

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

PIEDMONT HEALTH ALLIANCE, INC.,  
a corporation,

and

PETER H. BRADSHAW, M.D.,  
S. ANDREWS DEEKENS, M.D.,  
DANIEL C. DILLON, M.D.,  
SANFORD D. GUTTLER, M.D.,  
DAVID L. HARVEY, M.D.,  
JOHN W. KESSEL, M.D.,  
A. GREGORY ROSENFELD, M.D.,  
JAMES R. THOMPSON, M.D.  
ROBERT A. YAPUNDICH, M.D.,  
and WILLIAM LEE YOUNG III, M.D.,  
individually

Docket No. 9314

PUBLIC RECORD

RESPONDENT PIEDMONT HEALTH ALLIANCE'S MOTION TO LIMIT OR QUASH  
SUBPOENA DUCES TECUM TO ORLIKOFF & ASSOCIATES

Pursuant to Rules 3.22, 3.31(c)(2), and 3.34(c) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, Respondent Piedmont Health Alliance ("PHA") files the following Motion to Limit Subpoena Duces Tecum issued by Complaint Counsel to Orlikoff

*Per Associates ("Orlikoff & Associates")*

Orlikoff to produce a letter it received from PHA, dated March 12, 2001, which contains the substance of a privileged communication between PHA and its attorneys (“March 12 letter”). See Attachment 2 (redacted). Privilege was not waived by disclosing this document to Orlikoff because, in his role as a consultant, Orlikoff worked with PHA staff and Board Members to facilitate the revision of PHA’s strategic plan. To understand the factors affecting such revision, Orlikoff was provided with a survey of current issues PHA was addressing, including legal issues. PHA understood that Orlikoff would maintain the confidentiality of this information.

~~Subsequent to PHA's disclosure of this document to Orlikoff, PHA's legal counsel~~

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Under cover of the February 10 letter, PHA redacted the privileged information—a small fraction of the letter’s second page—and provided the letter to Complaint Counsel in accordance with Paragraph 17 of the Protective Order. *See* Attachment 2 (redacted).

Since disclosure of this document by Orlikoff would reveal information subject to PHA’s privilege, PHA moves to limit the Subpoena to exclude the March 12 letter from its scope on three grounds. First, the March 12 letter contains the substance of a privileged communication between PHA and its attorneys, and the privilege is held by PHA. Second, PHA has not waived the attorney-client privilege. Third, Complaint Counsel already has a version of the document that has been properly redacted, which would make any production by Orlikoff duplicative and contrary to Rule 3.3.1(c)(1)(i) of the Commission’s Rules of Practice.

## **II. Argument**

### **A. PHA Has A Protectable Interest In The March 12 Letter, And Therefore Has Standing to Challenge the Subpoena**

Although PHA is not the recipient of the Subpoena, PHA has standing to challenge its

that is unreasonably duplicative or cumulative. Commission Rules of Practice 3.31 (c)(1)(i), (c)(2), (d). Information may be withheld from discovery if it is subject to the attorney-client privilege. Commission Rules of Practice 3.31(c)(2). The Subpoena in this case calls for the

production of a document that is subject to the attorney client privilege. Therefore, the

Administrative Law Judge should modify and limit the Order to Subpoena in this case to exclude

**1. The March 12 Letter Constitutes A "Communication" Made For The Purpose Of Obtaining Legal Advice**

The attorney-client privilege is most robust when it arises in a direct line of

[REDACTED]

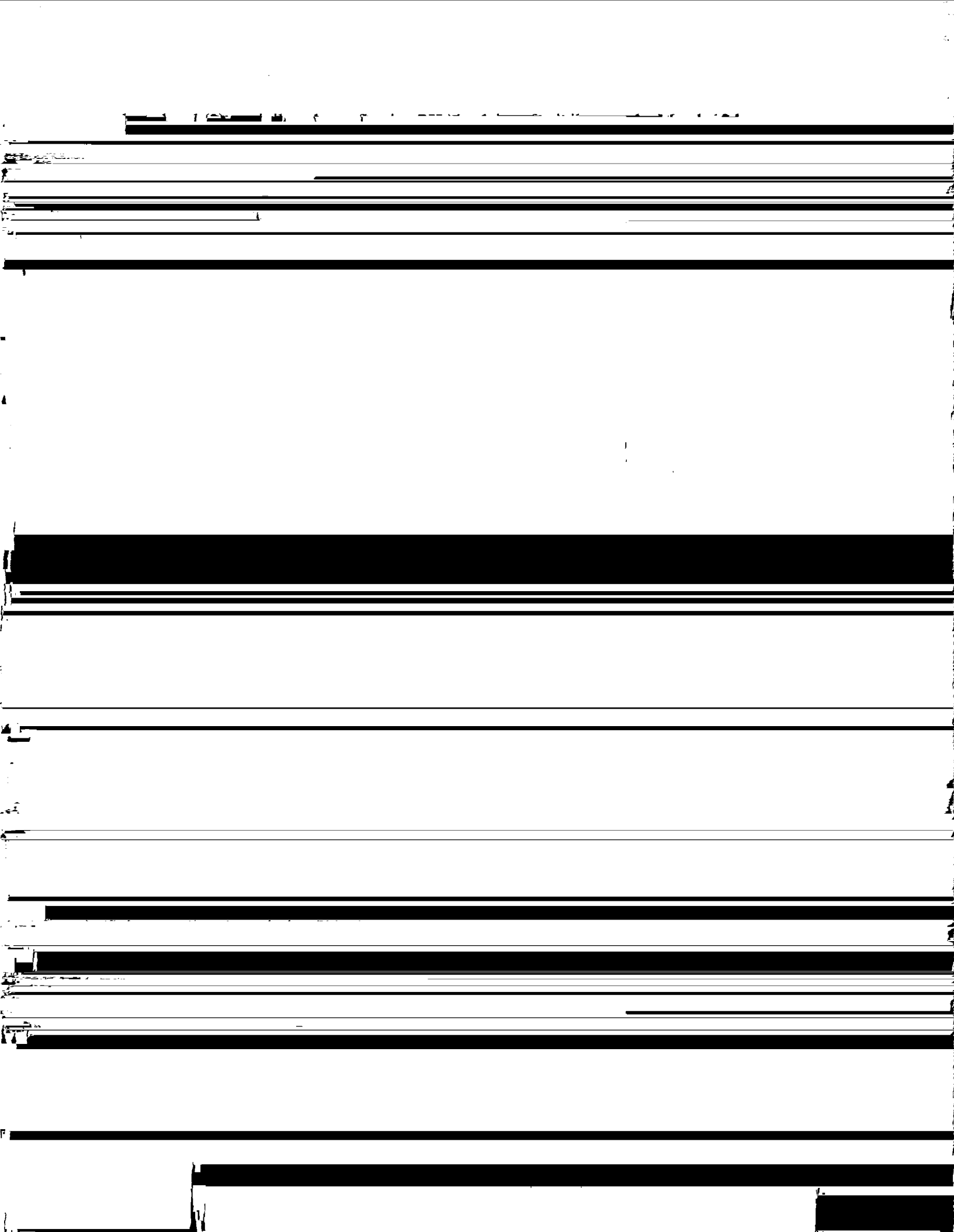
confidentiality of the communication be maintained. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). Therefore, the disclosure of privileged information must be limited. *Upjohn*, 449 U.S. 383 (1982). As the D.C. Circuit has explained, to avoid waiver, recipients of privileged information must either have a "need to know" or have authority to speak or act for the company on such matters. *GlaxoSmithKline*, 294 F.3d at 147 (quoting *Coastal States Gas Corp.*, 617 F.2d at 862).

Under the "need to know" standard, courts have extended the attorney-client privilege to the disclosure of privileged information to third parties, such as consultants, under certain circumstances. See *GlaxoSmithKline*, 294 F.3d at 147, 148. In *GlaxoSmithKline*, the D.C. Circuit

found that the disclosure of confidential information contained in 01 documents to public

Mr. Orlikoff continued to work on these issues in 2001, he also played a pivotal role working

perform his duties, Mr. Orlikoff needed to have an understanding of the current issues facing PHA, including legal issues that would affect any strategic plan PHA adopted. As a result, Mr. Orlikoff's duties within PHA could not have been performed without the confidential information reflected in the legal advice described in the March 2001 letter. Moreover, PHA





UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

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REDMOND, WASHINGTON

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[REDACTED]

PHA's motion is GRANTED, and the March 12, 2001 letter is excluded from the scope of the subpoena duces tecum served on Orlikoff.

**II.**

PHA contends that disclosure of the March 12 letter by Orlikoff would reveal PHA's privileged information. PHA has demonstrated that the March 12 letter contains a privileged communication. PHA has further shown that it maintained the confidentiality of the privilege when it conveyed the March 12 letter to Mr. Orlikoff, and therefore did not waive privilege. Since the privileged communication has not been waived, it is therefore entitled to the maximum protection from disclosure available under the law.

[REDACTED]

PHA further contends Orlikoff's disclosure of the March 12 letter would be unreasonably duplicative. PHA has demonstrated that it has already provided Complaint Counsel with (1) a redacted version of the March 12 letter, and (2) a properly supplemented privilege log. Moreover, PHA has shown that the privileged information constitutes only a very small portion of the March 12 letter.

[REDACTED]

[REDACTED]

11-11-11

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11-11-11

11-11-11



# SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

1. TO

Orlikoff & Associates, Inc.  
4800 South Chicago Beach Drive  
Suite 307 North  
Chicago, Illinois 60615

2. FROM

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, papers,

defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5 at the request of Counsel listed in Item 9 in the proceeding described in Item 6

3. PLACE OF PRODUCTION OR INSPECTION

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

4. MATERIAL WILL BE PRODUCED TO

Andrew S. Ginsburg, Esq.

5. DATE AND TIME OF PRODUCTION OR INSPECTION

February 24, 2004 at 9:00

**ATTACHMENT**

**SUBPOENA DUCES TECUM ISSUED TO:  
Orlikoff & Associates**

**SPECIFICATIONS**

In accordance with the instructions and definitions below, submit the following documents in the possession, custody or control of Orlikoff & Associates:

**SPECIFICATION 1: All documents relating to Piedmont Health Alliance ("PHA"), including, but not limited to:**

- (a) all communications or documents provided or sent to PHA, Ms. Sharon Alvis, or any other representative of PHA by Mr. James E. Orlikoff or Orlikoff & Associates;
- (b) all communications made by or documents received from PHA, Ms. Sharon Alvis, or any other representative of PHA and directed or sent to Mr. James E. Orlikoff or Orlikoff & Associates; and,
- (c) all documents relating to any work Mr. James E. Orlikoff or Orlikoff & Associates did or considered doing for PHA.

records of financial matters or commercial transactions; diagrams, graphs, charts,

person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, Orlikoff & Associates must provide the Commission with the following information as to each such person: his or her name, address, telephone number, and relationship to Orlikoff & Associates.

2. Except for privileged material, Orlikoff & Associates will produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. Orlikoff & Associates should submit any appendix, table, or other attachment by either physically attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, Orlikoff & Associates will not mask, cut, exchange, edit, or delete any responsive document or portion thereof in any manner.

3. Unless otherwise indicated, the specifications in this document request covers documents dated, generated, received, or in effect on or after January 1, 2000.

4. Orlikoff & Associates may submit electronically-stored documents, information, or data in an electronic data format, provided Orlikoff & Associates contacts the Commission and obtains instructions on electronic data formats that the Commission can accept. Unless otherwise indicated, in lieu of original hard-copy documents or electronically-stored documents, Orlikoff & Associates shall provide the Commission with a hard-copy printout of the electronically-stored documents, information, or data.

relevant specification(s), and (k) for redacted documents, the document control number (as described in Instruction 5). Additionally, for each document withheld under a claim of attorney work-product immunity, the Privilege Log shall list: (l) whether the document was prepared in anticipation of litigation or for trial. (m) the other parties or expected

complaint filing date, and (n) court name. For each person listed, the Privilege Log shall



Q 11-CC 1. [REDACTED] developments subject in the ordinary course of

business.

10. Q 11-CC 2. Associates must comply with this subpoena by submitting all responsive

**SUBPOENA DUCES TECUM ISSUED TO:  
Orlikoff & Associates**

**CERTIFICATION**

**ATTACHMENT 2**

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**[REDACTED]**

# **ATTACHMENT 3**



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Bureau of Competition  
601 Pennsylvania Ave., N.W.,  
Washington, D.C. 20580

~  
David M. Narrow  
Attorney

~  
Direct Line (202) 326-2744  
E-mail: dnarrow@ftc.gov  
FAX: (202) 326-3384

December 31, 2003

Nicholas R. Koberstein, Esquire  
McDermott, Will & Emery  
600 Thirteenth Street, N.W.  
Washington D.C. 20005-3096

FTC Docket No. 9314

*Nick*  
Dear Mr. Koberstein:

RE: [REDACTED] BPPA 40506 40509 - letter dated March

*A Partnership Including  
Professional Corporations*  
600 Thirteenth Street, N.W.  
Washington, D.C. 20005-3096  
202-756-8000  
Facsimile 202-756-8087  
www.mwe.com

Nicholas R. Koberstein  
Attorney at Law  
nkoberstein@mwe.com  
202-756-8288

Boston  
Chicago  
Düsseldorf  
London  
Los Angeles  
Miami  
Munich  
New York  
Orange County  
Silicon Valley  
Washington, D.C.

**MCDERMOTT, WILL & EMERY**

February 10, 2004

**VIA U.S. MAIL**

David M. Narrow, Esq.  
Bureau of Competition  
Federal Trade Commission

601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20540

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not part of a chain of such communication between PHA and its counsel, and (2) PHA waived any privilege by including this information in a letter to an outside party.

We believe that the document is protected from disclosure by the attorney-client privilege because it contains the substance of communications between PHA and its attorneys, made for the purpose of obtaining legal advice. Under certain circumstances, privileged information may be disclosed to third parties without waiving the privilege. *See, e.g., Fed. Trade Comm'n v. GlaxoSmithKline*, 294 F.3d 141, 146 (D.C. Cir. 2002). To preserve the attorney-client privilege in such situations, courts generally require that parties asserting the privilege establish the following prerequisites: first, the document must contain confidential information; second, the document must have been kept confidential. *Id.*

The March 12, 2001 letter contains confidential information, satisfying the first prerequisite for the attorney-client privilege to attach. As you know, the attorney-client privilege applies to communications that would reveal a client's confidential information given to its attorney. *See, e.g., Tax Ass'n of Am. v. Int'l Bus. Machs.*, 117 F.3d 607, 617 (D.C. Cir. 1997).

David M. Narrow, Esq.  
February 10, 2004

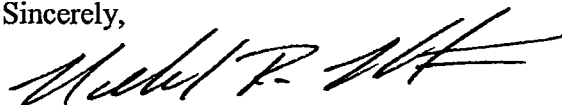
In accordance with Paragraph 17 of the Protective Order, we request that you return your original and all copies of the document numbered PHA 33931-35. Since only a portion of the document is privileged, we have attached (1) a redacted copy of this document, and (2) the

necessary supplement to our Privilege Log.

\* \* \*

Please call me if you wish to discuss any of this further.

Sincerely,



Nicholas R. Koberstein



CERTIFICATE OF SERVICE

I, Nicholas D. Kabanstein, hereby certify that on February 20, 2004:

[REDACTED]

[REDACTED]

[REDACTED]

Produced two copies of Respondent Piedmont Health Alliance's Public Record

[REDACTED]

Motion To Limit Or Quash Subpoena Duces Tecum To O'Leary & Associates and Respondent

[REDACTED]

[REDACTED]

A

[REDACTED]

