

I. INTRODUCTION

The Federal Trade Commission has commenced an investigation to determine whether Respondents, Apollo Education Group, Inc. and the University of Phoenix, Inc. (collectively, the Companies), “have engaged or are engaged in deceptive or unfair acts or practices in or affecting commerce in the advertising, marketing, or sale of secondary or postsecondary educational products or services, or educational accreditation products or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.”

It petitions this Court under Section 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 57b-1, and Section 1232g of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(b)(1)(J)(ii) and 1232g(b)(2)(B), for an order requiring the Companies to produce education records sought by civil investigative demands (CIDs) without disclosing the contents of the CIDs, or the information provided in response, as permitted by FERPA. This information is relevant to the Commission’s investigation.

The Companies have made several productions of documents but they have not yet produced FERPA-protected “education records.” They note that FERPA requires them to notify students and parents prior to the disclosure of such records and restricts their ability to produce them in an efficient and timely manner and assert that giving such notice will be costly and burdensome, and the parties have been engaged in discussions as to how best to address the production of FERPA-protected education records. The restrictions of FERPA and the corresponding non-production of education records called for by the CIDs have impeded the Commission’s investigation, prevented it from determining whether there have been any violations of the FTC Act, and hindered its ability to identify those potentially harmed by any such acts or practices. To effectively carry out its investigation, the Commission therefore asks the Court to enter an order requiring the Companies to produce education records responsive to

the CIDs without disclosing the contents of the CIDs, or any information provided in response thereto, as permitted by FERPA, 20 U.S.C. §§ 1232g(b)(1)(J)(ii) and 1232g(b)(2)(B). The Companies do not oppose this request.

II. JURISDICTION

Section 20 of the FTC Act authorizes the Commission to issue CIDs to require the production of documentary material relating to any matter under investigation. 15 U.S.C. § 57b-1(c). If a CID recipient fails to comply, the Commission may petition a district court for an order directing the recipient to comply. 15 U.S.C. § 57b-1(e), (h). The statute confers jurisdiction and venue on the district court of the United States in the district where the CID recipient “resides, is found, or transacts business” 15 U.S.C. § 57b-1(e). Apollo Education Group and the University of Phoenix reside, are found, or transact business in this district. Pet. Exh. 1, ¶¶ 3-4.

Under Section 20, the Commission issued the CIDs to Apollo Education Group and the University of Phoenix on July 23, 2015. Pet. Exh. 1, ¶ 6. Because the Companies have not fully complied with the CIDs, the Commission seeks judicial enforcement under 15 U.S.C. §§ 57b-1(e), (h). Further, FERPA authorizes this Court to enter an order requiring Respondents to produce FERPA-protected education records to the FTC without notification to the relevant students and without seeking written consent for the disclosure. 20 U.S.C. §§ 1232g(b)(1)(J)(ii), 1232g(b)(2)(B). The Court has federal question jurisdiction to enter orders pursuant to FERPA under 28 U.S.C. § 1331, and, as in the FTC Act, venue is proper where respondents reside. 28 U.S.C. § 1391(b)(1).

III. STATEMENT OF FACTS

A. The Parties

The Commission is an administrative agency of the United States, 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 prevent “unfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce.”

Respondent Apollo Education Group, Inc. is a private education provider, incorporated in Arizona, with its principal place of business in Phoenix, AZ. Pet. Exh. 1, ¶ 3. The University of Phoenix offers educational programs and services throughout the United States and is a wholly-owned subsidiary of Apollo Education Group, incorporated in Arizona, with its principal place of business in Phoenix, AZ. Pet. Exh. 1, ¶ 4. The University of Phoenix offers undergraduate and graduate degrees in nine schools and operates through a nationwide system of campuses and centers. Collectively, the University of Phoenix has approximately 200,000 current students and 900,000 graduates. Pet. Exh. 1, ¶ 4.

B. The Commission’s Investigation and CIDs

On November 14, 2013, the Commission issued a Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Secondary or Postsecondary Educational Products or Services or Educational Accreditation Products or Services (P138402). Pet. Exh 1, ¶ 5; Pet. Exh. 2. This resolution authorized the Commission to use all available compulsory process

[t]o determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaged in deceptive or unfair acts or practices in or affecting commerce in the advertising, marketing, or sale of secondary or postsecondary educational products or services, or educational accreditation products or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended.

Pet. Exh. 2.

Under the authority of this resolution, on July 23, 2015, the FTC issued CIDs to Apollo and the University of Phoenix to investigate their advertising, marketing, and sale of their

educational products or services for possible violations of the FTC Act. Pet. Exh. 1, ¶ 6. The FTC further modified the return dates on the CIDs by letter dated January 11, 2016. *Id.*

IV. LEGAL ANALYSIS

A. The Commission is Entitled to An Order Enforcing its CIDs.

The court's role in a proceeding to enforce an administrative subpoena is "strictly limited," *FTC v. Casey*, 578 F.2d 793, 799 (9th Cir. 1978), and such proceedings are adjudicated in a summary manner. *See SEC v. McCarthy*, 322 F.3d 650, 657 (9th Cir. 2003). A court must enforce an agency's compulsory process if (1) Congress has granted the authority to investigate¹; (2) procedural requirements have been followed²; and (3) the information is relevant and material to the investigation. *FDIC v. Garner*, 126 F.3d 1138, 1143 (9th Cir. 1997); *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir.1983) (*en banc*), *overruled on other grounds as recognized in Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994). An affidavit from a government official is sufficient to establish a prima facie showing that these requirements have been met. *Garner*, 126 F.3d at 1143 (citing *U.S. v. Stuart*, 489 U.S. 353, 360 (1989)). As shown by the Declaration from Thomas J. Widor, the Commission's CIDs satisfy these standards.

The education records sought by the CIDs – including call recordings, student complaints, and materials related to the Companies' investigation and resolution of those complaints – are clearly relevant to investigation. Pet. Exh. 1, ¶ 6. For example, call recordings with prospective, current, or former students may help the FTC determine whether the Companies

¹ The CIDs are within the statutory authority of the agency. They were issued as part of an investigation into Section 5 of the FTC Act and were authorized by the Commission under an investigatory resolution. Pet. Exh. 1, ¶¶ 5-6; Pet. Exh. 2.

² The agency followed all required processes in issuing these CIDs; notably, they were signed by a Commissioner, as required by the FTC Act and the FTC's Rules of Practice. 15 U.S.C. § 57b-1(i); 16 C.F.R. § 2.7(a); *see also* Pet. Exh. 1, ¶ 6.

or any of their employees may have engaged in deceptive acts or practices when advertising, marketing, or selling the Companies' educational products or services. Consumer complaints provide extrinsic information about the nature and prevalence of any potentially deceptive or unfair acts or practices, and material related to the Companies' investigation and resolution of these complaints show how and whether the Companies are addressing potentially deceptive or unfair acts or practices. *Id.*

Because the CIDs here meet each of the *Garner* requirements, the CIDs are enforceable. The Companies do not oppose providing materials responsive to the CIDs.

B. Good Cause Exists for the Court to Issue an Order Pursuant to FERPA to Enable Timely Compliance with the CIDs.

FERPA restricts how educational agencies and institutions may disclose students' "education records," a statutory term that includes a broad range of information "directly related to a student." 20 U.S.C. § 1232g(a)(4)(A). Specifically, FERPA penalizes the disclosure of education records without written consent from the affected parents and students with the potential loss of federal funds. 20 U.S.C. § 1232g(b)(1). However, FERPA also provides several exceptions to this limitation. Most pertinent here, an educational institution may disclose records without obtaining consent in response to a "subpoena issued for a law enforcement purpose." 20 U.S.C. § 1232g(b)(1)(J)(ii); 34 C.F.R. § 99.31(a)(9).

FERPA generally requires educational institutions to notify affected students and their parents before making such a disclosure. 20 U.S.C. 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9)(ii). For good cause, however, a court or the issuing agency may relieve an educational institution of the obligation to provide such notice by ordering the institution not to "disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena." 20 U.S.C. §§ 1232g(b)(1)(J)(ii), 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9)(ii)(B).

Thus, where an educational institution receives a subpoena issued for a law enforcement purpose that calls for education records, the institution may produce these records without seeking written consent – and also without notification to those whose education records are being produced – so long as a court or the issuing agency has issued an order, upon good cause shown, directing nondisclosure.³ The Commission and the Companies seek such a nondisclosure order.

The Companies have not objected to the CIDs. However, to date, they have not produced education records called for by the CIDs because meeting FERPA’s notice requirement would be costly, complex, and time-consuming, and would likely preclude prompt and timely compliance with the CIDs. Pet. Exh. 1, ¶¶ 7-8. This delay is due to the nature of the responsive material, the numbers of potentially affected students and graduates, and the difficulty in locating and notifying those individuals or their families. *Id.*

The non-production of education records called for by the CIDs has deprived the Commission of valuable information in its ongoing investigation. Moreover, the delay likely to result if the Companies were required to provide notice would significantly prolong and impede the Commission’s ability to gather the information it needs to complete its investigation. Pet. Exh. 1, ¶ 9. Finally, the Commission, which is entrusted with protecting consumers, has robust statutory and regulatory confidentiality protections for material received in response to compulsory process. 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10. Under these authorities, material received pursuant to process is deemed non- public and confidential and is exempt from public

³ The CIDs at issue qualify as administrative “subpoenas issued for a law enforcement purpose.” *See FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1087 (D.C. Cir. 1992); *see also General Fin. Corp. v. FTC*, 700 F.2d 366, 367 (7th Cir. 1983) (CID is “a type of subpoena”); *U.S. v. Markwood*, 48 F.3d 969, 976 (6th Cir. 1995) (CID is “a subpoena issued by an administrative agency”).

disclosure except in limited circumstances. 15 U.S.C. § 57b-2(b), (f). Thus, the confidentiality of students' education records remains protected with an order permitting the Companies to comply with the CIDs without providing notice. These factors thus constitute good cause for entry of an order pursuant to 20 U.S.C. §§ 1232g(b)(1)(J)(ii) and 1232g(b)(2)(B) requiring the Companies to produce responsive education records without disclosing the contents of the CIDs or any information furnished in response.

V. CONCLUSION

For these reasons, the Court should enter the FTC's proposed order requiring the Companies to produce education records responsive to the CIDs without disclosing the contents of the CIDs or any information furnished in response.

Respectfully submitted,

Dated: January 12, 2016

JONATHAN E. NUECHTERLEIN
General Counsel

LESLIE RICE MELMAN
Assistant General Counsel for Litigation

/s/ Burke Kappler
BURKE KAPPLER
Attorney, Office of General Counsel
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2043
Fax: (202) 326-2477
E-mail: bkappler@ftc.gov

*Attorneys for the Federal Trade
Commission*