Office of the Secretary

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VIA EMAIL AND COURIER DELIVERY

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I. INTRODUCTION

In early 2010, WHR disclosed that an intruder or intruders had gained access to its

Staff pursued settlement discussions with WHR over the next nine months. Staff and WHR were unable to reach settlement terms, and on September 19, 2011, WHR informed staff it would not enter into a settlement on the terms staff proposed.

Accordingly, in September 2011, staff informed WHR that it would resume the investigation. Soon thereafter, WHR agreed to provide a certification as to the completeness of the materials it had produced to date in response to the Access Letter. WHR provided this certification on December 1, 2011.

The FTC issued a CID to WHR on December 8, 2011 pursuant to Resolution P954807, a "blanket resolution" issued by the Commission on January 3, 2008. This Resolution authorizes FTC staff to use compulsory process in investigations

> [t]o determine whether unnamed 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.[9]

II. ANALYSIS

A. The CID was lawfully issued and Petitioners have sufficient notice of the nature and scope of the investigation.

Petitioners' principal objection, which they restate in various ways, is that the CID and its authorizing resolution are deficient for failing to inform them sufficiently of the nature and scope of the investigation. We find this complaint not credible, coming as it does nearly two years after the investigation commenced. As the petition acknog c com
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"white paper," and both parties have engaged in detailed and lengthy settlement negotiations.[12] In light of these facts, we find that the nature and scope of the investigation are quite clear to Petitioners and consequently that their claim of insufficient notice is specious.[13]

More important, it is well-established that a CID is proper if it "state[s] the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation."[14] In the present matter, we find that the authorizing resolution adequately delineates the purpose and scope of the investigation: "[t]o determine whether unnamed 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" (emphasis added). The description of the subject matter of the investigation, coupled with a citation to the statutory prohibition on "unfair or deceptive acts or practices" satisfies that requirement.[15] This has put WHR on notice as to the purpose, scope, and legal basis for the Commission's investigation. There is no need to either state the purpose of an investigation with greater specificity, or tie the conduct under investigation to any particular theory of violation.[16]

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[12] *Id.*, at 7-9 and Exh. 7.

[13] *Cf. Assocs. First Capital Corp.*, 127 F.T.C. 910, 915 (1999) ("In sum, the notice provided in the compulsory process resolutions, CIDs, and other communications with Petitioners more than meets the Commission's obligation of providing notice of the conduct and the potential statutory violations under investigation.").

[14] 15 U.S.C. § 57b-1(c)(2). *See also* 16 C.F.R. § 2.6.

[15] *FTC v. O'Connell Assoc.*, 828 F. Supp. 165, 170-71 (E.D.N.Y. 1993) (quoting *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)); *see also FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980). Petitioners attempt to distinguish *O'Connell*

Moreover, contrary to Petitioners' contention, the resolution is not invalid because it is a so-called "blanket resolution." According to Petitioners, Sections 2.4 and 2.7 of the Commission's Rules of Practice, 16 C.F.R. §§ 2.4, 2.7, require resolutions to be tailored to the facts of each investigation.[17] But no such requirement arises under the Commission's Rules. Rule 2.4 states that the Commission "may, in any matter under investigation adopt a resolution authorizing the use of any or all of the compulsory processes provided for by law."[18] That provision does not require a separate investigational resolution for each investigation, as Petitioners seem to suggest.[19] Likewise, Rule 2.7 simply states that the Commission may, pursuant to a resolution, issue compulsory process for documents or testimony.[20] This rule does not address the contents or form of the authorizing resolution. Accordingly, the resolution in this case satisfies the Commission's Rules.[21]

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[17] Pet., at 16-18 (citing 16 C.F.R. §§ 2.4, 2.7).

[18] 16 C.F.R. § 2.4.

[19] The narrowly tailored resolution that Petitioners desire is known as a "special resolution," and is one of three possible types suggested for FTC staff in the Commission's Operating Manual. *See* FTC Operating Manual, Chapter 3.3.6.7.4.1 to 3.3.6.7.4.4. The Commission has repeatedly rejected the proposition that such specificity is required in every investigation. *See*, *e.g*., *D. R. Horton, Inc*., Nos. 102-3050, 102-3051, at 4 (July 12, 2010) ("The Commission is not required to identify to Petitioners the specific acts or practices under investigation"), *available at* http://www.ftc.gov/os/quash/100712hortonresponse.pdf; *Dr. William V. Judy*, No. X000069, at 4-5 (Oct. 11, 2002) (sustaining validity of CIDs issued pursuant to an omnibus resolution),
available at

Petitioners also challenge the resolution as insufficiently specific in light of the legislative history of the Federal Trade Commission Improvements Act of 1980, which added a new Section 20 of the FTC Act.[22] Petitioners allege that this legislative history shows that Congress intended the FTC to provide more than "a vague description of the general subject matter of the inquiry . . .[,]"[23] and that the resolution here does not meet Congress's expectations.

We reject this argument for the same reason we rejected Petitioners' other arguments: the Commission's resolution satisfies the requirements of the statute.[24] It informs Petitioners of the nature of the conduct constituting the alleged violation—unfair or deceptive acts or practices involving consumer privacy and/or data security—and it identifies the applicable provision of law—Section 5 of the FTC Act. Moreover, even as Congress expressed its desire for specific notice, it nonetheless cautioned against reading too much into Section 20: "[T]his requirement is not intended to be overly strict so as to defeat the purpose of the act or to breed litigation and encourage the parties investigated to challenge the sufficiency of the notice."[25] We find that the resolution meets all legal requirements.[26]

Finally, Petitioners claim that the CID exceeded the FTC's jurisdiction by requesting information about employees, a group it contends is distinct from "consumers" for purposes of Section 5. Pet., at 28-32. We need not entertain this claim because challenges to the FTC's jurisdiction or regulatory coverage are not properly raised through challenges to investigatory process. *See*, *e.g.*, *FTC v. Ken Roberts Co.*Tje

B. The CID is not overbroad, unduly burdensome, or indefinite.

Petitioners also advance a series of arguments about the CID specifications, claiming that the CID is overbroad and asks for information not reasonably related to the investigation, in particular, information related to WHR's corporate parent WWC and its affiliates.[27]

An administrative subpoena is valid if the requested information is "reasonably relevant" to the purposes of the investigation.[28] Reasonable relevance is defined broadly in agency law enforcement investigations. As the D.C. Circuit has stated, "The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one . . . . The requested material, therefore, need only be relevant to the *investigation*—the boundary of which may be defined quite generally, as it was in the Commission's resolution here."[29] Courts thus place the burden on Petitioners to show that the Commission's determination is "obviously wrong" and that the information is irrelevant.[30]

Here, as Petitioners admit, Commission staff provided an explanation of the relevance of these requests.[31] More generally, staff's investigation focuses on a series of breaches of WHR's data security processes that are managed by other Wyndham entities.[32] In light of this, CID specifications that probe the details of the information security systems developed by Petitioners and their affiliates are relevant to this investigation. Petitioners have not met their burden of showing that this information is irrelevant, or that the Commission's request for it is "obviously wrong."

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[27] Pet., at 33-36.

[28] *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1516 (D.C. Cir. 1993) (citing *Invention Submission Corp.*, 965 F.2d at 1089; *FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977)).

[29] *Invention Submission Corp.*, 965 F.2d at 1090 (emphasis in original; internal citations omitted) (citing *Carter*, 636 F.2d at 787-88, and *Texaco*, 555 F.2d at 874 & n. 26).

[30] *Invention Submission Corp.*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 882) ("The burden of showing that the request is unreasonable is on the subpoenaed party.")); *Texaco*, 555 F.2d at 877 n.32. *Accord FTC v. Church & Dwight Co., Inc.*, 756 F. Supp. 2d 81, 85 (D.D.C. 2010).

[31] Pet., at 33 (citing Pet., Ex. 11, at 2).

[32] Pet., Exh. 11, at 2.

Petitioners further claim the CID is unduly burdensome, for the following reasons: (1) they have already spent over $5 million in responding, including producing over one million pages, and staff should now have enough information; (2) responding to the interrogatories will require six months and significant additional costs; (3) responding to the document requests that ask for "all documents" relating to a given subject will require about 10 weeks and $1 million to produce documents from an additional three custodians; and (4) responding to the document requests that ask for "documents sufficient to identify" a given subject are "hugely burdensome" and will require 6 months and $2.75 million to produce documents from the same three custodians. In sum, Petitioners claim that responding to the CID will require an additional $3.75 million, on top of what they have spent to date, and 1 to 2 years' additional time.[33]

Of course, the recipient of a CID must expect to incur some burden in responding to a CID.[34] The responsibility of establishing undue burden rests on Petitioners,[35] who must show

Petitioners' estimate also does not account for the effect of Instruction K, which permits Petitioners to identify, without having to reproduce, documents that were previously provided to the Commission.[40] To the extent that Petitioners' cost estimate includes production of duplicate materials, Instruction K permits Petitioners to avoid this expense and reduces the potential

Second, Petitioners have not established that this will seriously disrupt their operations. As expressed in *Texaco* and other key cases, some cost to recipients of process is expected, and the burden posed by this cost is evaluated in relation to the size and complexity of a recipient's business operations. In *Texaco*, for instance, the court affirmed enforcement of a subpoena that the company claimed would require 62 work-years and $4 million for compliance.[44] As in that case, it appears that the burden here may be a consequence of size—in 2010, Wyndham had an annual revenue of more than $3.8 billion—as well as the complexity of the corporate structure Wyndham has adopted.[45] Thus, full compliance with the CID, even if it were to reach the estimates included in the petition, is unlikely to "pose a threat to the normal operation of" Wyndham "considering [its] size."[46]

Third, Petitioners have claimed that the requests that ask for documents "sufficient to describe" the subject of the request present a "huge cost" and "extreme burden," particularly because the companies do not keep records in the manner called for.[47] It is unclear why a request that calls for documents "sufficient to describe" should be more burdensome than a request that calls for "all documents"; by definition, documents "sufficient to describe" should involve fewer than "all documents." The fact that Petitioners do not keep records in the manner that matches the request is not unusual and by itself does not present a basis for quashing these requests. Because staff often does not know how a CID recipient keeps its records, staff crafts its requests broadly, but provides a recipient flexibility in responding by allowing the recipient to produce those documents "sufficient to describe."

Fourth, the fact that Petitioners have already produced information to staff does not establish either that staff has sufficient information, or that further requests are unduly burdensome. The obligation is on Petitioners to show that the CID is unduly burdensome, not on staff to show that the CID is necessary.[48]

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[44] *Texaco*, 555 F.2d at 922 (Wilkey, J., dissenting).

[45] Wyndham Worldwide Corp., Annual Report (Form 10-K), at 34 (Feb. 22, 2011).

[46] *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1970).

[47] Pet., at 38-39. *See also* Pet., Exh. 10, at 6.

[48] *Cf. United States v. AT&T, Inc.*, No. 1:11-cv-01560, 2011 WL 5347178, at *6 (D.D.C. Nov. 6, 2011) ("There is no requirement that AT&T demonstrate to Sprint's satisfaction that the legal theories AT&T wishes to consider require documents beyond those [Sprint previously] supplied to DOJ . . . .").

Fifth, we find that Petitioners have not sufficiently availed themselves of the meet-and-confer process required by the FTC's Rules of Practice and the CID itself.[49] As we have previously said, this meet-and-confer requirement "provides a mechanism for discussing adjustment and scheduling issues and resolving disputes in an efficient manner."[50] Thus, the meet-and-confer requirements offer a critical opportunity for the recipient of a CID to engage with staff in a meaningful discussion aimed at reducing the burden of compliance. Here, Petitioners did not engage in a good faith exchange with staff intended to identify and discuss issues of burden.[51] Instead, Petitioners raised many of the same arguments found in this petition, often verbatim, and did not respond to legitimate requests from staff for specific proposals for narrowing or limiting the CID's scope. While staff was apparently willing to compromise on several issues, Petitioners demanded blanket and arbitrary caps on the number of document requests, interrogatories, and custodians. Petitioners cannot claim undue burden when they themselves undertook an inadequate meet-and-confer with staff.

Despite Petitioners' failure to carry their burden, we conclude that some modifications to the CID instructions may lessen Petitioners' costs of compliance. Accordingly, we amend the instructions to permit Petitioners to submit documents in lieu of interrogatories. This modification will allow Petitioners to avoid the time and expense of preparing interrogatory responses. In addition, to the extent that a document may be responsiTe2obuF8.6(ltiple This)]TJT*.0009 Tc-.00

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C. The CID was not issued for an improper purpose.

Petitioners claim that the size and timing of the CID shows that its true purposes were either to coerce settlement, or to obtain discovery outside of the rules of civil procedure. The facts of the investigation refute this conclusion. Mid-investigation, Petitioners expressed an interest in exploring settlement talks as a means of resolving the matter short of a full-blown investigation and consequent possible law enforcement action. At Petitioners' request, staff voluntarily allowed them to suspend their production, in order to reduce the burden on Petitioners. But staff also advised Petitioners that they would resume their investigation should settlement talks fail. And, as Petitioners admit, when the CID was issued, it was no surprise.[53] In light of these circumstances, there is no evidence of improper purpose, either to coerce settlement or to obtain information outside of the information necessary to complete the investigation.

III. CONCLUSION AND ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Wyndham Hotels & Resorts and Wyndham Worldwide Corporation to Quash, or Alternatively, Limit Civil Investigative Demand be, and it hereby is, **DENIED IN PART AND GRANTED IN PART**.

IT IS FURTHER ORDERED THAT the Definition T, "Personal information," be amended to exclude employee information as follows:

> "**Personal information**" shall mean individually identifiable from or about an individual consumer, including, but not limited to: (1) first and last name; (2) home or other physical address, including street name and name of city or town; (3) e-mail address or other online contact information, such as instant messenger user identifier or a screen name; (4) telephone number; (5) date of birth; (6) government-issued identification number, such as a driver's license, military identification, passport, or Social Security number, or other personal identification number; (7) financial information, including but not limited to: investment account information; income tax information; insurance policy information; checking account information; and **payment card** or check-cashing card information, including card number, expiration date, security number (such as card verification value), information stored on the magnetic stripe of the card, and personal identification number; (8) 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 (9) any information from or about an individual consumer that is combined with any of (1) through (8) above.

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[53] *Id.*, at 10.