

Date: February 27, 2013

To: FTC and DOJ Antitrust Complaints



Subject: Request for FTC to Look into the Matter of *FoodQuestTQ LLC versus the Food and Drug Administration and the Department of Health and Human Services*

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Among other things, the Federal Trade Commission Act empowers the Federal Trade Commission to conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce and to make reports and legislative recommendations to Congress.

Congressional actions giving federal government agencies the authority to patent and copyright coupled with their ability to supplement Congressional appropriations by engaging in commerce have made the Federal Government a *de facto* competitor with the private sector. As such the Federal Government has become an “entity engaged in commerce.” Federal agencies are now producing and charging the American consumer for “non-inherently governmental” purposes the same or similar goods and services that are also available from the private sector. These new authorities granted to federal agencies have had the unintended consequence of damaging the consumer by creating new and unforeseen market forces resulting in monopolistic practices such as government price fixing that stymies the innovation essential to protect the consumer.

The above concerns are exacerbated when federal agencies with regulatory authority are involved. By virtue of their regulatory influence over industry, federal regulatory agencies are now in the position to unfairly promote their own products and services over those offered by the private sector regardless of their quality. The use of federal regulatory agency influence to instill fear of regulatory reprisal for not using the lesser products and services supplied by the U.S. Government represents a new predatory anticompetitive conduct that damages the American consumer.

Fear of reprisal is only one edge of a two edged anticompetitive sword. Some regulated industries intentionally enter into collusion with their regulating federal agencies to increase profit taking by avoiding the normal costs associated with innovation. In collusion with the government, industry avoids the cost of innovation by using the inferior products supplied by their federal regulatory agencies at less cost in order to increase profit margins. This anticompetitive conduct seriously impacts the innovation required to maintain the very health and safety of the American consumer.

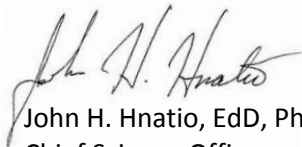
By way of example, FoodQuestTQ LLC is a small business that produces advanced risk management software to improve the safety of food. The company produced a suite of specialized tools designed to reduce the risk of intentional and unintentional poisoning of the food supply. In this case, the Food and Drug Administration (FDA) engaged in predatory and anticompetitive conduct by commandeering the patents, trade secrets and copyrighted works owned by FoodQuestTQ LLC. The company’s intellectual property was then used by the FDA to duplicate, at taxpayer expense, similar products that were by FDA’s own admission inferior to those already being produced and sold by FoodQuestTQ LLC. This resulted in the immediate loss of sales for the company as well as the loss of future potential sales of the superior FoodQuestTQ LLC products to the food industry.

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By commandeering FoodQuestTQ's intellectual property to produce duplicate inferior products, the FDA engaged in the predatory anticompetitive practice of "patent poaching." Patent poaching is a term used when a federal agency identifies a new technology and, without due process of law, simply commandeers it. FoodQuestTQ LLC, as a small business, was particularly susceptible to this type of predatory anticompetitive conduct by the FDA for two primary reasons. First, the FDA used the practice of "blacklisting" FoodQuestTQ LLC within government and industry to unfairly damage their future ability to compete. Second, the FDA and HHS took actions to channel the matter directly to the courts without any possibility of an arbitrated solution knowing full well that the small business could not afford lengthy and costly intellectual property litigation. The FDA then applied the predatory anticompetitive practice of exerting regulatory influence to encourage the food industry to use the products they duplicated using the intellectual property they commandeered from FoodQuestTQ LLC. By the FDA's own admission, the duplicated products were "not as sophisticated" as the original products developed and being sold by FoodQuestTQ LLC.

These are among the compelling reasons that we recently wrote a letter to Mr. Andrew I. Gavil, Director, Office of Policy and Coordination, Bureau of Competition at the Federal Trade Commission (copy attached). In our letter we request that the Federal Trade Commission exercise their authority to conduct an investigation of the recent powers granted to federal agencies by Congress that allows them to engage in direct commercial competition with the private sector frequently in collusion with the very industries they regulate. We have respectfully requested that the Federal Trade Commission provide a report with legislative recommendations to Congress on how to prevent these damages to the American consumer.

Sincerely,



John H. Hnatio, EdD, PhD  
Chief Science Officer

cc:

Kathleen Sebelius, HHS  
Margaret Hamburg, FDA  
Sarah Burwell Matthews, OMB  
Andrew Gavil, FTC  
William Baer, DOJ  
Senator Leahy  
Senator Grassley  
Representative Mica