

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. GUTTNER, 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 & Associates ("Orlikoff"), a non-party to this proceeding.

**I. Background**

On January 30, 2004, a Subpoena Duces Tecum ("Subpoena") was issued to Orlikoff by Complaint Counsel. See Attachment 1. The current scope of the Subpoena would require

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.

Subsequently, PHA inadvertently disclosed this document to the Federal Trade Commission (“FTC”) in a substantial volume of documents produced during the FTC’s investigation of PHA. By letter dated December 31, 2003, Complaint Counsel advised PHA that a document—the March 12 letter (PHA 40526-38)—appeared to contain privileged information and had been inadvertently produced. *See* Attachment 3. Complaint Counsel’s December 31, 2003 letter was the first instance in which PHA learned that these documents had been produced. In other correspondence, Complaint Counsel identified other potentially privileged documents, including (1) a draft letter to PHA shareholders (PHA 85187-98), (2) facsimile and draft letter from A. Diosegy to Sharon Alvis (PHA 65634-38), and (3) an outline of PHA goals (PHA 33931-35). Complaint Counsel has returned the draft letter to PHA shareholders and the draft letter from A. Diosegy, and has agreed to return the outline of PHA goals. Complaint Counsel has not, however, agreed to return the March 12 letter.

PHA and Complaint Counsel have been unable to agree that the March 12 letter is outside the scope of the Orlikoff Subpoena. By letter dated February 10, 2004, PHA requested that Complaint Counsel return the original March 12 letter and all copies. *See* Attachment 4.

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 scope. In its current form, the Subpoena will compel Orlikoff to produce the March 12 letter, which contains a communication subject to the attorney-client privilege belonging to PHA. Since PHA has a protectable interest in the privilege, PHA has standing to challenge the Subpoena at issue even though it was issued to a third party. *See Diram M. Seropian, M.D.*, 1991 FTC LEXIS 472 (1991).

### **B. Discovery Should Be Limited When It Would Require The Production of Privileged or Duplicative Information**

The Administrative Law Judge in an FTC proceeding has the authority to modify or limit a subpoena that requires the production of privileged, confidential or proprietary information, or

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 or limit the Orlikoff Subpoena in this case to exclude the March 12 letter from its scope.

**C. The Attorney-Client Privilege Applies To The March 12 Letter**

The purpose of the attorney-client privilege is to facilitate full and frank disclosure between attorneys and clients. *Upjohn Co. v. United States et al.*, 449 U.S. 383 (1981). The privilege protects from disclosure confidential statements made by a client for the purpose of obtaining legal advice, as well as legal advice provided to a client by an attorney. *See Upjohn*, 449 U.S. at 390; *Rehling v. City of Chicago*, 207 F.3d 1009, 1019 (7th Cir. 2000); *Tax Analysts v. Internal Rev. Serv.*, 117 F.3d 607, 617 (D.C. Cir. 1997).

Before the attorney-client privilege can attach, there must be a “communication” between the attorney and the client, in which legal advice is sought or provided, and the communication has been maintained as confidential. *See* 8 J. WIGMORE, EVIDENCE, § 2292 at 554 (McNaughton rev. ed. 1961). Once applicable, however, courts have held that the privilege is entitled to “maximum legal protection.” *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992). *See also Chase Manhattan Bank, N.A. v. Turner & Newall*, 964 F.2d 159, 165 (2d Cir. 1992). The March 12 letter contains a privileged communication, and this Court should therefore avail it of the maximum protection available under the law by excluding it from the scope of the Subpoena.

**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 communication between the attorney and the client. However, the attorney-client privilege may also apply in contexts where confidential client communications would be revealed. *United States v. (Under Seal)*, 748 F.2d 871, 874 (4th Cir. 1984); *Alexander v. FBI*, 192 F.R.D. 42, 46 n.3 (D.D.C. 2000) (the attorney-client privilege may apply to communications that would “clearly reveal those facts... specifically discussed with counsel.”).

If disclosed in full, the March 12 letter would reveal facts that were specifically discussed with PHA’s counsel for the purpose of obtaining legal advice. The March 12 letter reflects the substance of PHA’s exchanges with its attorney. By its own admission, Complaint Counsel acknowledged that the document “contains information that apparently was provided as part of a privileged communication.”<sup>1</sup> The March 12 letter is, in effect, a survey of issues faced by PHA, including legal issues. The communication described in the document reflects PHA’s attorney’s legal assessment of PHA’s current strategic plans. As a result, the March 12 letter contains a “communication” between PHA and its attorney that was made for the purpose of obtaining legal advice.

**2. PHA Maintained The Confidentiality Of The Communication When It Transmitted the March 12 Letter to James E. Orlikoff**

While the attorney-client privilege applies only to communications of confidential information made for the purpose of obtaining legal advice, it also requires that the

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<sup>1</sup> See Attachment 3. Although Complaint Counsel acknowledges that the letter contains information apparently provided as a privileged communication, it asserts that PHA waived its privilege. See Attachment 3. See also pp 5-7, *infra*.

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 147-48. In *GlaxoSmithKline*, the D.C. Circuit found that the disclosure of confidential information contained in 91 documents to public relations and government relations consultants, among others, was protected by the attorney client privilege because (1) the documents at issue were disclosed only to the individuals whose duties related to the contents of the documents; (2) the consultants acted as part of a team, working with full-time employees on issues that were “completely intertwined” with GlaxoSmithKline’s legal strategies, and (3) the consultants understood that the information was confidential. *Id.* at 147-49.

PHA’s disclosure of confidential information in its letter to Mr. Orlikoff likewise demonstrates PHA’s efforts to maintain the confidentiality of the information. First, PHA disclosed the document only to Mr. Orlikoff, whose duties unquestionably related to the contents of the March 12 letter. Mr. Orlikoff specializes in supporting the organization and governance of boards, as well as the development of strategies in risk management by boards. His relationship with PHA began more than one year before the March 2001 board meeting, during which time Mr. Orlikoff worked closely with PHA to improve its Board’s governance and structure. While

Mr. Orlikoff continued to work on these issues in 2001, he also played a pivotal role working with PHA staff and Board members in facilitating the revision of PHA's strategic plan. In order to 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 provided the information to Mr. Orlikoff with the understanding that Mr. Orlikoff would keep the March 12 letter confidential.

The March 12 letter is therefore entitled to protection under the attorney-client privilege for the following reasons: First, it contains the type of confidential information that is protected by the attorney-client privilege. Second, PHA maintained the confidentiality of the information by limiting its disclosure to Mr. Orlikoff, a consultant who (a) needed to know the confidential information contained in the letter to fulfill his duties within PHA; (b) worked closely with PHA staff and Board members to formulate a framework for a new strategic plan; and (c) was given the information with the understanding Orlikoff would maintain its confidentiality.

**D. Orlikoff Should Not Be Compelled To Produce The March 12 letter Because Such Production Would Be Duplicative**

Pursuant to Rule 3.3.1(c)(1)(i) of the Commission's Rules of Adjudicative Procedure, an Administrative Law Judge may limit discovery in his discretion if he determines that "the discovery sought is unreasonably cumulative or duplicative." In this case, there is no need for Mr. Orlikoff, a non-party to this case, to produce the March 12 letter because Complaint Counsel has already been provided with (1) a version of the March 12 letter that has been properly

redacted and (2) a privilege log reflecting PHA's claim of privilege to the March 12 letter.

Therefore, the Subpoena should be limited to exclude the March 12 letter.

### **III. Conclusion**

The Subpoena should be limited to exclude the March 12, 2001 letter because the document contains the substance of legal advice to PHA protected by the attorney-client privilege, which PHA has not waived. Moreover, production of the March 21 letter would be redundant and duplicative because the majority of the document is not privileged, and Complaint Counsel has been furnished with a redacted copy of this document.

For the foregoing reasons, PHA respectfully requests that the March 12 letter be excluded from the scope of the Subpoena issued to Orlikoff.

Dated: February 20, 2004

Respectfully submitted,

By: 

**James H. Sneed**

**Nicholas R. Koberstein**

**Linda M. Holleran**

McDERMOTT, WILL & EMERY

600 Thirteenth Street N.W.

Washington, D.C. 20002

Tel: (202) 756-8000

Fax: (202) 756-8855

Email: Jsneed@mwe.com;

NKoberstein@mwe.com;

Lholleran@mwe.com.

**Christine L. White**

McDERMOTT, WILL & EMERY

50 Rockefeller Plaza

New York, NY 10020

Tel: (212) 547-5545

Fax: (212) 547-5444

Email: cwhite@mwe.com

ATTORNEYS FOR PHA



**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

**In the Matter of**

**PIEDMONT HEALTH ALLIANCE, INC.,  
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**PETER H. BRADSHAW, M.D.,  
S. ANDREWS DEEKENS, M.D.,  
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ROBERT A. YAPUNDICH, M.D.,  
and WILLIAM LEE YOUNG III, M.D.,  
individually**

**Docket No. 9314**

**ORDER GRANTING RESPONDENT PIEDMONT HEALTH ALLIANCE'S  
MOTION TO LIMIT OR QUASH SUBPOENA DUCES TECUM TO ORLIKOFF &  
ASSOCIATES, A NON-PARTY**

**I.**

Orlikoff & Associates (“Orlikoff”) was served with a subpoena duces tecum by Complaint Counsel on January 30, 2004. Respondent Piedmont Health Alliance, Inc. (“PHA”) filed a Motion to Limit the subpoena duces tecum to exclude a March 12, 2001 letter sent by PHA to Orlikoff from the scope of subpoena because (1) its disclosure would reveal PHA’s privileged information; (2) its disclosure would be duplicative.

Although PHA is not the recipient of the Subpoena, PHA has standing to challenge its scope. In its current form, the Subpoena will compel Orlikoff to produce the March 12 letter, which contains a communication subject to the attorney-client privilege belonging to PHA. Since PHA has a protectable interest in the privilege, PHA has standing to challenge the Subpoena at issue even though it was issued to a third party. For the reasons set forth below,

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 .

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, and that further production of the March 12 letter would be duplicative.

PHA met its burden of showing that the March 12 letter contains privileged information and that PHA has not waived this privilege. As a result, Orlikoff may not waive PHA's privilege by disclosing the March 12 letter. Moreover, any such production of the March 12 letter would be duplicative as Complaint Counsel already possesses a properly redacted version of the letter, in which only a small amount of information is redacted. For the above stated reasons, PHA's motion is GRANTED.

ORDERED:

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D. Michael Chappell  
Administrative Law Judge

# **ATTACHMENT 1**



# SUBPOENA DUCES TECUM

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

<p>1. TO</p> <p>Orlikoff &amp; Associates, Inc. 4800 South Chicago Beach Drive Suite 307 North Chicago, Illinois 60615</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to produce and permit inspection and copying of designated books, documents 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.

<p>3. PLACE OF PRODUCTION OR INSPECTION</p> <p>Federal Trade Commission 601 New Jersey Avenue, N.W. Washington, D.C. 20001</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p>Andrew S. Ginsburg, Esq.</p> <p>5. DATE AND TIME OF PRODUCTION OR INSPECTION</p> <p>February 24, 2004 at 9:00</p>
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6. SUBJECT OF PROCEEDING

In the Matter of Piedmont Health Alliance, Inc., et al., Docket No. 9314

7. MATERIAL TO BE PRODUCED

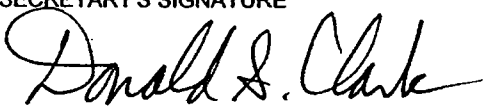
See Attachment

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL REQUESTING SUBPOENA</p> <p>David M. Narrow, Esq.</p>
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DATE ISSUED

JAN 30 2004

SECRETARY'S SIGNATURE



### GENERAL INSTRUCTIONS

#### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

#### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

#### TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

## **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.

**SPECIFICATION 2:** All documents relating to any meeting involving PHA and either Mr. James E. Orlikoff, Orlikoff & Associates, or both, including, but not limited to, the PHA Board retreat on March 31, 2001, in Greensboro, North Carolina.

#### **DEFINITIONS**

- A. The term "document" means all written, recorded, or graphic materials of every kind, prepared by any person, that are in the possession, custody, or control of Orlikoff & Associates. It includes all electronically-stored data accessible through computer or other information retrieval systems or devices. The term "document" includes the complete original document (or a copy thereof if the original is not available), all drafts, whether or not they resulted in a final document, and all copies that differ in any respect from the original, including any notation, underlining, marking, or information not on the original. Documents covered by this subpoena include, but are not limited to, the following: letters; memoranda; reports; contracts and other agreements; studies; plans; entries in notebooks, calendars and diaries; minutes, records, and transcripts of conferences, meetings, telephone calls or other communications; publications and unpublished speeches or articles; typed and handwritten notes; electronic mail; facsimiles (including the header showing the receipt date and time); tabulations; statements, ledgers, and other

records of financial matters or commercial transactions; diagrams, graphs, charts, blueprints, and other drawings; technical plans and specifications; advertising, product labels, and packaging materials; photographs, photocopies, slides, microfilm, microfiche, and other copies or reproductions; film, audio and video tapes; tape, disk, and other electronic recordings; and, computer printouts.

- B. The term "relating to" means, in whole or in part, addressing, analyzing, concerning, constituting, containing, commenting on, discussing, describing, explaining, identifying, referring to, reflecting, reporting on, supporting, stating, or dealing with.
- C. The term "meeting" means any encounter between two or more persons during which a communication of any kind occurred, including, but not limited to, formal or informal gatherings, conversations, and telephone calls.
- D. The terms "each," "any," and "all" mean "each and every."
- E. The terms "and" and "or" have both conjunctive and disjunctive meanings as necessary to bring within the scope of this document request anything that might otherwise be outside its scope.
- F. The singular form of a noun or pronoun includes its plural form, and vice versa; and the present tense of any word includes the past tense, and vice versa.
- G. The term "Orlikoff & Associates" includes its domestic and foreign parents, predecessors, divisions, and wholly or partially owned subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, consultants, agents and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control by the company.
- H. The term "Piedmont Health Alliance" or "PHA" includes its domestic and foreign parents, predecessors, divisions, and wholly or partially owned subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, consultants, agents and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control by the company.

### INSTRUCTIONS

- 1. Compliance with this subpoena requires a search of all documents in Orlikoff & Associates's possession, custody, or control, without limitation, those documents held by any of Orlikoff & Associates's officers, directors, employees, agents, or representatives, whether or not such documents are on the Orlikoff & Associates's premises. If any

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, expunge, 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 may submit legible copies. However, if the coloring of any document communicates any substantive information, Orlikoff & Associates must submit the original document or a like-colored photocopy.
5. Each submitted page or sheet will include an identification acronym for Orlikoff & Associates and a consecutive control number (in a color other than black or with a distinctive raised label). Only the first page of a bound pamphlet or book must include this unique identification and consecutive control number. Orlikoff & Associates will provide the Commission with a Document Log listing all submitted documents as follows: (a) the control numbers on the document's first and last pages; (b) the title of the document; and (c) the name of the person from whose files the document was obtained.
6. If Orlikoff & Associates withholds any responsive document or masks or redacts any portion of any responsive document based on a claim of privilege or work-product immunity, Orlikoff & Associates must provide the Commission with a log ("Privilege Log") describing the privilege claim and all facts supporting the claim sufficient to comply with Federal Trade Commission Rule of Practice 3.38A. 16 C.F.R. § 3.38A (2004). For each document withheld, masked, or redacted, the Privilege Log shall list the following: (a) specific grounds for claim of privilege or immunity, (b) type of document, (c) title, (d) author(s), (e) date, (f) addressees and recipients of the original document or any copy thereof (including persons "cc'd" or "blind cc'd"), (g) a description of the subject matter, with sufficient detail to assess the claim of privilege, (h) a description identifying each attachment to the document, (i) the page length of the document, (j) the

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 other parties to the litigation and whether that party is adverse, (n) case number, (o) complaint filing date, and (p) court name. For each person listed, the Privilege Log shall include the person's full name, address, job title, and employer or firm; for each non-company recipient, include such additional description sufficient to show that individual's need to know the information contained in the document. Please denote all attorneys with an asterisk ("\*"). Any part of an answer to which Orlikoff & Associates do not claim privilege or work product should be given in full.

7. Orlikoff & Associates will provide the Commission with the following:
  - a. A verified statement identifying the person(s) involved and the procedures followed in conducting the document search and preparing the response to this request.
  - b. A copy of all instructions used to conduct the document search and to prepare the responsive documents for submission to the Commission.
  
8. Compliance with this subpoena requires Orlikoff & Associates to submit all responsive documents and the following to the Commission:
  - a. Executed and notarized certification form, which is attached.
  - b. Privilege Log according to Instruction 6, if any responsive documents are withheld or redacted.
  - c. List of any persons whose files have not been searched according to Instruction 1.
  - d. List of all files which have been searched, as designated by the person controlling the file, Orlikoff & Associates's name for the file, or the computer or storage device where the file resides.
  - e. Document Log listing the document control number and other data according to Instruction 5.
  - f. Verified statement of the instructions used by Orlikoff & Associates to comply with this request, along with any written instructions used to prepare the document submission according to Instruction 7.



9. Orlikoff & Associates should produce documents as kept in the ordinary course of business.
10. Orlikoff & Associates must comply with this subpoena by submitting all responsive documents on or before the date identified in the subpoena to Andrew S. Ginsburg, Esq., Federal Trade Commission, Room 7151, 601 New Jersey Avenue, N.W., Washington, D.C. 20001. Orlikoff & Associates can arrange for document delivery by calling Mr. Ginsburg at 202-326-3108. Orlikoff & Associates does not need to personally deliver the documents.
11. If Orlikoff & Associates believes that this subpoena's specifications can be narrowed consistent with the Commission's need for information, we encourage it to discuss possible modifications with a Commission representative. Note that an authorized Commission representative, generally the Bureau's Assistant Directors, must agree in writing to any modifications to this subpoena. All inquiries about this subpoena and modification requests should be directed to Mr. Ginsburg at 202-326-3108.

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

**CERTIFICATION**

This response to the Subpoena Duces Tecum issued by the Federal Trade Commission, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete. If the Commission uses such copies in any court or administrative proceeding, the company will not object based on the Commission not offering the original document.

I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
TYPE OR PRINT NAME AND TITLE

\_\_\_\_\_  
(Signature)

Subscribed and sworn to before me at the City of \_\_\_\_\_,

State of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
(Notary Public)

My Commission expires: \_\_\_\_\_

**ATTACHMENT 2**  
**[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](mailto: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

Re: Piedmont Health Alliance, Inc., et al.  
FTC Docket No. 9314

*Nr*  
Dear Mr. Koberstein:

It has just been brought to my attention that document PHA 40526-40528, a letter dated March 12, 2001, from Sharon Alvis to Mr. Jamie Orlikoff of Orlikoff & Associates, Inc., contains a restatement by Ms Alvis of the substance of a legal opinion provided by PHA's legal counsel. While this letter contains information that apparently was provided as part of a privileged communication, the letter itself is not part of a chain of such communication between PHA and its counsel, and therefore does not appear to be privileged. Moreover, by including the information in a letter to an outside party, any privilege that might exist regarding that information appears to have been waived by PHA. However, if you have information that clearly demonstrates that the document is entitled to be given privileged status, we would be willing to reconsider our position regarding the document.

Please call me at (202) 326-2744 if you have any questions.

Very truly,

A handwritten signature in black ink, appearing to read "David M. Narrow".

David M. Narrow  
Counsel Supporting the Complaint

*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. 20580

Re: In the Matter of Piedmont Health Alliance, et al., Docket 9314; Privileged Documents

Dear David:

In your letters of December 31, January 6, and January 12, you identified a number of potentially inadvertently produced privileged documents. In this letter, we address the claims of privilege for the documents mentioned in your letters. As a preliminary matter, however, we do not believe that the inadvertent disclosure of these documents in any way constitutes a waiver of the attorney-client privilege, or any other applicable privilege.

**Documents DEEK 1166, DEEK 1879, DIL 0004, and PHA 70544**

In your letters dated January 6, 2004 and January 12, 2004 you stated that documents numbered DEEK 1166, DEEK 1879, DIL 0004, and PHA 70544 may be privileged. We do not seek the return of these documents. However, we are not waiving the attorney-client privilege, or any other applicable privilege, with respect to the information referenced in these documents.

**Document PHA 40526-40528**

In your letter of December 31, 2003, you identified the document numbered PHA 40526-28 as a document potentially subject to the attorney-client privilege. This document is a letter from Sharon Alvis to James Orlikoff of Orlikoff & Associates dated March 12, 2001 ("March 12, 2001 letter"). Although you acknowledge that this document appears to reflect a privileged communication, you assert that that the document is not privileged because (1) the letter itself is

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 Analysts v. Internal Rev. Serv.*, 117 F.3d 607, 617 (D.C. Cir. 1997); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). As you acknowledge in your December 31 letter, the document describes substantive legal advice. The disclosure of that advice would reveal information provided by PHA to its counsel in confidence, and thus constitutes the type of communication protected from disclosure by the attorney-client privilege.

The March 12, 2001 letter also meets the second prerequisite of the attorney-client privilege because PHA intended for the communication to be kept confidential, and in fact kept it confidential. To maintain the confidentiality of a communication, the communication can be disclosed only to those who need to know the information, or are authorized 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). In addition, courts have held that, in certain cases, confidential communications can be disclosed to consultants without waiving the attorney-client privilege. *See GlaxoSmithKline*, 294 F.3d at 147-48. In *GlaxoSmithKline*, the D.C. Circuit found that GlaxoSmithKline's disclosure of confidential information contained in 91 documents to public relations and government relations consultants, among others, was protected by the attorney-client privilege because (1) the documents at issue were disclosed only to the individuals whose duties related generally to the contents of the documents; (2) the consultants acted as part of a team, working with full-time employees on issues that were "completely intertwined" with GlaxoSmithKline's legal strategies, and (3) the consultants understood that the information was confidential. *Id.* at 147-49 (citing *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001)).

PHA's disclosure of confidential information in its letter to Mr. Orlikoff likewise demonstrates PHA's efforts to maintain the confidentiality of the information. First, PHA disclosed the document only to Mr. Orlikoff, whose duties unquestionably related to the contents of the document, and implementing the legal advice it contained. Mr. Orlikoff specializes in supporting the organization and governance of boards, as well as the development of strategies in

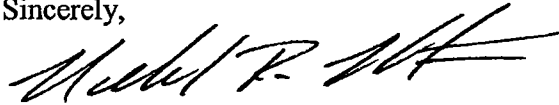
David M. Narrow, Esq.  
February 10, 2004  
Page 4

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 R. Koberstein, hereby certify that on February 20, 2004:

I caused two copies of Respondent Piedmont Health Alliance's Public Record Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, and Respondent Piedmont Health Alliance's Rule 3.45(e) Attachment To Its Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, to be served by hand delivery upon the following person:

Hon. D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
Room H-104  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

I caused two copies of Respondent Piedmont Health Alliance's Public Record Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, and Respondent Piedmont Health Alliance's Rule 3.45(e) Attachment To Its Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, to be served by hand delivery upon the following:

Office of the Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

I caused a copy of Respondent Piedmont Health Alliance's Public Record Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, and Respondent Piedmont Health Alliance's Rule 3.45(e) Attachment To Its Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, to be served via electronic mail and followed by U.S. mail delivery to the following persons:

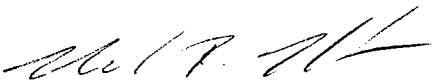
John S. Martin, Esq.  
David M. Narrow, Esq.  
Complaint Counsel  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Room S-3013  
Washington, D.C. 20580

I caused a copy of Respondent Piedmont Health Alliance's Public Record Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, and Respondent Piedmont Health Alliance's Rule 3.45(e) Attachment To Its Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, to be served via U.S. mail delivery to the following person:

Jeffrey Brennan, Esq.  
Assistant Director Health Care Services & Products  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20580

I caused a copy of Respondent Piedmont Health Alliance's Public Record Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, to be served via U.S. mail to the following person:

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

  
\_\_\_\_\_  
Nicholas R. Koberstein