, at 10:00 a.m. in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW Washington, D.C.; and

2. The deadlines specified in Part 9, beginning with December 19, 2008, are changed as follows:

   a. December 19, 2008 is changed to February 4, 2009;

   b. January 5, 2009 is changed to February 19, 2009;

   c. January 15, 2009 is changed to March 2, 2009;

   d. January 22, 2009 is changed to March 9, 2009;

   e. January 27, 2009 is changed to March 16, 2009;

   f. January 30, 2009 is changed to March 19, 2009;

   g. February 4, 2009 is changed to March 24, 2009; and

   h. February 11, 2009 is changed to March 31, 2009; and

IT IS FURTHER ORDERED THAT Part 11(e) of the September 10, 2008 Scheduling Order is deleted.

By the Commission, Commissioner Rosch dissenting.

DISSENTING STATEMENT OF COMMISSIONER J. THOMAS ROSCH

I respectfully dissent from this ruling. Respondent's motion is based on three premises that are unsupported and unsound.

The first premise of the motion is that the remand proceeding "will result in findings of fact regarding the actual effects of the . . . merger and other important issues that necessarily will affect the conduct of the administrative proceeding." Memorandum in Support of Motion at 1, 4. That is incorrect. The first prong of this premise – that the remand proceeding "will result in findings of fact regarding the actual effects of the merger"– is apparently based on the assertion that "there was no opinion of the court" in the D.C. Circuit Court of Appeals proceeding because there were multiple panel opinions. Memorandum in Support of Motion at p.3. That assertion is in turn apparently based on the concurring opinions of two of the nine judges who participated in denying Respondent's motion for en banc review of the panel decision. *See* attached rehearing en banc order. However, the other seven participating judges did not adopt that view of the law. *Id.* To the contrary, as Judge Kavanaugh pointed out in footnote 8 of his dissent to the panel decision, the Marks principle, which is operative in both the jurisprudence of the Supreme Court and the Circuit Court, treats as binding precedent all explicit and implicit agreements between the authors of the multiple opinions. *Federal Trade Commission v. Whole Foods Market, Inc.*, 2008 U.S. App. LEXIS 24092 at *91, n.8 (Kavanaugh, J.). Judge Kavanaugh's dissenting opinion further pointed out that a majority of the panel (Judge Brown and Judge Tatel) agreed that the remand court is not to "make findings of fact regarding the actual effects of the merger." *Id.* at *85 (Kavanaugh, J.). That is confirmed by the opinions of Judge Brown and Judge Tatel themselves. *Id.* at *29 (Brown, J.), *54 (Tatel, J.) Thus, as was pointed out in our denial of Respondent's motion to recuse the Commission (p.2), insofar as the remand court considers the merits at all, it cannot make "findings of fact regarding the actual effects of the merger" that will affect the conduct of the plenary trial.

The motion also fails to support the second prong of the premise – that the remand proceeding will result in "findings of fact regarding . . . other important issues that necessarily will affect the conduct of the administrative proceeding." Apparently, those "other important issues" have to do with the "balancing of equities mandated by the D.C. Circuit." Memorandum in Support of Motion at p.4. Again, however, that is a function to be performed by the remand court in the preliminary injunction proceeding; whatever "findings of fact" the remand court may make on that score will not necessarily affect the conduct of the plenary trial.

The second premise of the motion is that "staying the Commission's challenge to this transaction, which was consummated over 15 months ago, will have no adverse effect on the public interest." Memorandum in Support of Motion at pp. 1, 2, 4-5. That premise is based on the same contentions Respondent made in claiming in the Circuit Court of Appeals proceeding that the matter was moot. Specifically, there, as here, Respondent argued that the fact that it had closed the transaction and that the Commission had stayed the plenary trial made it impossible for the Commission to order any meaningful relief after a plenary trial. Mootness Motion at pp. 2-4; Reply at pp. 1-3, 9. In this instance too, the majority of the panel (Judge Brown and Judge Tatel) agreed that the mootness motion and its premises were without merit. The motion does not demonstrate otherwise. Indeed, the threat that Respondent may take steps to moot the matter underscores the public interest in moving this matter to a conclusion expeditiously.

Finally, the third premise of Respondent's motion is that it needs until September 14, 2009 to prepare adequately for the plenary trial. Memorandum in Support of Motion at pp. 1, 2. This premise is supported by Respondent's assertions that in order to defend claims pertaining to the 29 separate geographic markets at issue in this case, it needs compliance with 96 third party subpoenas it has issued, and it cannot take the depositions of any

third party until that compliance has occurred. Memorandum in Support of Motion at pp.2, 5-6.

Respondent's motion does correctly assert that the scheduling order requires compliance with third party subpoenas before third party depositions are taken. More specifically, paragraph 11e. of the order provides that:

> [n]o deposition of a non-party shall be scheduled between the time of production in response to a subpoena duces tecum and three (3) days after copies of the production are provided to the non-issuing party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, the documents are produced at the time of the deposition, or as agreed to by all parties involved.

This is a standard provision in federal district court scheduling orders. It is designed to make third party depositions more useful by providing that the third party's documents will be produced first. A party who encounters a problem in this respect is expected promptly to call the problem to the court's attention, and the court normally either orders prompt compliance with the subpoena, or, if the subpoena is overly broad or unduly burdensome, modifies it and sets a date for the deposition.

Respondent's motion makes no showing that any of this occurred. Specifically there is no showing that Respondent needed to issue 96 third party subpoenas to begin with, or if it did, that Respondent promptly called any problem created by paragraph 11e. in those circumstances to the attention of the administrative law judge or the Commission. Indeed, there is no showing that a problem even exists with any of the 96 subpoenas, much less with all of them. There is no showing with respect to the status of compliance respecting any of the 96 subpoenas. To the contrary, it appears Respondent has not yet taken a single third

party deposition to date, and it has failed to show good cause for not having done so.

Under these circumstances, most, if not all, federal judges would simply deny the motion. Certainly they would not grant a 45 day extension of time to complete discovery or continue the hearing date for 49 days, as this ruling does. At most, the ruling should be limited to deleting paragraph 11e (as the majority has done), extending the discovery deadline for 15 days and continuing the hearing date for the same amount of time. Moreover, the ruling should make it clear that no further extensions or continuances will be granted.

For these reasons, I respectfully dissent.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

WEST ASSET MANAGEMENT, INC.

FTC File No. 072 3006 Decision, July 2, 2008

RESPONSE TO WEST ASSET MANAGEMENT, INC.'S ("WAM") REQUEST FOR REVIEW OF DENIAL OF PETITION TO LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Berg:

This letter advises you of the Commission's disposition of West Asset Management, Inc.'s ("WAM") Request for Review of Denial of Petition to Limit Civil Investigative Demand ("Request for Review") issued in conjunction with an investigation of WAM by the Federal Trade Commission (hereinafter "FTC" or "Commission"). For the reasons stated below, the Letter Ruling Denying WAM's Petition to Limit (Apr. 18, 2008) ("Letter Ruling") is affirmed.

I. Background and Summary

The present investigation seeks to determine whether there is any reason to believe that WAM, a debt collection firm, may have violated either the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*., or the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq*. The Commission issued a Civil Investigative Demand ("CID") to WAM on August 13, 2007. On November 5, 2007, WAM filed a Petition to Limit Civil Investigative Demand ("Petition to Limit"). WAM requested that the CID be limited "because: (1) the requests are unduly burdensome and can be reasonably limited without adversely impacting the FTC's investigation; and (2) the requests require the disclosure of confidential and personally identifiable consumer and client information that is not relevant in any manner to the FTC's investigation." Petition to Limit at 1.

After Commissioner Harbour issued the Letter Ruling denying the Petition to Limit, WAM filed its Request for Review on April 25, 2008. WAM's Request for Review questions the denial of its Petition to Limit, and supplements and clarifies some of the facts supporting its burdensomeness claim by submitting a second declaration from its Associate Counsel for Compliance, Nancy Van Hoven, and a declaration from its Senior Vice President for Systems and Technology, Michael Regalia.

As Commissioner Harbour noted in the Letter Ruling, WAM's argument that it must be permitted to redact non-privileged, confidential third-party information from its CID responses bears directly on the extent of the burden WAM claims will be imposed on it by CID compliance. Letter Ruling at 3. We therefore address redaction of non-privileged information first.

II. WAM Is Not Entitled to Redact Non-Privileged Information

In its Request for Review, WAM renews its objection to Interrogatories 8, 22, and 26 and Document Requests 21-25 and 27. WAM argues that it should be entitled to review and redact "confidential and personal identifying information" from its CID responses. Petition to Limit at 22.[1] In support of this argument, WAM submits that this information is not relevant to the staffs

[1] The Request for Review also stated that the Letter Ruling compels WAM to produce privileged attorney-client and work product information. Request for Review at 2-3. WAM specifically faults the Letter Ruling for failing to distinguish between privileged information and confidential information. WAM's claim is wide of the mark for two reasons. First, the CID does not require WAM to produce any privileged information. CID ¶ II.B. ("Claims of Privilege) (permitting redaction of such materials and requiring the service of a specified form of privilege log). Second, the Petition to Limit did not seek leave to delete privileged information, only several varieties of third-party confidential information. Accordingly, the fact that the Letter Ruling failed to make an unrequested redaction distinction, *see* Request for Review at 2, is hardly surprising. Further, WAM's unsupported speculation that the Letter Ruling "intended to accomplish a punitive purpose" is beyond the limits of legitimate advocacy. Request for Review at 3.

investigation, and that the lack of need for the information should be weighed against the harm of disclosure. *See, e.g.*, Request for Review at 11.[2] WAM's objections fail on several grounds.

The Commission is entitled to information if it is "reasonably relevant" to the investigation. *See, e.g., Fed. Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) ("It is well established that a district court must enforce a federal agency's investigative subpoena if the information is reasonably relevant. . . or, put differently, not plainly incompetent or irrelevant to any lawful purpose. . . and not unduly burdensome to produce.") (citations and internal quotation marks omitted). Like Commissioner Harbour, we find that the information sought by these specifications, including any non-privileged confidential information, is reasonably relevant to the investigation of WAM's debt collection practices. Letter Ruling at 2 n.4.

In many cases the "confidential and personal identifying information" WAM seeks to redact is not only relevant, it is often the most relevant evidence sought by the CID specification. For example, Interrogatory 26 asks WAM to "identify the name, address, and telephone number of each consumer from whom WAM has received a complaint, directly either from the consumer or from a third party on behalf of the consumer."[3] If the contact information for the individuals who complained were redacted as confidential, staff would not be able to contact those individuals and the investigation would be hampered materially. The complementary Document Request, Document Request 23, required WAM to provide the complete consumer file for each

[2] In addition to consumer and creditor information, WAM proposes to redact "other confidential information of little conceivable value to the investigation". *Id.*

[3] WAM objected to this demand for consumers' names, addresses, and telephone numbers on the basis of an unspecified privilege and on the basis that the interrogatory called for confidential personal information. Petition to Limit, Exhibit F, WAM Non-Public Response to August 13, 2007 CID (undated) at 23-24. WAM does not specify the legal grounds for either objection.

person who complained – information that, again, is highly relevant to determining whether the company's practices violated the FDCPA and would be significantly less useful if it could not be matched to the actual consumer who complained. Similarly, Interrogatory 22 asks that WAM "identify all client-creditors who have instructed WAM not to file suit or commence litigation to collect a debt." A "threat to take any action that cannot legally be taken or that is not intended to be taken" violates Section 807(5) of the FDCPA,[4] so this information – combined with complaint information that a threat to take legal action was made on behalf of a particular creditor – would enable staff to determine when any threat to take legal action to collect a debt on behalf of a particular client creditor would constitute a violation.[5] If the creditor's identity were redacted and replaced with a coded identifier, staff would not be able to verify whether complaints obtained from sources other than WAM (such as the Better Business Bureau or the Commission's own complaint database) about threats by WAM to take legal action on behalf of that creditor were empty threats, thus violating the FDCPA.

WAM's belief that it is entitled to withhold production of responsive documents and material so that it can redact non-privileged information is misplaced. First, WAM objects that disclosure of information that identifies its clients would cause "substantial economic harm to [its] competitive position." Petition at 28 (citing *Diamond State Ins. v. Rebel Oil Co., Inc*., 157 F.R.D. 691, 697 (D. Nev. 1994)). The court in *Diamond State* did note that under Fed. R. Civ. P. 45 a federal court may limit or quash a subpoena requesting confidential commercial information which, if disclosed, would cause substantial economic harm to the competitive position of the entity from whom the information was obtained. The court went on to hold, however, that the subpoenaed party's claim was "unsubstantiated" and that a "generalized, self-serving, conclusory assertion of protection or

[4] 15 U.S.C. § 1692e(5).

[5] *See also* Letter Ruling at 3 n.5.

privilege is without merit." *ld.* at 698. Further, WAM cites no authority that extends this discovery rule to the investigatory process of the FTC.

WAM's claim of substantial harm is inadequate for the same reasons. Neither WAM's Petition nor its Request for Review demonstrate how disclosure of its clients' names to the Commission – which is required to afford it substantial confidentiality protections[6] – would cause "substantial economic and competitive harm" to WAM. At most, WAM indicates that it entered a non-disclosure agreement with at least one client that places certain restrictions on WAM's disclosure of that clients relationship with WAM. WAM, however, does not cite any case law suggesting that a company can shield information from a federal inquiry by entering a non-disclosure agreement with a private party, even if its contract, properly construed, so provided.[7] The district court in *Fed. Trade Comm'n v. Invention Submission Corp*., 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353-54 (D.D.C. 1991), rejected precisely this argument, holding that Invention Submission Corp. must produce documents demanded by the Commission even if so doing would breach its confidentiality agreements with third parties. The court recognized that "any other state of affairs would undermine the Commission's mandate to investigate unfair business practices and allow any organization under investigation to escape scrutiny simply by protecting all information under confidentiality agreements." *Id*. at 65,353; Letter Ruling at 5. Moreover, the Petition does not demonstrate how producing information in

[6] *See, e.g.*, 15 U.S.C. §§ 46(f) (protecting trade secrets and confidential financial or commercial information), 57b-2(b) (protecting documents obtained under compulsory process in a law enforcement investigation). *See also* 16 C.F.R. § 4.10; 5 U.S.C. § 552(b)(7)(C) (provision of the Freedom of Information Act exempting from mandatory disclosure records or information compiled for law enforcement purposes, to the extent that production could reasonably be expected to constitute an unwarranted invasion of personal privacy).

[7] *See* Letter Ruling at 6 n.l3.

response to a lawful demand of a federal agency – which is expressly contemplated in the agreement excerpted by WAM, Petition to Limit, Exhibit Y, ¶ IV.C. – would lead to substantial economic and competitive harm for WAM.[8]

Second, WAM objects to producing unredacted documents and material on the basis that various statutes relating to particular types of data place restrictions on disclosure of that data, suggesting that if WAM were to provide the information responsive to the CID it would be violating some other law. WAM's primary argument relates to protected health information that it may have received from health care clients that would be protected under the Health Information Portability and Accountability Act of 1996.[9] As a preliminary matter, any health care client, as a covered entity under HIPAA, would be required to ensure that disclosures made to a business associate, such as WAM, for purposes of obtaining payment involved the minimum necessary disclosure. *See* 45 C.F.R. §§ 164.502(b), 164.5l4(d). Just as WAM apparently needed protected health information for its collection purposes, the context for the debt is relevant to the Commission's investigation of WAM's debt collection practices and is an integral part of the consumer's file.[10] WAM implicitly

[8] WAM argues that WAM would be prejudiced in that it would have to disclose the FTC's investigation to its clients. Petition at 28; Van Hoven Declaration (Nov. 5, 2007) at ¶¶ 33-35 (substantial and irreparable commercial and competitive harm would result to WAM because WAM would have "to provide notification. . . to everyone of WAM's clients of the FTC's preliminary non-public investigation"). However, the non-disclosure agreement WAM cites required WAM to have notified its client of the CID "promptly upon [its] receipt" in August 2007. Petition to Limit, Exhibit Y, ¶ IV.C. In any event, as pointed out in the Letter Ruling, the existence of the investigation is now a matter of public record. Letter Ruling at 6 (citing 16 C.F.R. § 2.7(g)).

[9] Pub. L. 105-34 (Aug. 21, 1996, *as amended by* Pub. L. 105-33 (Aug. 5, 1997) *and* Pub. L. 105-34 (Aug. 5, 1997)) ("HIPAA").

[10] Under 45 C.F.R. § 160.103, protected health information includes individually identifiable health information that is created by a health care provider, health plan, employer, or health care clearinghouse and that relates to the past, present, or future payment for the provision of health care to an individual.

concedes as much by offering to turn over this information if Commission staff shows a "specifically identified and justifiable need for the information – an analysis that should be performed on case-by-case basis." Request for Review at 7. Like the Letter Ruling, the Commission finds that HIPAA regulations allow protected health information to be disclosed to Commission staff in response to a CID where, as here, any protected health information is relevant and material to a legitimate law enforcement inquiry, the Commission's requests are specific and limited in scope to the extent practicable, and de-identified information – as noted above – would not suffice. 45 C.F.R. § 164.512(f); Letter Ruling at 5. *See also* 45 C.F.R. § 164.512(e)(1) (exceptions for production of information responsive to administrative order or subpoena, including information responsive to an order of a court or administrative tribunal).[11]

WAM argues that other statutes or regulations may somehow be implicated in addition to HIPAA, but does not identify which statutory provisions apply or how they would apply to WAM. Most of the statutes, however, do not on their face apply to debt collectors such as WAM. Petition to Limit at 21 (citing 18 U.S.C. § 2702(a)(3) – disclosure of information by communications providers, 20 U.S.C. § 1232g – disclosure of information by educational institutions, 42 U.S.C. § 1320d-2 – disclosure of information by health care plans, providers and clearinghouses).

[11] The Commission fully understands that preserving the confidentiality of consumers' protected health information is important, and the Commission does not take the protection of that information lightly. Commission staff routinely handles highly sensitive information. Documents and material produced to the Commission that are marked confidential are accorded substantial protections against public disclosure equivalent to those in a protective order. *See, e.g.*, 15 U.S.C. 46(f) (governing trade secrets and confidential financial or commercial information); 15 U.S.C. § 57b-2 (protecting confidentiality of information obtained by compulsory process or otherwise in an investigation, including requiring 10 days notice prior to disclosure and providing for return of material produced); 16 C.F.R. § 4.10 (applying to nonpublic material, including material obtained in an investigation).

WAM also cites the Gramm-Leach-Bliley Privacy of Consumer Financial Information Rule, 16 C.F.R. § 313, which does apply to debt collectors in some respects, but specifically allows disclosure to the Federal Trade Commission. 16 CFR § 313.15(a)(4). Moreover, WAM does not cite a single case either in the Petition to Limit or its Request for Review where the Commission or any federal court limited a discovery request to allow a party to redact such non-privileged information, even in litigation between private parties.[12]

For the reasons stated above, we reject WAM's contention that HIPAA, other federal statutes or rules, or WAM's client contracts justify redacting the non-privileged confidential information that WAM seeks to exclude from its CID responses. This holding eliminates most of the burden claimed by WAM for producing material responsive to the ClD. *See*, *e.g.*, Request for Review, Van Hoven Decl. (Apr. 25, 2008) at ¶ 3 (estimating it would take one week to gather documents responsive to a specification, and three to five weeks to review and redact them)[13]

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[12] WAM does not cite any case law supporting its redaction arguments in its Request for Review. The case law cited in its Petition to Limit involved challenges to production of confidential *commercial* information, Petition to Limit at 21, and the courts in those cases invariably ordered the parties to produce, subject to confidentiality protections, the requested information. *See*, *e.g.*, *Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D.D.C. 1963) (plaintiff had shown a clearly defined and serious injury to his business from public disclosure of confidential business information in a public Commission hearing, but plaintiff must produce the documents provided that they would not be made public unless necessary for proper enforcement of the law); *Fed. Trade Comm'n v. Bowman*, 149 F. Supp. 624 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957).

[13] WAM suggests that its demand to redact responsive documents before producing them is somehow "part of its effort to narrow the scope of the CID," Request for Review at 7, but clearly the process of review and redaction would take a considerable amount of time to redact a single document. WAM made a significant number of redactions to Exhibit W of the Petition to Limit. We assume WAM took particular care when it redacted confidential information from that exhibit; even then, one Social Security number was overlooked on page 2.

III. WAM Has Not Established that Compliance with the CID Would Be Unduly Burdensome.

WAM challenges Document Requests 23-25 and 27 as unduly burdensome.[14] WAM contends that "several of the requests are so broad and burdensome that compliance with them would cause significant hardship for WAM," Petition at 14, and "would severely disrupt WAM's business operations." Request for Review at 8. WAM objects that production of computerized voice recordings would cost "approximately $262,000 (hardware and labor cost total)" and that "even with a sufficient increase in WAM's computing capacity, WAM lacks the personnel to carry out the necessary task of reviewing the consumer and regulatory inquiries as well as employee files" for responsiveness and privilege. Request for Review at 8. WAM states that only two individuals could be made available to produce responsive material and that it would take "nearly 4 months of full-time work by those employees to review and make necessary redactions to all of the computer and hardcopy records responsive to the CID." Request for Review at 8-9, Request for Review, Exhibit B.[15]

[14] WAM notes that Document Request 23 includes all of the material that would be responsive to Requests 24 and 27. Petition to Limit at 18 n.5. Document Request 23 seeks, "for every consumer who complained about WAM, whether directly to the company or through a third party, the complete consumer file, including, but not limited to, each complaint, each recording made of any telephone contacts with the complaining consumer, and WAM's response to each complaint." The other request at issue, Document Request 25, seeks "all recordings of telephone calls, in whatever format stored, between any WAM debt collector and any other person made in the process of attempting to collect a debt."

[15] We note that WAM's estimates include substantial costs (and additional time) to redact documents to remove non-privileged information. Request for Review, Exhibit B; *see also* Petition to Limit at 17 ("efforts would need to be undertaken to listen to each call in order to determine whether they contain any confidential or personally identifiable information of consumers, which would require audio redaction"). As noted above, WAM will not have to incur those costs.

WAM bears the burden of demonstrating that a CID request is unduly burdensome. As noted in *Fed. Trade Comm'n v. Texaco, Inc*., 555 F.2d 862, 882 (D.C. Cir. 1977):

> Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. . . . Further, that burden is not easily met where. . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. . . . Broadness alone is not sufficient justification to refuse enforcement of a subpoena. . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

Texaco, 555 F.2d at 882 (footnotes and citations omitted).[16]

WAM's allegations of burden relate in substantial part to the production of digital recordings of "telephone calls. . . between any WAM debt collector and any other person made in the process of attempting to collect a debt." Document Request 25

[16] WAM's reliance on discovery cases involving disputes between private litigants for the claim that an undue burden arises whenever it can be shown that the burden of production outweighs the probative value of the information is misplaced. *See* Request for Review at 7 (*citing N.C. Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005) and *Travelers lndem. Co. v. Metro. Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005)). Both cases, moreover, involved discovery demands directed to non-parties. WAM also cited *Fed. Trade Com'n v. Jim Walter Corp*., 651 F.2d 251 (1981), which involved a challenge to an FTC subpoena. That court discussed weighing the "hardships and benefits" of production "when a subpoena threatens to be unreasonable," but applied the "unduly disrupt or seriously hinder normal operations" standard from *Texaco* in rejecting the allegation of burden. *Id*. at 258.

(Petition to Limit Exhibit F at 38).[17] WAM notes that it is unlikely that staff will listen to all of these recordings. WAM, therefore, proposes that the Commission should alleviate its burden of producing all of the recordings by accepting only a sample of them. Sampling can sometimes obviate a complete production; however, this is normally done when the issue is genuinely one of whether the requested evidence is actually relevant or useful. *See Texaco*, 555 F.2d at 883 ("The Commission notes that other studies have utilized random sampling techniques and that, in its opinion, such studies are inadequate for its purposes. . . . We therefore enforce the subpoena as originally conceived, without production on a random sample basis."). Here there is no legitimate question about the relevance or utility of these recordings.

Staff needs access to all of the recordings so it can correlate particular (and as yet unidentified) calls to particular (and as yet unidentified) consumer complaints. Further, staff may devise its own samples of these calls to determine whether particular WAM employees might have engaged in suspect, but not subject of complaint, conduct. If only a sample of calls were initially produced, Commission staff following up on a complaint or targeted employee would likely find that many of the calls required for further investigation were not included in the sample received. Staff would then have to ask WAM to provide those particular calls, thereby enabling WAM, were it so inclined, to impede the investigation based on its ability to monitor and anticipate the investigation's progress and focus.

WAM's financial burden to produce the recordings, relative to its annual gross revenue of nearly $300 million, Letter Ruling at 8, does not demonstrate undue burden. *See, e.g., Fed. Trade*

[17] Like its redaction arguments, WAM claims these recordings are of little or no relevance. WAM seemingly ignores the fact that these recordings, by themselves, might substantially confirm or refute consumers' complaints about misrepresentations, harassment, empty threats, or other violations of FDCPA or the FTC Act. The records are, therefore, especially relevant to the investigation.

Comm'n v. Rockefeller, 591 F.2d 182, 190 (DC Cir. 1979) ("The compliance cost. . . estimates. . . simply do not appear to pose a threat to the normal operations of appellants' businesses considering their size."). WAM has not satisfied its burden of demonstrating compliance with the ClD would be unduly burdensome.

Further, we reject WAM's assumption that tasking two employees to perform production review is adequate. The record is unclear regarding WAM's size. *Cf.* Petition to Limit at 16 (1198 employees) versus Petition to Limit, Exhibit F at 2-3 (1856 employees). WAM's website claims it has over 2600 employees.[18] Regardless of which number is correct, more than two employees need to be dedicated to CID production review. Further, WAM's burden claims appear to be based on the assumption that compliance should be organized "in a manner that will minimize as much as possible the disruption to WAM's business operations." Request for Review at 4 (noting that "the time and cost burden analysis set forth in the Petition to Limit and supplemental affidavit reflects tasking in a manner that will minimize as much as possible the disruption to WAM's business operations that would arise from the production of such material to the Commission in compliance with the CID"). WAM has not cited, and the Commission is unaware of, any cases to support WAM's minimize-disruption standard. *See Texaco*, 555 F.2d at 882 ("Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business."). As in *Texaco* the breadth of the CID is a reflection of the comprehensiveness of the inquiry being undertaken and the magnitude of WAM's business operations. *Id.*

[18] West Asset Management, About Us, *http://www.westassetmanagement.comlwho_about.cfm?g=1* (last visited Jun. 16, 2008).

We hold that WAM need not review and redact the production to delete nonprivileged confidential information. We also cannot rely on WAM's estimates based on the work of only two of its employees. In short, we cannot rely on WAM's estimates of time for its production; those estimates included substantial time for such redactions to be performed by only two employees. Accordingly, we direct that WAM comply with the CID immediately, subject to any discreet extensions pursuant to 16 C.F.R. § 2.7(c) to which the Staff agrees with respect to particular specifications.[19]

IV. Order

For the reasons set forth herein, the Letter Ruling should be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

[19] This decision moots WAM's motion to stay or extend the May 8, 2008 return date. Request for Review at 2.

Responses to Petitions to Quash

NUTRACEUTICALS INTERNATIONAL, LLC

FTC File No. 082 3130 Decision, July 30, 2008

RESPONSE TO NUTRACEUTICALS INTERNATIONAL'S APPEAL OF THE DENIAL BY COMMISSIONER HARBOUR OF THE PETITION BY NUTRACEUTICALS INTERNATIONAL, LLC TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Klivinyi:

This letter advises you of the Commission's disposition of Nutraceuticals International, L.L.C.'s ("NI") Appeal from the Letter Ruling denying the Petition to Quash or Limit Civil Investigative Demand[1] ("Appeal") issued in conjunction with an investigation of NI by the Federal Trade Commission (hereinafter "FTC" or "Commission"). As set forth below, the Appeal is dismissed as moot.[2]

NI's Petition claimed that the Civil Investigative Demand ("CID") seeks information that is "clearly beyond the scope of the investigation as defined by the Commission[,]" and also sought to quash the CID because Commission Staff had allegedly acted inappropriately toward an NI clerical employee on one occasion. Petition at 1.[3] The Letter Ruling denied the Petition on the grounds that it failed to comply with the requirements of Commission Rules 2.7(d)(2) and 4.1(a)(2)(i), 16 C.F.R. §§ 2.7(d)(2) and 4.1(a)(2)(i), which respectively address the

[1] Letter Ruling Denying Petition of Nutraceuticals International, LLC to Quash or Limit Civil Investigative Demand, File No. 082-3130 (Jun. 25, 2008) ("Letter Ruling").

[2] Had we reached the merits of NI' s appeal, we would have affirmed the denial of NI's Petition to Quash or Limit CID for substantially the same reasons set forth in the Letter Ruling,

[3] Like the Letter Ruling, we find no evidence that any alleged misconduct on the part of Commission staff provided any grounds for quashing or limiting the CID.

requirement that a Petitioner must have conferred with Commission staff regarding its objections in advance of filing a petition to quash or limit a CID and the qualification of an NI officer to represent it before the Commission on its Petition. Letter Ruling at 3. The Letter Ruling also denied the Petition on the grounds that NI had failed to satisfy its burden of showing that the information sought was either outside the scope of the investigation or tainted by the alleged misconduct of Commission staff. Letter Ruling at 4-5. The Letter Ruling directed NI to comply with the CID by July 7, 2008. 16 C.F.R., § 2.7(f).

NI's appeal was timely filed on July 1, 2008. In its appeal, NI claims that the Letter Ruling erroneously found that NI's Petition was "procedurally deficient (and) without substantive merit." Appeal at 1. NI also requested a stay of the July 7 return date until after the

Commission had ruled on the appeal as well as for an additional period sufficient for NI "to access the Federal District Court to protect the Company's legal rights and interests."[4] *Id.* NI further advised the Commission that if its request for a stay was not granted prior to July 7, then NI intended to "submit its responses to the second CID directly to the Commissioners to hold in strict confidence and not release to Commission staff investigators" pending the Commission's decision and resolution of any actions initiated by NI in the federal courts.[5] *Id.*

[4] Contrary to Petitioner's apparent belief that such judicial review would be available to it immediately following the Commission's decision of this appeal, it is well established that FTC investigatory process is not self-executing; accordingly, this CID can only be enforced (or denied enforcement) by the district court in a CID enforcement action brought by the Commission – pre-enforcement challenges to Commission CIDs brought by the party being subpoenaed are premature and not ripe for judicial review. *See, e.g., Atlantic Richfield Co. v. Fed. Trade Comm'n*, 546 F.2d 646, 648-50 (5th Cir. 1977) (affirming district court's dismissal of action for declaratory and injunctive relief challenging FTC subpoena); *Anheuser-Busch Inc. v. Fed. Trade Comm'n*, 359 F.2d 487, 490 (8th Cir 1966) (same).

[5] NI cites no legal authority to support its request that its CID responses be

Responses to Petitions to Quash

On July 8, 2008, the Secretary received NI's Response to the Second Civil Investigative Demand, dated July 3, 2008, The Commission has reason to believe that NI has substantially complied with the CID, Thus, the relief requested by the Petition – that NI be excused from complying with the CID, or that the CID be substantially modified prior to such compliance – was rendered moot by NI's substantial compliance with the commandments of the CID.

For the reasons set forth above, **IT IS ORDERED** that NI's Appeal should be, and it hereby is, **DISMISSED**.

By Direction of the Commission.

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withheld from the "Commission staff investigators" during the pendency of this appeal. The Commission's Rules have no provision for such relief, and the Commission is unaware of any other legal authority which would support that relief.

Responses to Petitions to Quash

CVS CAREMARK CORPORATION

FTC File No. 072 3119 Decision, August 6, 2008

RESPONSE TO CVS CAREMARK CORPORATION'S PETITION TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMAND

Dear Mr. DiResta:

This letter advises you of the disposition of CVS Caremark Corp.'s ("Petitioner" or "CVS") Petition to Limit or Quash Civil Investigative Demand ("Petition") served on it in conjunction with the Federal Trade Commission's ("FTC" or "Commission") investigation of CVS's consumer privacy and data security practices. The Petition is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the Civil Investigative Demand ("CID") is August 18, 2008.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1]

I. Background and Summary

The Commission and the Office of Civil Rights of the Department of Health and Human Services ("HHS") are conducting coordinated investigations of CVS's consumer privacy and data security practices. Petition at 2. Television reports detailed CVS's failure to properly dispose of sensitive consumer information that was discovered in publicly-accessible garbage

[1] This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal should be calculated from the date you received the original by express mail.

containers located behind CVS pharmacies in Indianapolis, IN between June and September 2006. *Id*. at 5. Additionally, between September 2006 and May 2007, additional media reports indicated that sensitive consumer information was found in the trash containers behind CVS pharmacies in Indiana, Ohio, Kentucky, Arizona, and Texas.[2] *Id*. at 8.[3] By letter dated September 27, 2007, FTC staff advised CVS that the Commission was conducting an inquiry "to determine whether CVS's handling of sensitive information from or about its consumers in connection with the preparation and sale of prescription medicines and supplies raises any issues under Section 5." *Id*. at 5 (quoting from Exhibit C to the Petition at 1-2 [Letter from Alain Sheer, FTC Div. of Privacy and Identity Protection, to Christine L. Egan, Esquire, Asst. Gen. Counsel, for CVS]). That letter further asked CVS to voluntarily provide information identified in the letter to the FTC and/or HHS for their use in their coordinated investigations. Petition, Exh. C at 2-8. Paragraph 9 of the specification in the letter included "documents sufficient to identify all policies and statements made by CVS regarding its collection, disclosure, use, and protection of personal information. . . ." *Id*. at 4. CVS claims that it cooperated with the FTC's investigation, and voluntarily "provided information and voluminous documents relevant to the inquiry. . . ."[4] Petition at 2.

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[2] CVS has over 6,000 retail pharmacies, *compare* Petition at 5 ("over 6,200") *with* Petition at 7 ("now more than 6300"), in forty (40) states and the District of Columbia, and has more than 190,000 employees in its retail pharmacy operations. Petition at 5.

[3] CVS refers to these reports collectively as the "Dumpster Incidents." Petition at 7. For the sake of convenience, the FTC will use this same phrase to refer to these events. In addition, a June, 2005 *Computerworld* article reported a potential security vulnerability in the CVS ExtraCare FSA program. *Id.* at 9-10. ExtraCare is the name CVS uses for its loyalty card program. *See id.* at 9. CVS indicates that its own investigation revealed no disclosure of personally identifiable information as a result of this vulnerability. *Id*. at 10.

[4] Exhibit E to the Petition (letter of December 14, 2007, from FTC Attorney Loretta Garrison to Anthony DiResta) indicates that Commission staff did not believe CVS had fully responded to its information requests.

Responses to Petitions to Quash

On May 22, 2008, CVS received the CID, issued on May 20, 2008, that is the subject of the Petition. According to CVS, the specifications of the CID seek "a massive volume of documents and information regarding the security and confidentiality of CVS's electronically stored, transmitted or accessible information that is not limited, or related at all, to: (1) the dumpster incidents or (2) the protection of the ExtraCare program information." Petition at 3-4. CVS timely fied its Petition on June 20, 2008. The Petition seeks relief from the CID on the following grounds:

> (1) CID Specifications for Documents Nos. 5, 6, and 7 and for Interrogatories Nos. 1, 6 and 7 broadly demand disclosure of vast amounts of CVS's electronically stored, transmitted or accessible information, dating back three to five years, that is not relevant to the purpose of the inquiry and is therefore unreasonable;
>
> (2) based on the overly broad definition of "Company" included in the CID, the Staff unreasonably demands documents and information, not only from CVS's retail pharmacy operations, but also from its Caremark segment, a Pharmacy Benefit Management company ("PBM") that merged with CVS in March of 2007, that remains a separate business distinct from CVS's retail pharmacy, and that had no role in the incidents that form the basis of the inquiry, all of which occurred nearly two years before the 2007 merger;
>
> (3) the challenged Specifications unreasonably demand documents and information from CVS (and its Caremark segment) which is primarily regulated by other federal agencies with exclusive administration and enforcement authority over patient privacy and security issues;
>
> (4) the CID is defective and unenforceable because the challenged Specifications demand documents and information outside the scope and purpose of the inquiry in violation of the FTC's own rules; and

> (5) compliance with the overly-broad CID Specifications in question would be unduly burdensome to CVS, not only as a result of the sheer volume of the electronically-stored, transmitted or accessible information demanded, but also because the CID further requires that CVS first redact all "Personal Information" from all such information and documents.

Petition at 4 (footnote omitted).

The gravamen of CVS's claims stems from CVS's misimpression as to the actual scope of the Commission's inquiry. CVS correctly notes that the Commission initiated its investigation because media reports indicated that CVS store personnel in several different states had disposed of sensitive consumer information by placing it in publicly-accessible trash containers – the dumpster incidents. *Id*. at 5. CVS also concedes that the Commission's investigation was directed toward a reported security vulnerability in its ExtraCare program. CVS relies on these two identified data security problems to support its claims that the FTC can only investigate issues related to the physical disposal of records at its pharmacies (the dumpster incidents) or to its ExtraCare program. *Id*. at 10-11.

In particular, CVS complains that the CID seeks information beyond the scope of the investigation, that is, "documents and information regarding the security and confidentiality of CVS'[s] electronically-stored, transmitted or electronically-accessible information that is not relevant, or related at all, to the inquiry concerning: (1) CVS'[s] practices in handling consumers' personal information with the dumpster incidents and (2) the ExtraCare program." *Id.* The security vulnerability identified in the media reports relating to the ExtraCare program involved electronically-stored, -transmitted or -accessible information. Petition at 9-10. Accordingly, CVS cannot complain that such information is, in and of itself, beyond the scope of the investigation. It must, therefore, be claiming that the investigation cannot be any broader than the precise episodes that provided the

lead information for the investigation. Put another way, the scope of the FTC's investigatory powers is, according to CVS, limited to those things the FTC knows about and excludes those things about which the FTC might be suspicious, based on the things it knows. CVS cites no authority for this position; indeed, the *Morton Salt* case that it does cite, Petition at 14, flatly contradicts CVS's position. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) ("[The FTC's power of inquiry] 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 assurance that it is not.").

CVS concedes that the dumpster incidents were the result of store personnel at a number of its stores around the country failing to properly adhere to CVS's own data security policies – the "Blue Bag Policy" – regarding the proper disposal of sensitive customer information.[5] Petition at 7. In sum, the dumpster incidents suggest that some areas of CVS's business operations might be affected by a degree of laxity with respect to adequate data security practices. Accordingly, the scope of the FTC's investigation is directed toward the possibility that portions of the nation's "largest provider of prescriptions and related health care services," *Id.* at 5, may have data security practices that place its customers' data in jeopardy. The Commission believes that determining the nature, scope, and, if appropriate, remediation of such risks is in the public interest.

Before turning to the issues raised by CVS in its Petition, however, it is appropriate to emphasize the fact that the party who

[5] Exhibit O [Memorandum of Apr. 7, 2008, from CVS Counsel to FTC Counsel] to the Petition describes the Blue Bag Program as a protocol for the segregation and secure disposal of sensitive waste by pharmacy personnel. In essence, sensitive customer information was to be segregated in blue bags and retained in the stores for later pick-up and disposal; in contrast, nonsensitive waste could be disposed of in the trash receptacle located outside of each store. Exhibit O at 2-5.

moves to limit the enforcement of a CID bears the burden of demonstrating that a particular CID specification is unreasonable. "[T]he burden of showing that an agency subpoena is unreasonable remains with the respondent, . . . and where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met. [citations omitted]." *Fed. Trade Comm'n v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979), quoting *Sec. and Exchange Comm'n v. Brigadoon Scotch Distributing Co.,* 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

II. CVS Has Not Shown that the CID Seeks Information that Is Irrelevant to the Investigation.

The scope of this investigation is determined by the terms of the resolution authorizing the use of CIDs and other compulsory process to conduct the investigation. *Fed. Trade Comm'n v. Invention Submission Corp*., 965 F.2d 1086,1091-92 (1992) ("The Commission's compulsory process resolution did not restrict the investigation to possible oral misrepresentations, however, and we have previously made clear that 'the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.'") (quoting *Fed. Trade Comm'n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)). As the *Invention Submission* court also noted:

> It is well established that a district court must enforce a federal agency's investigative subpoena if the information sought is "'reasonably relevant,'" *FTC v. Texaco, Inc*., 555 F.2d 862, 872, 873 n. 23 (D.C. Cir.) (en banc) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652. . . (1950)), *cert. denied*, 431 U.S. 974. . . (1977) – or, put differently, "'not plainly incompetent or irrelevant to any lawful purpose' of the [agency]," *id*. at 872 (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 . . . (1943)); *accord*

> *United States v. Aero Mayflower Transit Co.*, 83l F.2d 1142, 1145 (D.C. Cir. 1987) – and not "unduly burdensome" to produce, *Texaco*, 555 F.2d at 881. We have said that the agency's own appraisal of relevancy must be accepted so long as it is not "'obviously wrong.'" *FTC v. Carter*, 636 F.2d 781,787-88 (D.C. Cir. 1980) (quoting *Texaco*, 555 F.2d at 877 n. 32).

Invention Submission Corp., 965 F.2d at 1089. This is the framework within which CVS's relevance claims must be assessed.

A copy of the resolution authorizing the use of compulsory process for this investigation was attached to the CID. Petition, Exhibit A at 3. In pertinent part it reads,

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

Id. The documents and information sought in the challenged CID specifications appear to fall well within the purpose of this investigation; that is, a determination of whether CVS's business operations might constitute "deceptive acts or unfair practices related to consumer privacy and/or data security in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act." Petition, Exhibit A at 3.

Indeed, CVS does not claim that the documents and information sought by Document Specifications 5, 6, or 7 and Interrogatories 1, 6, and 7 are unrelated to deceptive acts or unfair practices related to consumer privacy and/or data security.[6] It complains, rather, that these specifications seek documents and materials, relating to the electronically stored and retrievable personal information regarding its customers, that are unrelated to the events that triggered the Commission's interest in investigating CVS's data security practices in the first place: the dumpster incidents and ExtraCare Program data security vulnerability. Even in this regard, CVS's argument fails as to the data vulnerability with the ExtraCare Program because CVS's own description of this problem shows that it involved electronically stored and retrievable personal information about consumers. Petition at 9 ("Prior to June 20, 2005, the ExtraCare loyalty card program allowed ExtraCare members to obtain their recent purchase histories via a website request."). As previously noted, CVS has offered no legal support for its argument that the FTC may not conduct investigations about possible violations of law unless it already possesses some knowledge about each incident it wishes to investigate. Legal authority it does cite, the *Morton Salt* case in particular, flatly rejects CVS's argument. We find, therefore, both that the information sought by the challenged specifications is relevant to the purpose of this investigation, and that the investigation is in the public interest.

III. CVS Has Not Demonstrated that the FTC Lacks the Jurisdiction to Investigate CVS's Electronic Data Privacy and Security Acts and Practices.

[6] The challenged specifications deal with CVS's electronic security policies, practices and procedures, its policies, practices and procedures for evaluating the compliance and effectiveness of its electronic security policies, practices and procedures, and the identification of each instance in the last five years when unauthorized electronic access to a consumer's personal information has occurred. There is no legitimate basis for concluding that these specifications seek documents or information beyond the scope of the resolution authorizing the use of compulsory process in this investigation.

CVS claims that the FTC lacks jurisdiction to enforce privacy and data security standards related to protected health information ("PHI") within the meaning of the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 (Aug. 21, 1996) *as amended by* Pub. L. 105-33 (Aug. 5, 1997) *and* Pub. L. 105-34 (Aug. 5, 1997) ("HIPAA") because "Congress gave HHS exclusive administration and enforcement authority regarding data privacy and security issues under HIPAA." Petition at 20. CVS cites no authority for its claim that HHS has exclusive jurisdiction with respect to CVS's privacy and data security practices. Further, CVS cites no authority to support its claim that HIPAA somehow precludes the FTC from bringing an action against CVS for violations of Section 5 of the FTC Act relating to privacy and data security practices.[7]

Even if CVS's claim were correct, it would not provide sufficient grounds for quashing or limiting this investigatory CID. First, this is a coordinated investigation by HHS and the FTC. CVS cites no authority holding that the two agencies cannot conduct a coordinated investigation, eschewing redundant investigatory process service on CVS, which would be followed by post-investigation decisions regarding whether one agency or both agencies were better situated to deal with particular enforcement actions that might be uncovered during the course of these investigations. Second, "[a]n agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction." *Fed. Trade Comm'n v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977). "With rare exceptions (none of which applies here), a subpoena enforcement action is not the proper forum in which to litigate disagreements over an agency's authority to pursue an investigation." *Fed. Trade Comm'n v. Ken Roberts Co.*, 276 F.3d 583, 584 (D.C. Cir. 2001). Third, this is especially true where it

[7] CVS's Petition cites to public statements by current and former senior FTC officials to the effect that the Commission, as a matter of prosecutorial discretion, does not enforce HHS's privacy regulations under HIPAA. *See* Petition at 22 n. 38-39. Even so, the FTC has jurisdiction to remedy any violations of the FTC Act by CVS.

may not be possible to determine the scope of the jurisdictional claim until the investigation is substantially complete. *Fed. Trade Comm'n v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979) ("But where, as here, the FTC does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding prior to the conclusion of the agency's adjudication."); *Fed. Trade Comm'n v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) (Judge, now Justice, Breyer) ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a[n] 'immunity'.").

IV. CVS Has Not Demonstrated that Caremark's Consumer Privacy and Data Security Practices Are Beyond the Scope of the Investigation.

CVS correctly notes that its Caremark subsidiary was acquired by it after the time of the events that gave rise to this investigation. Petition at 4 (Caremark "had no role in the incidents that form the basis of the inquiry, all of which occurred nearly two years before the 2007 merger."). CVS offers two reasons for excluding Caremark from the CID. Having already decided that CVS's electronic security is within the scope of the investigation, CVS's only remaining argument is that the CVS and Caremark "businesses are distinct." Petition at 18. CVS further argues that it "maintains a comprehensive firewall separating the businesses and records" of the parent and subsidiary firms. *Id*. That, however, does not provide a basis for eliminating Caremark from the CID. The Commission has reason to believe that the CVS and Caremark databases are interconnected. The information provided by CVS has not demonstrated that an intruder into the CVS system would be unable to gain access to sensitive personal information contained in the Caremark system. The Declarations of Nobles and Balnaves, Exhibits Y and Z respectively to the Petition, do not mention whether personal information is protected by the firewalls. The written firewall policy annexed to Exhibit Y applies to sensitive commercial information (such as prices and

contracts); it does not appear to address sensitive personal information at all. Accordingly, the Commission has no factual basis to conclude that continued investigation of CVS, including its Caremark subsidiary, is no longer in the public interest.[8]

V. CVS Has Provided No Factual Support for Its Claims that CID Compliance Would Be Burdensome.

Allegations of burden must be supported with specificity. *In re National Claims Service, Inc., Petition to Limit Civil Investigative Demand*, 125 F.T.C. 1325, 1328-29, 1998 FTC LEXIS 192, *8 (1998). *National Claims* teaches that, "[a]t a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (e.g., the person-hours and cost of meeting the particular specifications at issue)." *Id*. CVS's Petition fails to meet this burden.

Even assuming that there were some merit in CVS's claims of burden, we have no factual basis upon which to rely in order to fashion a CID modification with respect to either its scope or the time within which compliance should occur. Additionally, any claim of burden must be assessed in the context of the size and scope of the investigation and of the Petitioner. CVS has provided no facts relative to these issues. Accordingly, the Commission has no reason to believe that CVS's compliance with the CID is likely to "pose a threat to the normal operation of [CVS's business] considering [its] size." *Fed. Trade Comm'n v. Rockefeller*, 591

[8] CVS's claim that the CID is defective, based on its speculation that procedures contained in the Commission's Operating Manual were not followed, Petition at 23-25, is without merit. The Operating Manual specifies internal operating procedures; it creates no rights enforceable by recipients of a CID, and CVS cites no authority to support its arguments based on the Operating Manual, even if it had a factual basis for its speculations.

F.2d 182, 190 (DC Cir. 1979).[9] Here, given the scope and scale of CVS's business, compliance with the CID seems unlikely to pose such a threat to CVS. The fact that compliance may be inconvenient or even of some burden is not a sufficient basis to quash or limit a CID. *Texaco*, 555 F.2d at 882 ("Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest.").

VI. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED** that CVS's Petition be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), Petitioner must comply with the CID by August 18, 2008.

By direction of the Commission

[9] *See also Federal Trade Comm. v. Standard American, Inc*., 306 F.2d 231, 235 (3rd Cir. 1962) (finding petitioner had not provided sufficient evidence that compliance would lead to the "virtual destruction" of a business).

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