UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	**PUBLIC**
THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS,	)	DOCKET NO. 9343
Respondent.	)	

RESPONDENT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR AN ORDER COMPELLING DISCOVERY

Respondent, The North Carolina State Board of Dental Examiners ("State Board") files this Memorandum in Support of Its Motion for an Order Compelling Discovery. The Motion is necessary because Respondent State Board and the attorneys representing the Federal Trade Commission in this matter ("Complaint Counsel") have reached an impasse regarding Complaint Counsel's insufficient response to Respondent's First Set of Requests for Admissions ("Requests for Admission"), First Set of Interrogatories ("Interrogatories"), and First Set of Requests for Production of Documents ("Requests for Production") (collectively, the "Discovery Requests"). Complaint Counsel has refused to provide responses to numerous requests contained in the State Board's Discovery Requests, and has made several overbroad and inapplicable privilege claims in connection with these requests.

ARGUMENT

I. This Motion Is Timely

This Motion to Compel is permitted pursuant to Commission Rule 3.38 and Fed. R. Civ. P. 37. On October 12, 2010, Counsel for Respondent served on the Commission its Discovery Requests consistent with Commission Rules 16 C.F.R. §§ 3.31, 3.32, 3.35, and 3.37. Complaint Counsel filed its responses to Respondent's Requests for Admission on October 22, 2010. Complaint Counsel served its response to the Interrogatories and Requests for Production on November 18, 2010, which was the date upon which discovery closed as set by the Administrative Law Judge ("ALJ").

On January 5, 2011, Respondent sent to Complaint Counsel a list detailing the insufficiency of the responses to the Discovery Requests ("List of Specific Discovery Items Requested," attached as Exhibit G) and requesting that Complaint Counsel respond by taking the "Action Required" for the "Reason(s) Requested." Respondent stated that its counsel was available to negotiate the matter in good faith. On January 11, 2011, the parties reached an impasse, which has required Respondent to file its Motion.

II. Complaint Counsel Is Obligated to Respond to Respondent's Discovery Requests

Despite Respondent's good faith efforts to resolve differences, Complaint Counsel continues to insist that no further response is required. Because of the impasse, Respondent has filed its Motion pursuant to Rule 3.38, which provides that a party may apply "for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to . . . a request for admission under 3.32, . . . or an interrogatory under 3.35." § 3.38(a). The rule provides that "[i]f a party fails to respond to or comply as requested with a request for production or access made

under 3.37(a), the discovering party may move for an order to compel production or access . . . " *Id.*; *see also e.g., In re Doe v. Under Seal*, 584 F.3d 175 (4th Cir. 2007); *Smith v. US Sprint (In re Mbakpuo)*, No. 93-1662, 1995 U.S. App. LEXIS 8758 (4th Cir. Apr. 17, 1995).

Generally, Complaint Counsel's responses fail to provide sufficient detail to evaluate the accuracy of its objections, and are insufficient to comply with the Commission's Rules of Discovery. *See* List of Specific Discovery Items Requested, "Reason(s) Requested" column; *see also* 16 C.F.R. § 3.32 ("If objection is made . . . the answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter."); § 3.35 (in specifying records from which the answer to an interrogatory can be derived, "[t] he specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained."); § 3.37 ("the reasons for [any] objection shall be stated.")

Accordingly, to obtain proper and sufficient response to its Discovery Requests, Respondent has filed its Motion Compelling Discovery.

III. The Privileges Claimed by Complaint Counsel Are Overbroad and/or Inapplicable

A. Government Deliberative Process Privilege

Complaint Counsel asserts it is entitled to the protection of the government deliberative process privilege. However, this privilege is inapplicable here.

In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the Supreme Court held "The cases uniformly rest the privilege on the policy of protecting the 'decision-making processes of government agencies,'; and focus on documents 'reflecting advisory

opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Id.* at 150 (citations omitted).

For the deliberative process privilege to apply, the "materials must bear on the formulation or exercise of agency policy-oriented *judgment*." *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (internal citations omitted) (emphasis in the original). Material that could not "reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment" is not privileged. *Id.*

Thus the privilege is designed to protect government **policy-making**. It is unrelated to the Commission's role as an investigative and enforcement agency. *See, e.g., Playboy Enter. v. DOJ*, 677 F.2d 931, 935 (D.C. Cir. 1982) (concluding a report was not privileged because it was compiled "to investigate the facts," and was not "intertwined with the policy-making process").

Even if the privilege was applicable here, the Commission would be required to show that the record is (1) deliberative, *i.e.*, part of the decision-making process, and (2) predecisional, *i.e.*, prepared "to assist an agency decision-maker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). The privilege protects "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Further, the privilege "is to be construed narrowly, and the burden rests upon the government to be precise and conservative in its privilege claims . . . the privilege does

not protect a document which is merely peripheral to actual policy formation." *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994). Complaint Counsel have not been "precise and conservative" in their privilege claims. No reasoning or case law has been cited in support of assertions of privilege. Accordingly, Complaint Counsel is not entitled to the protection afforded by the government deliberative process privilege.

B. Law Enforcement Investigatory Privilege

The law enforcement investigatory privilege is a "limited" privilege which "protects criminal investigatory files." *Lykken v. Brady*, No. 07-4020-KES, 2008 WL 2077937, at *5 (D.S.D. May 14, 2008) (citations omitted). "[T]he primary concern over disclosure of law enforcement reports is to prevent a party who is himself the subject of a criminal investigation from obtaining **premature discovery** of law enforcement actions." *Id.* (citing 3 WEINSTEN'S FED. EVIDENCE § 509.24[2][a]) (emphasis added). "[W]here the enforcement action has already been taken . . . 'the rationale for nondisclosure does not apply, and the files should be made available.'" *Id.* Further, "the exemption only applies in situations where disclosure of law enforcement investigatory files would interfere with enforcement proceedings." *Id.* (citing *Campbell v. Dept. of Health & Human Services*, 682 F.2d 256 (D.D.C.1982) (J. Ginsburg) (government must provide affidavit with sufficient facts showing that disclosure of files would interfere with an enforcement proceeding).

Complaint Counsel has not met its burden in establishing a privilege. To do so: "(i) the head of the department having control over the information requested must assert the privilege; (ii) the official in question must do so based on actual personal consideration; and (iii) he or she must specify the information purportedly covered by the

privilege, and accompany the request with an explanation as to why such information falls within the scope of the privilege." *In re Adler, Coleman, Clearing Corp.*, No. 95-08203JLG, 1999 WL 1747410, at *3 (S.D.N.Y. Dec. 8, 1999); *see also Lykken*, 2008 WL 2077937, at *5, quoting *Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1377 (8th Cir. 1975) ("The privilege is a 'very narrow one and need only be honored where the policy behind its invocation by the agency outweighs any necessity for the information shown by the party seeking it."). Further, "[t]he proponent of the law enforcement privilege bears the burden of proving its claim." *Alexander v. F.B.I.*, 186 F.R.D. 154, 167 (D.D.C. 1999) (citation omitted).

Complaint Counsel has failed to meet their burden on any of the above three criteria for asserting the law enforcement investigatory privilege. Courts may not "defer blindly to assertions made by a law enforcement official regarding the existence of the law enforcement privilege." *MacNamara v. City of New York*, 249 F.R.D. 70, 85 (S.D.N.Y. 2008), and "across-the-board claims of law enforcement privilege supported only by conclusory statements will not suffice." *Alexander*, 186 F.R.D. at 167. Even if Complaint Counsel had made such a showing in its discovery responses, it would still have to satisfy a 10-factor balancing test, which "must be conducted with an eye towards disclosure." *Torres v. Kuzniasz*, 936 F. Supp. 1201, 1210 (D.N.J. 1996).

In a similar matter, *SEC v. Shanahan*, No. 407CV270 JCH (E.D. Mo. July 9, 2009), the District Court held that the Securities and Exchange Commission could not assert the law enforcement investigatory privilege in a civil case to protect interviews conducted by the U.S. Attorney's Office. The court noted that the interviews were conducted in the context of a separate (and completed) criminal investigation against the

defendant. The court concluded that the government's arguments in support of the privilege "consist[ed] solely of boilerplate and conclusory statements." *See SEC v. Shanahan* at 4, copy attached hereto as Exhibit 1.

Here, Complaint Counsel rely on boilerplate and conclusory statements. Additionally, the present matter is a civil case and not the subject of a criminal investigation. Accordingly, the law enforcement investigatory privilege does not apply.

C. Work Product Doctrine

Complaint Counsel asserts that it is entitled to the protection afforded by the work product doctrine.

The work product doctrine only encompasses "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). It does not apply to "Facts that the adverse party's lawyer has learned, or the Persons from whom he has learned such facts, or the Existence or nonexistence of documents, even though the documents themselves may not be subject to discovery." *See Ford v. Philips Elec. Instruments Co.*, 82 F.R.D. 359, 360 (E.D. Pa. 1979) quoting 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 2023, at 194 (1970)).

Complaint Counsel relies only on conclusory allegations that the work-product doctrine applies here, without specific showings. It is impossible to evaluate whether Complaint Counsel's claim encompasses facts or an attorney's mental impressions without a more specific and detailed description of information and documents allegedly subject to this privilege.

D. Government Informer Privilege

Complaint Counsel asserts it is entitled to the protection of the government informer privilege, but provides no justification for this assertion.

The government informer privilege is "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro v. U.S.*, 353 U.S. 53, 59 (1957). Its purpose is the furtherance and protection of the public interest in effective law enforcement. *Id.* The privilege preserves citizens' anonymity to encourage them to communicate with law-enforcement officials. *Id.*

But Complaint Counsel's privilege claim overlooks the reality that the present matter does not concern either civil or criminal "*violations* of law." Rather, it concerns the Commission's disagreement with a state agency over its enforcement of a law. The so-called "informants" are not "persons who furnish information of violations of law" as contemplated by *Roviaro*. They are either fact witnesses who have been interviewed by the Commission, or government agents.[1]

Even if the privilege did apply here, it "must give way" when "the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id.* at 60-61. "In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Id.* at 61.

Complaint Counsel has not made a specific showing of which documents the privilege applies to. Complaint Counsel invokes this privilege not to protect the identity

[1] Counsel has not provided sufficient information to evaluate to whom the privilege applies.

of informants, but to withhold information that should properly be provided. Accordingly, the government informer privilege does not apply here.

CONCLUSION

Complaint Counsel has generally and specifically failed to respond to Respondent's Requests for Discovery, and Respondent is entitled to the relief requested in its Motion for an Order Compelling Discovery.

WHEREFORE, Respondent respectfully requests that the Administrative Law Judge GRANT Respondent's Motion for an Order Compelling Discovery and issue an order compelling Complaint Counsel to respond to Respondent State Board's Discovery Requests.

This the 11th day of January, 2011.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2011, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

I hereby certify that the undersigned has this date served copies of the foregoing upon all parties to this cause by electronic mail as follows:

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I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

The Honorable D. Michael Chappell
Administrative Law Judge
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This the 11th day of January, 2011.

/s/ Alfred P. Carlton, Jr.
Alfred P. Carlton, Jr.

CERTIFICATION FOR ELECTRONIC FILING

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.

/s/ Alfred P. Carlton, Jr.
Alfred P. Carlton, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff(s),	)	
vs.	)	Case No. 4:07CV270 JCH
MICHAEL F. SHANAHAN, SR., and MICHAEL F. SHANAHAN, JR.,	)	
Defendant(s).	)	

MEMORANDUM AND ORDER

This matter is before the Court on Michael F. Shanahan, Jr.'s ("Shanahan") Motion to Compel Discovery, filed June 9, 2009. (Doc. No. 83). The matter is fully briefed and ready for disposition.

By way of background, this case involves allegations of the Securities and Exchange Commission (the "Commission") centering on the alleged "backdating" of stock options at Engineered Support Systems, Inc. between 1996 and 2003. (Shanahan's Memo in Support, P. 2). In July, 2007, the United States Attorney's Office for the Eastern District of Missouri ("USAO") filed criminal charges against Shanahan, involving allegations substantially similar to the Commission's claims at issue here. (Id.). In connection with the criminal investigation, USAO investigators conducted a number of interviews with potential witnesses, and prepared written summaries of those interviews. (Id.; Plaintiff's Response to Shanahan's Motion to Compel Production ("Commission's Response"), P. 1). During the course of the USAO and Commission investigations, the USAO provided the Commission with copies of thirty interview memoranda drafted by its agents. (Commission's Response, P. 2). Shanahan did not receive copies of the memoranda during the criminal action. (Shanahan's Memo in Support, PP. 2-3). Shanahan did receive a few interview

summaries directly from the USAO, however, including five written summaries of interviews prepared by an FBI agent, and United States Postal Service memoranda regarding interviews of Gary Gerhardt conducted in June, 2006, and March, 2007, and of Steven Landmann conducted in June, 2006. (Id., P. 3 and n. 2).

On April 1, 2009, Shanahan's counsel requested that the Commission produce, "[a]ll transcripts or summaries of investigative interviews relating to this case, including, but not limited to, all interview transcripts, notes of interviews, summaries of interviews, and all Federal Bureau of Investigation Form FD-302s." (Shanahan Memo in Support, P. 3). Counsel for the Commission informed the USAO of this request, and after consultation, the Acting United States Attorney for the Eastern District of Missouri instructed counsel for the Commission to assert a law enforcement privilege over the interview memoranda provided to the Commission. (Commission Response, P. 3).[1] On May 18, 2009, the Commission provided a privilege log to Shanahan, in which it disclosed the identity of each interviewee, and lodged a single privilege objection to the production of the summaries, the "law enforcement/investigative privilege." (Shanahan Memo in Support, P. 3).

As stated above, Shanahan filed the instant motion on June 9, 2009, seeking production of the summaries of investigative interviews.

DISCUSSION

"There is a limited, federal common law of privilege which protects criminal investigatory files." Lykken v. Brady, 2008 WL 2077937 at *5 (D.S.D. May 14, 2008) (citations omitted). The privilege is predicated on the public interest in minimizing the disclosure of documents that would

[1] The Commission attaches to its response as Exhibit B the May 15, 2009, letter from Michael W. Reap, Acting United States Attorney.

tend to reveal law enforcement investigative techniques or sources. In re Adler, Coleman, Clearing Corp., 1999 WL 1747410 at *3 (S.D.N.Y. Dec. 8, 1999).

"There are three prerequisites to the assertion of the privilege: (i) the head of the department having control over the information requested must assert the privilege; (ii) the official in question must do so based on actual personal consideration; and (iii) he or she must specify the information purportedly covered by the privilege, and accompany the request with an explanation as to why such information falls within the scope of the privilege." Adler, 1999 WL 1747410 at *3 (citations omitted). "Once these conditions are satisfied, the information sought will not be disclosed unless the party seeking disclosure establishes that its need for the information outweighs the public interest in preventing disclosure." Id. (citation omitted); see also Lykken v. Brady, 2008 WL 2077937 at *5, quoting Stephens Produce Co. v. NLRB, 515 F.2d 1373, 1377 (8th Cir. 1975) ("The privilege is a 'very narrow one and need only be honored where the policy behind its invocation by the agency outweighs any necessity for the information shown by the party seeking it."). Further, "[t]he proponent of the law enforcement privilege bears the burden of proving its claim."[2] Alexander v. F.B.I., 186 F.R.D. 154, 167 (D.D.C. 1999) (citation omitted).

In balancing the public interest in nondisclosure against the need of a particular litigant for access to the privileged information, district courts consider the following factors:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending

[2] Courts need not, "defer blindly to assertions made by a law enforcement official regarding the existence of the law enforcement privilege." MacNamara v. City of New York, 249 F.R.D. 70, 85 (S.D.N.Y. 2008).

> or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; [and] (10) the importance of the information sought to the plaintiff's case.

In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988) (citations omitted). "Importantly, across-the-board claims of law enforcement privilege supported only by conclusory statements will not suffice." Alexander, 186 F.R.D. at 167.[3]

Upon consideration of the foregoing, the Court finds that to the extent they apply at all in this case[4], the factors favor requiring the Commission to produce the requested summaries of investigative interviews. For example, with respect to the extent to which disclosure would thwart governmental processes by discouraging citizens from giving the government information, the Court finds the USAO's rationale on this point consists solely of boilerplate and conclusory statements. See May 15, 2009, Letter from Michael W. Reap, Acting United States Attorney, to the Commission, P. 1; see also Miller v. U.S. Dept. of Agriculture, 13 F.3d 260, 263 (8th Cir. 1993) (citation omitted) ("We conclude that the government must make a more specific showing of why disclosure of the documents requested here could reasonably be expected to interfere with enforcement proceedings, and that it has not yet done so."). With respect to the impact upon persons who have given information of having their identities disclosed, as stated above the Commission already has revealed this information in the privilege log provided to Shanahan.[5] With respect to whether the information

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[3] "[T]he balancing test for determining whether the law enforcement privilege applies must be conducted with an eye towards disclosure." Torres v. Kuzniasz, 936 F.Supp. 1201, 1210 (D.N.J. 1996).

[4] The Court finds factors three, seven and eight have no relevance here.

[5] The Court notes the Commission provided this information against the wishes of the Acting United States Attorney.

sought is factual data or evaluative summary, it is undisputed the summaries contain only factual information, albeit potentially in an edited format. See Adler, 1999 WL 1747410 at *4 (citations omitted) ("Neither the investigatory privilege nor the attorney work product doctrine ordinarily precludes discovery of factual or statistical information, as opposed to mental impressions or opinions, even if such information is embodied in privileged materials or serves as the basis for opinions of the investigator or attorney involved.").

The fifth factor, i.e., whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question, is often considered by courts to be the most important. Lykken, 2008 WL 2077937 at *7.

> In general, courts interpreting FOIA[6] have held that the primary concern over disclosure of law enforcement reports is to prevent a party who is himself the subject of a criminal investigation from obtaining premature discovery of law enforcement actions that may be taken against him. Where there is no prospect of law enforcement proceedings being taken, or where the enforcement action has already been taken, or where the party seeking discovery is not the party who is the subject of the investigation, the rationale for nondisclosure does not apply, and the files should be made available.

Id. (internal quotations and citations omitted). Upon review of the record, the Court agrees that the criminal case against Shanahan has concluded. Specifically, the Court notes the USAO dismissed the indictment against Shanahan on July 21, 2008, and the Commission itself later acknowledged the "resolution of the criminal charges" against him. (See Doc. No. 35, P. 2; see also Cause No. 4:07CR175 JCH, Doc. No. 254). The Court does not find Mr. Reap's present assertion that the criminal investigation and prosecution are "on hold," rather than completed, sufficient to overcome

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[6] "Because of the paucity of cases developing the federal common law investigatory file privilege, many courts have analogized from decisions rendered under the exemption from disclosure for law enforcement investigatory files under the Freedom of Information Act ('FOIA')." Lykken, 2008 WL 2077937 at *7 (citations omitted).

the indications in the record that there no longer exists an ongoing investigation concerning Shanahan. Factor five thus weighs in favor of disclosure as well. See Miller, 13 F.3d at 263 (internal quotations and citation omitted) (in order to invoke the privilege, the government must demonstrate that "disclosure could reasonably be expected to interfere with enforcement proceedings.").[7]

Finally, with respect to the importance of the information sought to Shanahan's case, and whether the information sought is available through other discovery or from other sources, the Court agrees with Shanahan that statements taken at a time more contemporaneous with the events at issue have unique value. See Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 93 (E.D. Mo. 1980). Thus, neither the documents already provided to Shanahan, nor the taking of depositions of the witnesses identified in the Commission's privilege log, provides an acceptable substitute for the information contained in the summaries of interviews taken several years ago.[8]

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[7] The above discussion of factor five applies to factor six as well, and thus whether or not the police investigation has been completed will not be addressed separately in this Order.

[8] In light of the above ruling, the Court need not address Shanahan's claims that the privilege was improperly asserted or waived.

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that Michael F. Shanahan, Jr.'s Motion to Compel Discovery (Doc. No. 83) is **GRANTED**, and the Commission is ordered to produce the summaries of investigative interviews requested in the motion no later than **Friday, July 10, 2009**.[9]

Dated this 6th day of July, 2009.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

[9] Shanahan previously has indicated his willingness to receive the memoranda subject to a protective order shielding the documents from disclosure outside of this litigation. (Shanahan's Reply to SEC's Opposition to Motion to Compel Production, P. 11 n. 8).