IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| FEDERAL TRADE COMMISSION, Petitioner, | ) | |
| v. | ) | Misc. No. |
| SCOTT TARRIFF, *et al.*, Respondents. | ) | |

**MEMORANDUM IN SUPPORT OF PETITION OF THE FEDERAL TRADE COMMISSION FOR AN ORDER ENFORCING SUBPOENAS *AD TESTIFICANDUM***

**PRELIMINARY STATEMENT**

Petitioner, the Federal Trade Commission ("FTC" or "Commission"), by its designated attorneys and pursuant to Sections 9 and 16 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 49, 56, petitions this Court for an Order requiring Mr. Scott Tarriff, the former Chief Executive Officer of Par Pharmaceutical Companies, Inc. ("Par"), Mr. Edward Maloney, a senior executive of Paddock Laboratories, Inc. ("Paddock"), and Mr. Paul Campanelli, President of Par's Generic division (collectively "Respondents") to comply with the subpoenas *ad testificandum* issued by the FTC to each of these individuals. These subpoenas seek testimony relevant to an ongoing Commission law enforcement investigation. The Commission issued the subpoenas in aid of an investigation seeking to determine whether Par and Paddock in addition to, *inter alia*, Unimed Pharmaceuticals, Inc., Laboratories Besins Iscovesco, and Solvay Pharmaceuticals, Inc. (collectively, "Solvay") have engaged or are engaging in unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, by delaying entry of

a generic version of the drug AndroGel.

The Respondents have refused to comply with the Subpoenas requiring their testimony, despite an order from the Commission requiring them to do so. Because the subpoenas were lawfully issued and the testimony sought is relevant to the Commission's investigation, the Court should order Respondents to show cause why they should not fully comply. *See, e.g., FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *FTC v. MacArthur*, 532 F.2d 1135, 1141-42 (7th Cir. 1976); *see also* Fed. R. Civ. P. 26(a)(1)(E), 81(a)(3).

## JURISDICTION

Section 9 of the FTC Act, 15 U.S.C. § 49, authorizes the Commission to issue subpoenas to require the attendance and testimony of witnesses relating to any matter under investigation. If the recipient of the subpoena fails to comply, the Commission may petition the appropriate district court for an order requiring compliance. *Id.* The statute confers jurisdiction and venue on the district court of the United States in the district in which the investigation is being conducted. *Id.* The Commission issued the Subpoenas on February 13, 2008. Pet. Exh. 1, ¶ 11 (Declaration of Jonathan Lutinski of April 14, 2008);[1] Pet Exh. 3. It served the subpoenas upon Respondents' counsel in Washington, D.C. Pet. Exh. 1, ¶ 12; Pet. Exh. 3. The Commission's investigation is taking place within Washington, D.C. Pet. Exh. 1, ¶ 9. Because Respondents have refused to comply with the subpoenas, Section 9 of the FTC Act empowers this Court to issue its process (*e.g.*, a show cause order) to Respondents in this proceeding. *See, e.g., FTC v. Browning*, 435 F.2d 96, 100 (D.C. Cir. 1970); *FEC v. Committee to Elect Lyndon LaRouche*, 613 F.2d 849, 854-58 (D.C. Cir. 1979).

[1] Exhibits to the Commission's Petition are referred to as "Pet. Exh."

## STATEMENT OF FACTS

### I. THE PARTIES

The Commission is an administrative agency of the United States government, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41, *et seq*. The Commission is authorized and directed by Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), to prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.

Section 3 of the FTC Act, 15 U.S.C. § 43, empowers the Commission to prosecute any inquiry necessary to its duties in any part of the United States. Section 6 of the Act, 15 U.S.C. § 46, empowers the Commission "[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce," with certain exceptions that are not relevant here. As noted above, Section 9 of the Act empowers the Commission to require by subpoena the attendance and testimony of witnesses relating to any matter under investigation.

Respondents are either current or former officers of Par, a publicly traded Delaware company that is in the business of developing, manufacturing and marketing generic and branded drugs in the United States, or of Paddock, a privately held Minnesota company that is a high volume manufacturer of bioequivalent generic pharmaceuticals and over-the-counter specialty products. Pet. Exh. 1, ¶ 5. Par and Paddock are engaged in, and their businesses affect, "commerce," as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

### II. BACKGROUND

Solvay markets and sells AndroGel, a testosterone replacement drug with sales that exceeded $350 million in 2007. Pet. Exh. 1, ¶ 6. Paddock developed a generic version of AndroGel, and filed an abbreviated new drug application ("ANDA") on May 21, 2003, to obtain U.S. Food and Drug

Administration (FDA) approval to sell its generic drug. *Id.* at ¶ 7. Paddock entered into a Product Development, Manufacturing and Supply Agreement with Par on October 8, 2003, under which Paddock would manufacture its generic AndroGel product and Par would market it. *Id.*

On August 21, 2003, Solvay filed a patent infringement suit against Paddock in the United States District Court for the Northern District of Georgia. Pet. Exh. 1, ¶ 8. On September 13, 2006, the parties entered into a settlement agreement resolving their patent dispute. *Id.* Under the terms of the agreement, Paddock, and its assignee Par, agreed not to market a generic version of AndroGel until 2015. *Id.* On the same day as the patent settlement, the parties also entered into transactions that provided for substantial payments from Solvay, the patent holder, to Paddock and Par. *Id.* The parties to the settlement agreement provided a copy of the agreement to the FTC pursuant to the requirements of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108-173).

## III. THE COMMISSION'S INVESTIGATION AND THE SUBPOENAS

On March 2, 2007, the Commission issued a Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation (FTC File No. 071-0060). Pet. Exh. 1, ¶ 9; Pet. Exh. 2. The investigation seeks to determine whether, *inter alia*, the September 13, 2006, agreements between Solvay and Par or Paddock, or any other agreement, unlawfully delayed entry of a lower-cost generic version of AndroGel in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Pet. Exh. 1, ¶ 10. As part of this investigation, Commission staff issued the subpoenas to the Respondents to obtain their testimony relating to the negotiation and terms of the settlement agreements. In particular, the Commission wants to obtain information regarding the relationship between Par and Paddock's agreement to delay the marketing of the generic version of AndroGel, and the compensation that Solvay has agreed to provide to Par and Paddock. The Commission also seeks testimony from

Respondents regarding the potential harm to consumers from delaying the entry of a generic version of AndroGel. *Id.*

The Commission issued the subpoenas to the Respondents on February 13, 2008, requiring them to appear for investigational hearings. Pet. Exh. 1, ¶ 11; Pet. Exh. 3. Investigational hearings are similar to depositions in many respects and provide the Commission with the means to obtain testimony from witnesses to determine whether there is reason to believe a violation of law has taken place. *See* 16 C.F.R. §§ 2.8, 2.9 (describing procedures for investigational hearings). Each subpoena provided notice that the investigational hearing of the witness would be recorded by sound-and-visual means in addition to stenographic means. Pet. Exh. 1, ¶ 11; Pet. Exh. 3. The Commission served the subpoenas on Respondents' counsel, White & Case LLP. Respondents have not disputed service of the subpoenas. Pet. Exh. 1, ¶ 12; *see* Pet. Exh. 6.

On February 20, 2008, Respondents filed a Petition to Quash or Limit the Subpoenas ("Petition to Quash").[2] Pet. Exh. 1, ¶ 13; *see* Pet. Exh. 4. The Petition to Quash asserted that the Commission lacks authority to record its investigational hearings by any means other than stenographic. Respondents did not otherwise object to the subpoenas. *Id.*

On March 14, 2008, the Commission issued a letter opinion rejecting Respondents' Petition to Quash. Pet. Exh. 1, ¶ 15; Pet. Exh. 5. The Commission's decision reset the investigational hearing dates of Respondents Campanelli, Maloney, and Tarriff for March 28, 2008, April 4, 2008, and April 10, 2008, respectively. *Id.*

Notwithstanding the Commission's decision, Respondents informed the Commission on

[2] In fact, the Petition to Quash was actually filed by Par and Paddock on behalf of Respondents. Pet. Exh. 5, n.1.

March 21, 2008, that they did not intend to comply with the subpoenas, and that they refused to appear for videotaped investigational hearings. Pet. Exh. 1, ¶ 16; Pet. Exh. 6.

## LEGAL STANDARD FOR ENFORCEMENT

Although "the court's function is 'neither minor nor ministerial,' the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." *FTC v. Texaco*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (citation omitted); *accord, FTC v. Anderson*, 631 F.2d 741, 744-45 (D.C. Cir. 1979). Proceedings to enforce administrative subpoenas are entitled to summary disposition. *See* Fed. R. Civ. P. 81(a)(3). They are properly instituted by a petition and order to show cause (rather than by complaint and summons) and are summary in nature; discovery or evidentiary hearings may be granted only upon a showing of exceptional circumstances, which are not present here. *See, e.g., FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *FTC v. MacArthur*, 532 F.2d 1135, 1141-42 (7th Cir. 1976); *see also* Fed. R. Civ. P. 26(a)(1)(E); *United States v. Markwood*, 48 F.3d, 969, 981-82 (6th Cir. 1995); *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 704-05 (D.C. Cir. 1978).

The standards for judicial enforcement of administrative process are well settled:

> 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, 872-73, n.23 (D.C. Cir.) (*en banc*) (quoting *United States v. Morton Salt*, 338 U.S. 632, 652 (1950)) -- 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.*, 831 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 [at] 787-88 (quoting *Texaco*, 555 F.2d at 877 n.32).

*FTC v. Invention Submission Corp*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *see also FMC v. Port of Seattle*, 521 F.2d 431, 433-34 (9th Cir. 1975).

## ARGUMENT

### I. THE SUBPOENAS ARE LAWFUL AND SEEK RELEVANT INFORMATION

Because the Commission lawfully issued the subpoenas and, because the testimony being sought is relevant to the Commission's investigation, the Court should order Respondents to show cause why they should not fully comply.

#### A. The Subpoenas Are Lawful

The Commission properly issued the subpoenas as part of an investigation concerning possible violations of Section 5 of the FTC Act. *See* Sections 5 and 9 of the FTC Act, 15 U.S.C. §§ 45, 49; *see FTC v. Adams*, 296 F.2d 861, 867-70 (8th Cir. 1961); *FTC v. United States Pipe & Foundry Co.*, 304 F. Supp. 1254, 1259 (D.D.C. 1969); *see also Carter*, 636 F.2d at 787-88; *FTC v. Green*, 252 F. Supp. 153, 155-56 (S.D.N.Y. 1966). Respondents have not challenged the authority of the Commission to issue subpoenas requiring their testimony, nor have they claimed that the subpoenas would impose an undue burden on them.[3] *See* Pet. Exh. 4. Indeed, Respondents have indicated they would comply with the subpoenas if their hearings were recorded only by stenographic means. *See* Pet. Exh. 6. Thus, Respondents' sole argument is that the Commission lacks authority to videotape its investigational hearings. *Id.*; Pet. Exh. 1, ¶ 13.

[3] Arguments not first raised before the Commission in a petition to quash a subpoena are waived. *See FTC v. O'Connell*, 828 F. Supp. 165, 168 (E.D. N.Y. 1993); *EEOC v. City of Milwaukee*, 919 F. Supp. 1247 (E.D. Wis. 1996); *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,351 n.12 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992).

### B. The Subpoenas Seek Information That Is Reasonably Relevant To The Commission's Investigation

The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one. In an investigation the Commission does not seek information necessary to prove specific charges; it merely seeks to learn whether the law is being violated and whether to file a complaint. *See Texaco*, 55 F.2d at 872. The requested testimony, therefore, need only be relevant to the investigation – the boundary of which may be defined quite generally. *See Carter*, 636 F.2d at 787-88; *Texaco*, 555 F.2d at 874 & n. 26.

The present investigation seeks to determine, among other things, whether Solvay's payments to Par and Paddock were made to delay those companies from marketing a generic version of AndroGel. Pet. Exh. 1, ¶ 10. As part of this investigation, the FTC seeks to question the Respondents about their knowledge of the settlement agreements and other relevant conduct. *Id.* Indeed, Scott Tarriff, Par's former President and CEO, and Paul Campanelli, Par's current Generics Division President, were the key individuals who negotiated, and decided to enter into, the patent litigation settlement and other agreements related to AndroGel on behalf of Par. Ed Maloney, Paddock's Vice President of Business Development, was the chief negotiator for Paddock in the AndroGel settlement. The testimony sought by the subpoenas – including the non-verbal credibility evidence of their demeanor and tone – is highly relevant to the Commission's investigation. *See* Pet. Exh. 1, ¶ 17. Neither Par nor Paddock has challenged the relevance of the information requested by the subpoenas. Based on the foregoing, the subpoenas should be enforced. *See FTC v. Texaco, Inc.*, 555 F.2d at 874-76.

## II. RESPONDENTS HAVE NOT PROFFERED ANY VALID OBJECTION TO THE SUBPOENAS

Respondents have not proffered any valid objection for their failure to comply with the Commission's subpoenas. Their sole reason for refusing to comply is their mistaken belief that the Commission lacks the authority to videotape its own investigational hearings. *See* Pet. Exh. 4. In support of their position Respondents cite Commission Rule 2.8, 16 C.F.R. § 2.8, which governs investigational hearings, and specifically to Rule 2.8(b), which states:

> Investigational hearings shall be conducted by any Commission member, examiner, attorney, investigator, or other person duly designated under the FTC Act, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.

Respondents argue that this language limits the manner in which the Commission may record its hearings to stenographic means, and that it precludes the use of any other additional method.[4] *See* Pet Exh. 4. Respondents' argument is wrong because it ignores the broad authority granted to the Commission under the FTC Act. Further, it discounts the breadth of the Commission's regulations, which authorize the Commission to videotape investigational hearings as a supplement to making a stenographic record.

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[4] In their Petition to Quash, Respondents also claimed that videotaping the investigational hearings implicated the procedural due process rights of the witnesses. It is axiomatic that there can be no violation of due process rights unless there is a deprivation of liberty or property. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). In the investigational hearing context, no such interest is at stake. Nor is any purported due process issue ripe for judicial consideration. If the Commission seeks to use the investigational hearing material in a proceeding at which liberty or property interests are at stake, *i.e.*, in a judicial or administrative law enforcement proceeding, due process issues may be raised at that time.

### A. The Commission Has Authority to Order the Videotaping of Investigational Hearings under its Broad Grant of Subpoena Power

Congress endowed the Commission with expansive subpoena authority to be used flexibly in furtherance of its important statutory goals. *U.S. v. Morton Salt*, 338 U.S. 632, 642-43 (1950); *FTC v. Rockerfeller*, 591 F.2d 182, 188 (2d Cir. 1979). Given the importance of memorializing the evidence of witness's demeanor and the potential disciplining effects of videotape on the conduct of a witness, this broad grant of subpoena power permits the Commission to videotape hearings in furtherance of its investigational processes.

Section 9 of the FTC Act, 15 U.S.C. § 49, provides:

> The Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

The D.C. Circuit has held that the Commission's subpoena power under Section 9 should be broadly construed to effect Congress's goal of permitting the Commission to accomplish its investigative duties. *FTC v. Browning,* 435 F.2d 96, 99 (D.C. Cir. 1970) (interpreting the agency's subpoena power under Section 9 to effect the "[C]ongressional purpose to endow the Commission with broad powers of investigation . . . ."); *see also FTC v. Tuttle*, 244 F.2d 605, 614 (2d Cir. 1957) (rejecting respondent's proposed narrow interpretation of the words "such documentary evidence" as used in the first paragraph of Section 9 of the Act because "[i]t was clearly the purpose of the Congress that the Commission should have adequate subpoena power to perform its duties"); *SEC v. Jerry T. O'Brien, Inc.,* 467 U.S. 735, 743-44 (1984) (upholding similar "expansive" subpoena power of the SEC).

Congress's grant of authority to the Commission to subpoena witnesses to testify necessarily

includes the authority to record such testimony. But there is nothing in Section 9 that limits the manner in which testimony may be recorded.[5] The form of recordation is left to the discretion of the Commission.

Given this wide-reaching grant, the Commission has ample authority to videotape testimony at its investigational hearings. Witness testimony includes both a verbal component and a non-verbal component. This non-verbal component is sometimes referred to as demeanor evidence. Videotaping captures that demeanor evidence, thereby preserving evidence regarding the credibility of the witness providing the testimony. Videotaping permits Commission staff to share among one another, and with the Commission, the evidence of a witness's demeanor, gestures, timing, and tone. For the Commissioners, and for Commission staff who cannot be present at a hearing, this sound-and-visual record enables better, and more extensive, assessment of evidence than could be obtained by review of a written transcript. Videotaping investigational hearings allows the Commissioners to view these witnesses, instead of relying on a written record or second-hand description. This is useful in any investigation, particularly where the credibility of the witness may assist in determining whether there is reason to believe that a violation of law has taken place. A videotape record further permits even Commission staff who were present at the hearings the opportunity to review their impressions of witnesses' credibility after the live hearings have ended. Videotaping an investigational hearing consequently permits the Commission more effectively to perform its fact-finding investigative duties.

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[5] To the extent that Section 9 addresses procedural matters at all, it addresses them for depositions, as opposed to other testimony taken pursuant to a subpoena, such as investigational hearings. Section 9 of the FTC Act only requires that depositions be "reduced to writing by the person taking the deposition" and then be subscribed by the deponent. 15 U.S.C. § 49.

As discussed *infra,* videotaping investigational hearings also provides a deterrent to dilatory or obstructionist behavior by witnesses and counsel. This also enhances the Commission's ability to investigate. The additional benefits of videotape may not justify the added expense in every case, but when, as here, the Commission deems videotaping necessary, it has the authority to do so.

### B. Nothing in the Commission's Rules Limits its Authority to Videotape its own Investigational Hearings.

In their Petition to Quash, Respondents did not argue that the Commission lacked the *statutory* authority to require videotaping. Rather, they focused entirely on the Commission's regulations, and argued that the absence of an express statement in those regulations authorizing videotaping of investigational hearings somehow precludes the Commission from doing so. Pet. Exh. 4, pp. 5-6. That is, Respondents contended that, no matter how broad the Commission's statutory authority to conduct investigations, the Commission may not exercise any aspect of that authority unless it first promulgates a rule allowing itself to do so. But this argument is flatly contrary to basic principles of administrative law. Where, as here, an administrative agency is empowered by statute to exercise authority, it is up to the agency whether to carry out its program by means of regulations, case-by-case determinations, or a combination of these approaches. *See generally SEC v. Cheney Corps,* 332 U.S. 194 (1947).

To the extent that Respondents also argue that the Commission's present actions are contrary to its existing regulations, such arguments are based on a misreading of the regulations. The Commission, under its independent authority to enact rules and regulations to carry out its statutory mission, has properly implemented rules of practice for non-adjudicative proceedings through rule-making procedures. 16 C.F.R. §§ 2.1-2.16. These rules particularly address investigational hearings, 16 C.F.R. § 2.8, and the rights of witnesses in these investigative proceedings, 16 C.F.R. § 2.9.

The Commission's rules echo the broad authority given to the Commission by statute. As the Commission held in its decision on Respondents' Petition to Quash, its rules also permit the videotaping of investigational hearings in order to record the demeanor evidence of witnesses' nonverbal testimony. The Commission noted that interpreting its rules to permit videotaping is consistent with Congress's broad grant of investigational authority. Pet. Exh. 5. The Commission refused to endorse a narrow interpretation of its rules that would foreclose all means of recording investigational hearings other than stenographic means. The Commission's interpretation of its own procedural rules, an interpretation that is neither "plainly erroneous" nor "plainly * * * inconsistent" with the text of the rule, is "controlling." *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007).

**1. Rule 2.8.** The Commission concluded that Rule 2.8(b)'s requirement that investigational hearings be "stenographically reported" and transcribed establishes a *minimum* standard of recordation. Pet. Exh. 5, p. 3. Indeed, the purpose of the Commission's requirement under Section 2.8 for a written transcript of an investigational hearing is to provide witnesses a minimum procedural guarantee to ensure that an accurate record exists of the hearing. This standard does not foreclose any, much less all, other means of recording. *Id.*

Rather, in broad language similar to that of the FTC Act, Rule 2.8(b), 16 C.F.R. § 2.8(b) states that "[i]nvestigational hearings shall be conducted . . . for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation."[6] As

[6] "Data" is neither a narrow nor technical term. It includes "factual information . . . used as a basis for reasoning, discussion, or calculation" . . . as well as "information output by a sensing device or organ that includes both useful and irrelevant or redundant information and must be processed to be meaningful." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 293 (10th ed. 2002).

the Commission concluded, witness testimony includes both verbal and nonverbal evidence, including demeanor evidence. Pet. Exh. 5, p. 4. A videotaped investigational hearing establishes an even more complete record of an official proceeding than merely a written transcript, and it protects both the witness and the Commission. The Commission consequently held that Rule 2.8 permits videotaping to capture the witness's nonverbal testimony because this relates to a subject that is always relevant in an investigation: the credibility of each witness. It rejected Petitioners' narrow interpretation of Rule 2.8(b), which would require finding that the Rule was intended to yield records of investigational hearings devoid of witness demeanor evidence. *Id.*

Respondents' interpretation of Rule 2.8 would preclude the Commission from making use of technology that is routine in today's legal climate. Further, Respondents' interpretation of Rule 2.8 is unreasonable and, if adopted, would lead to absurd results. In its Petition to Quash, Respondents rely on a dictionary definition of "stenography" as:

> 1: the art or process of writing in shorthand; 2: shorthand esp. written from dictation or oral discourse; 3: the making of shorthand notes and the subsequent transcription of them * * *.

Pet. Exh. 4, p. 4. Under Respondent's definition of "stenography," the Commission could not employ court reporters using standard modern reporting systems such as steno masks, audiotape or digital back-up systems, all of which help to enhance the accuracy of transcription. *See* April C. Artegian, National Center for State Courts, *The Technology-Augmented Court Record* (1997), http://www.ncsconline.org/D_Tech/ctc/showarticle.asp?id=87 ("Many stenographic reporters use various forms of audio recording as back-up devices"). Respondents' interpretation could even prohibit both Commission staff and counsel for the witness from taking longhand notes during the course of investigational hearings, or from using laptop computers. In rejecting these arguments, the Commission concluded that Respondents construction of Rule 2.8 would deny it and any witness the

increased protections afforded by a more accurate record of the proceedings. Pet. Exh. 5, p. 3.

**2. Rule 2.9.** An examination of Commission Rule 2.9(b)(6), 16 C.F.R. § 2.9(b)(6), makes the absurdity of Respondents' argument even more apparent. Rule 2.9(b)(6) provides:

> The person conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. *Id.*

As the Commission found in its decision on Respondents' Petition to Quash, this provision provides the investigator broad discretion in the means and manner of conducting the hearing to ensure that investigational objectives are achieved. Pet. Ex. 5, n. 6. Under this provision the person conducting the hearing has the authority, in appropriate cases, to require that the testimony be taped because of its effect to curb improper conduct. *Id.* citing to Michael J. Henke and Craig D. Margolis, *The Taking and Use of Video Depositions: An Update*, 17 REV. LITIG. 1, 20 (1998) ("[c]onduct that a stenographic transcript could not adequately convey – such as aggressive examination, abusive treatment of opposing counsel or the witness, and witness coaching – may be preserved in full detail on video. Therefore, the video deposition is a powerful means of curbing discovery abuse"). Videotaping provides the person conducting the hearing with an important tool to protect the integrity of the investigation and the subjects being investigated. Videotaping a hearing can be a "necessary action to regulate the course of the hearing" within the meaning of Rule 2.9(b)(6). Pet. Ex. 5, n. 6.

In the present case, the Commission did not invoke Rule 2.9(b)(6) as an affirmative ground for videotaping these investigational hearings. Nevertheless, as the Commission recognized, the availability of the authority to do so in appropriate cases disproves Respondents' argument that Rule 2.8 categorically precludes videotaping. Thus, the Commission was well within its broad underlying statutory authority in providing that, in addition to stenographic transcription, Respondents' investigational hearings be videotaped.

## CONCLUSION

For the reasons set forth above, this Court should enter an Order for Par and Paddock to comply, in full, with the Subpoena *Ad Testificandum* by providing testimony within thirty (30) days of the Court's order.

Dated: April 16, 2008

Respectfully submitted,

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