

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In re NATIONAL PROCESSING COMPANY, et al



PETITION TO QUASH
CIVIL INVESTIGATIVE DEMAND DATED JULY 24, 2013

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Dated: August 15, 2013

I. INTRODUCTION

Pursuant to 15 U.S.C. §57b-1(f) and 16 C.F.R. §2.10, National Processing Company (“NPC”) and Vantiv, Inc. (“Vantiv”) (collectively the “Vantiv Parties”) hereby petition to quash the Civil Investigative Demands issued by the Federal Trade Commission (the “Commission” or “FTC”) on July 24, 2013 (“The CIDs”). As described more fully below, the FTC’s authority to use pre-adjudication compulsory process under Part II of the Commission’s Rules of Practice terminated when FTC Staff issued Rule 45 subpoenas in a pending litigation seeking the same information. Simultaneously pursuing both The CIDs and Rule 45 subpoenas is outside the agency’s authority. Thus, the Commission should quash The CIDs or direct FTC Staff to withdraw the Rule 45 subpoenas.

II. FACTUAL AND PROCEDURE BACKGROUND

From December 2009 until October 2012, NPC provided credit card processing services to A+ Financial Center, LLC f/k/a Accelerated Accounting Services, LLC (“A+ Financial”) pursuant to an arms’ length business relationship. A+ Financial was one of approximately 175,000 merchants for which NPC provides payment processing services. NPC is a subsidiary of Vantiv, which is a publicly traded company (NYSE: VNTV). Vantiv is the nation’s third largest payment processor. Declaration of Leonard L. Gordon (“Gordon Declaration”) ¶4, attached as Exhibit 1.

On October 23, 2012, the FTC sued A+ Financial and its principals, Christopher Miano and Dana Miano alleging that they made illegal “robocalls” and illegally marketed interest rate reduction services in violation of the FTC Act and the Telemarketing Sales Rule (“TSR”) (“A+ Litigation”). In January 2013, the FTC reached a settlement with all of the defendants in the A+ Litigation. Gordon Declaration ¶5.

After the litigation began, NPC caused all reserves that had been established regarding the A+ Financial account to be turned over to the court-appointed receiver (“Receiver”). NPC also produced to the Receiver and to the FTC, certain documents regarding NPC’s relationship with A+ Financial. On February 5, 2013, NPC and Vantiv voluntarily produced three employees for depositions where they were questioned by the Receiver and the FTC regarding the A+ Financial account. Gordon Declaration ¶6.

On February 27, 2013, FTC Staff informed counsel for Vantiv and NPC that they were recommending that the Commission authorize Staff to file an amended complaint naming Vantiv and NPC as additional defendants in the A+ Litigation based on the Vantiv Parties’ allegedly assisting and facilitating A+ Financial’s TSR violations by providing payment processing services to A+ Financial. Ultimately, Judge Graham (who presides over the A+ Financial Litigation) gave the FTC a deadline of July 5, 2013 to indicate whether the FTC would so amend the complaint. Gordon Declaration ¶7.

Subsequent to being informed of the FTC Staff’s recommendation to add the Vantiv Parties to the A+ Litigation, executives of those companies travelled to Washington, DC numerous times to meet with two levels of management in the FTC’s Bureau of Consumer Protection and with each of the individual Commissioners. In those meetings, and in papers prepared for those meetings, the Vantiv Parties explained their side of the story. In short, the Vantiv Parties explained that NPC’s limited arms’ length involvement with A+ Financial did not provide an adequate factual or legal basis to hold the Vantiv Parties responsible for all of the consumer injury allegedly caused by A+ Financial. The Vantiv Parties also explained that holding a payment processor responsible for all of the harm that any of the thousands of merchants in a portfolio allegedly caused could have devastating effects on the payment

processing industry as a whole and ultimately harm consumers. The Vantiv Parties expended considerable money and time in this effort. Gordon Declaration ¶8.

At the end of those discussions, FTC Staff apparently decided to withdraw their complaint recommendation to the Commission. On July 3, 2013, FTC Staff informed counsel for the Vantiv Parties that the FTC would not be seeking to add those entities as defendants in the A+ Litigation, and the FTC so informed the Court on July 5, 2013. During the July 3, 2013 call, FTC Staff informed counsel that it was Staff's intention to request that the Commission issue CIDs to the Vantiv Parties seeking additional information regarding the A+ Financial account. On July 24, 2013, the Commission issued The CIDs, which Staff served on July 26, 2013. At no time prior to this did the FTC seek to obtain documents or information from Vantiv or NPC through compulsory process either in the A+ Litigation or through the FTC's Part II procedures. Gordon Declaration ¶9.

On July 24, 2013, Judge Graham conducted a hearing regarding the FTC's settlement with A+ Financial and the Mianos. The Judge did not approve the settlement at that hearing. At the hearing, the Receiver requested that the FTC share with him any materials it might obtain from its investigation of parties that may have assisted and facilitated A+ Financial's TSR violations. FTC Staff correctly informed the Court that the FTC could not share with the Receiver materials obtained in response to a CID. Gordon Declaration ¶10.

On August 2, 2013, the FTC Staff moved the court to lift the stay on discovery in the A+ Litigation to permit Staff to serve Rule 45 subpoenas. The Staff's motion makes clear that one of the purposes in so doing was to end run the confidentiality restrictions on information the FTC obtains through CIDs. FTC Motion to Lift Stay (Exhibit 2) at p. 2. The court granted the FTC's motion on August 6, 2013, and the FTC served Rule 45 subpoenas on the Vantiv Parties that

same day. The Rule 45 subpoenas seek the exact same information as The CIDs. Gordon Declaration ¶11.

During calls with FTC Staff on August 5 and August 7, counsel for the Vantiv Parties raised the issue of the impropriety of seeking information both through Rule 45 subpoenas and The CIDs. FTC Staff and counsel were unable to resolve their differences on this issue. Gordon Declaration ¶3.

III. ARGUMENT

A. The Commission Cannot Pursue Discovery Simultaneously in Federal Court and Through Part II Procedures.

The FTC Act permits the Staff to use investigative compulsory processes (such as CIDs) only until the Commission institutes an adjudicative proceeding. Here, the FTC issued the CIDs after it had informed the Court that it would not be amending the complaint in the A+ Litigation and was presenting for Court approval the Final Order in that case. FTC Staff, however, now seems to have changed its mind on that subject and has sought to revive the A+ Litigation by having the stay lifted and pursuing discovery in that case with the clear goal of possibly amending the complaint in that litigation. Given that conduct, The CIDs no longer are valid and should be quashed. Alternatively, the FTC can withdraw the subpoenas and stop pursuing discovery in the A+ Litigation. The FTC, however, cannot do both.

The FTC's authority to issue CIDs arises from Section 20 of the FTC Act, which provides that investigative compulsory process may only be used "before the institution of any proceedings[.]" 15 U.S.C. §57b-1(c)(2009). Section 20 expressly excludes the use of CIDs from "any proceeding under section 45b of this title [section 13b of the FTC Act]... or any adjudicative proceeding under any other provision of law." 15 U.S.C. § 57b-1(j)(2009). The A+ Litigation was brought under section 13b of the FTC Act, and FTC Staff has now re-opened that

litigation and is again exploring adding the Vantiv Parties as defendants in that pending adjudicative proceeding. Moreover, FTC Staff has indicated that it is their position that any amendment of the complaint in the A+ Litigation adding the Vantiv Parties for assisting and facilitating A+ Financial's TSR violations would "relate back" to the original complaint under Federal Rule of Civil Procedure 15(c). Gordon Declaration ¶12. In addition, the fact that Staff seeks the same information through both the CIDs and the Rule 45 subpoenas confirms that The CIDs are being used in an adjudicative proceeding brought under Section 13b of the FTC Act. Thus, the CIDs are improper.

Courts have recognized that there is a "shift" from investigative rules to adjudicative rules once a complaint issues. *Genuine Parts Co. v. F.T.C.*, 445 F.2d 1382, 1388 (5th Cir. 1971). *See also United States v. Associated Merchandising Corp.*, 261 F. Supp. 553, 558 (D.C.N.Y. 1966) ("[I]t is the adjudicative rules, not the investigative ones, which are to govern once a complaint has issued."); *Hannah v. Larche*, 363 U.S. 420, 446 (1960) (stating that the Commission's "rules draw a clear distinction between adjudicative proceedings and investigative proceedings"); *Standard Oil Co v. F.T.C.*, 475 F. Supp. 1261, 1268 (N.D. Ind. 1979) (same); *General Motors Corp. v. F.T.C.*, No. C77-706, 1977 WL 1552 (N.D. Ohio Nov. 4, 1977) (same).¹ Here, Staff now seeks to use the CID in an adjudicative proceeding with the goal of adding the Vantiv Parties as defendants in that adjudicative proceeding.

Accordingly, because the Commission staff choose to re-open the A+ Litigation and seek the same information covered by The CIDs in Rule 45 subpoenas, the FTC's authority to issue or

¹ While these cases arise in the context of Part III adjudicative proceedings, the principle is the same where the Commission has brought a civil rather than an administrative complaint. *See F.T.C. v. Turner*, 609 F.2d 743, 745 n.3 (5th Cir. 1980) ("Although the Federal Rules of Civil Procedure do not bind administrative agencies in conducting purely administrative investigations, administrative agencies are unquestionably bound by the rules when they are parties in civil actions." (internal citation omitted)).

enforce a CID – an investigative tool that may not be used in “any adjudicative proceeding under any . . . provision of law[.]” 15 U.S.C. § 57b-1(j) – terminated. Rather, the Commission must seek discovery pursuant to the Federal Rules of Civil Procedure or withdraw the Rule 45 subpoenas.

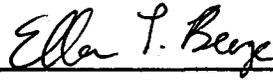
B. Staff’s Effort To End-Run The Confidentiality Provisions Governing CIDs Requires that the CID Be Quashed Or the Rule 45 Subpoenas Be Withdrawn.

The current investigation of the Vantiv Parties remains a confidential non-public matter. Section 20 of the FTC Act and the Commission’s Rules requires that materials produced in response to a CID be kept confidential and not be shared with third parties. 15 U.S.C. §57b-2; 16 C.F.R. 4.10. FTC Staff has admitted in seeking leave from the Court to serve Rule 45 subpoenas that one reason for doing so was to share information obtained from the Vantiv Parties through the CIDs with the Receiver. The Vantiv Parties question the propriety of Staff end-running the statutory confidentiality prohibitions governing CIDs. Because Staff seeks the same information under both The CIDs and Rule 45 subpoenas, that information is subject to conflicting confidentiality rules. Information provided in response to a CID cannot be shared with the Receiver. 15 U.S.C. §57b-2(b)(3)(C). Information provided in response to a Rule 45 subpoena could be. This conflict further demonstrates the improper nature of seeking information simultaneously through both Rule 45 subpoenas and The CIDs. Thus, the Commission should either direct Staff to withdraw the subpoenas or quash The CIDs.

IV CONCLUSION

Because staff cannot pursue discovery simultaneously through both the CIDs and Rule 45 subpoenas, the Commission should either quash the CIDs or direct staff to withdraw the subpoenas.

Respectfully submitted,



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EXHIBIT 1

DECLARATION AND RULE 2.10(a)(2) STATEMENT OF LEONARD L. GORDON

I, Leonard L. Gordon, hereby declare as follows:

1. I am partner in the law firm of Venable LLP and am one of the lawyers representing National Processing Company and Vantiv Inc. (collectively "Vantiv Parties") in connection with the investigation by the Federal Trade Commission ("FTC" or "Commission") regarding The Vantiv Parties' involvement with A+ Financial Center, LLC f/k/a Accelerated Accounting Services, LLC ("A+ Financial") and its principals, Christopher Miano and Dana Miano.
2. I make this statement and declaration upon personal knowledge in support of the Petition to Quash filed by The Vantiv Parties of the Civil Investigative Demands issued by the FTC on July 24, 2013 ("The CIDs").
3. During calls with FTC Staff on August 5 and August 7, I and other lawyers at Venable LLP raised the issue of the impropriety of seeking information both through Rule 45 subpoenas and The CIDs. FTC Staff and counsel for the Vantiv Parties were unable to resolve their differences on this issue.
4. From December 2009 until October 2012, NPC provided credit card processing services to A+ Financial Center, LLC f/k/a Accelerated Accounting Services, LLC ("A+ Financial") pursuant to an arms' length business relationship. A+ Financial was one of approximately 175,000 merchants for which NPC provides payment processing services. NPC is a subsidiary of Vantiv, which is a publicly traded company (NYSE: VNTV). Vantiv is the nation's third largest payment processor.
5. On October 23, 2012, the FTC sued A+ Financial and its principals, Christopher Miano and Dana Miano alleging that they made illegal "robocalls" and illegally marketed interest rate reduction services in violation of the FTC Act and the Telemarketing Sales Rule

("TSR") ("A+ Litigation"). In January 2013, the FTC reached a settlement with all of the defendants in the A+ Litigation.

6. After the litigation began, NPC caused all reserves that had been established regarding the A+ Financial account to be turned over to the court-appointed receiver ("Receiver"). NPC also produced to the Receiver and to the FTC, certain documents regarding NPC's relationship with A+ Financial. On February 5, 2013, NPC and Vantiv voluntarily produced three employees for depositions where they were questioned by the Receiver and the FTC regarding the A+ Financial account.

7. On February 27, 2013, FTC Staff informed me and other lawyers at Venable LLP that FTC Staff was recommending that the Commission authorize Staff to file an amended complaint naming Vantiv and NPC as additional defendants in the A+ Litigation based on the Vantiv Parties' allegedly assisting and facilitating A+ Financial's TSR violations by providing payment processing services to A+ Financial. Ultimately, Judge Graham (who presides over the A+ Financial Litigation) gave the FTC a deadline of July 5, 2013 to indicate whether the FTC would so amend the complaint.

8. Subsequent to being informed of the FTC Staff's recommendation to add the Vantiv Parties to the A+ Litigation, executives of those companies travelled to Washington, DC numerous times to meet with two levels of management in the FTC's Bureau of Consumer Protection and with each of the individual Commissioners. In those meetings, and in papers prepared for those meetings, the Vantiv Parties explained their side of the story. In short, the Vantiv Parties explained that NPC's limited arms' length involvement with A+ Financial did not provide an adequate factual or legal basis to hold the Vantiv Parties responsible for all of the consumer injury allegedly caused by A+ Financial. The Vantiv Parties also explained that

holding a payment processor responsible for all of the harm that any of the thousands of merchants in a portfolio allegedly caused could have devastating effects on the payment processing industry as a whole and ultimately harm consumers. The Vantiv Parties expended considerable money and time in this effort.

9. On July 3, 2013, FTC Staff informed me that the FTC would not be seeking to add the Vantiv Parties as defendants in the A+ Litigation, and the FTC so informed the Court on July 5, 2013. During the July 3, 2013 call, FTC Staff informed me that it was Staff's intention to request that the Commission issue CIDs to the Vantiv Parties seeking additional information regarding the A+ Financial account. On July 24, 2013, the Commission issued The CIDs, which Staff served on July 26, 2013. At no time prior to this did the FTC seek to obtain documents or information from Vantiv or NPC through compulsory process either in the A+ Litigation or through the FTC's Part II procedures.

10. On July 24, 2013, Judge Graham conducted a hearing regarding the FTC's settlement with A+ Financial and the Mianos. The Judge did not approve the settlement at that hearing. At the hearing, the Receiver requested that the FTC share with him any materials it might obtain from its investigation of parties that may have assisted and facilitated A+ Financial's TSR violations. FTC Staff correctly informed the Court that the FTC could not share materials obtained in response to a CID.

11. On August 2, 2013, the FTC Staff moved the court to lift the stay on discovery in the A+ Litigation to permit Staff to serve Rule 45 subpoenas. The Staff's motion makes clear that one of the purposes in so doing was to end run the confidentiality restrictions on information the FTC obtains through CIDs. The court granted the FTC's motion on August 6, 2013, and the

FTC served Rule 45 subpoenas on the Vantiv Parties that same day. The Rule 45 subpoenas seek the exact same information as The CIDs.

12. In mid-March 2013, I had several conversations with FTC Staff concerning a possible tolling agreement. During one of those conversations, Bikram Bandy of the FTC stated that he did not believe a tolling agreement was actually necessary as any amendment of the FTC's Complaint to add The Vantiv Parties as defendants in the A+ Litigation would "relate back" to the original complaint under Federal Rule of Civil Procedure 15(c).

I HEREBY DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS
TRUE AND CORRECT.

August 15, 2013

DATE



LEONARD L. GORDON

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-CV-14373-DLG

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

A+ FINANCIAL CENTER, LLC, et al.,

Defendants.

**PLAINTIFF'S UNOPPOSED MOTION FOR PARTIAL LIFTING OF
STAY TO AUTHORIZE SERVICE OF RULE 45 SUBPOENAS**

Plaintiff, Federal Trade Commission ("FTC"), respectfully requests that this Court partially lift the stay currently in place in this action for the limited purpose of allowing the parties and the Receiver to serve Rule 45 subpoenas on non-parties seeking any information relevant to this action, including information relating to potential claims that could be asserted against third parties who may have assisted and facilitated the unlawful conduct alleged in the Complaint. As explained below, good cause exists for granting the requested relief.

First, allowing the parties to serve Rule 45 subpoenas will give the FTC and the Receiver the ability to collect information necessary to determine whether there are potential claims that can be asserted against third parties relating to the conduct alleged in the Complaint – claims that, if successfully asserted, would lead to additional funds for the Receivership estate that can be used to provide meaningful compensation to consumers who lost money as a result of Defendants' unlawful acts and practices. Given that the Court indicated at the July 24, 2013, hearing its strong preference that a final resolution of this action include meaningful redress to

consumer victims and the fact that there are insufficient funds in the Receivership estate to provide such redress, it is critical that the parties (particularly the FTC and the Receiver) be given the ability to obtain information via subpoena so that they can ascertain whether there are any viable claims against third parties that could ultimately lead to additional funds sufficient to provide meaningful redress to consumer victims.

In addition, authorizing the parties to serve Rule 45 subpoenas will also be efficient and avoid unnecessary duplication of effort because the FTC will be able to share information received via subpoena with the Receiver. As explained at the July 24, 2013, hearing, FTC regulations generally prohibit the FTC from sharing information obtained under its own independent civil subpoena authority. The FTC, however, generally is not prohibited from sharing information that it obtains via a Rule 45 subpoena issued in an active litigation. For this reason, authorizing the parties to issue Rule 45 subpoenas will allow the Receiver and the FTC to share information obtained from third parties, thereby avoiding duplication of effort and undue burden on subpoena recipients in responding to multiple requests for similar information.

Finally, the FTC is only requesting a lifting of the stay for the purposes of allowing the parties to serve subpoenas on third parties (as well as the filing of any motions relating to any subpoenas). The FTC is not requesting that the Court authorize the parties to serve discovery requests on each other or that the existing stay be lifted for any other purpose. Given the pending Joint Motion for Entry of Stipulated Final Judgment and Order for Permanent Injunction [Doc. No. 99], the opening of full discovery is neither prudent nor necessary, particularly given the Defendants' concern raised at the July 24, 2013, hearing of incurring additional attorneys' fees and expenses with a settlement agreement pending before the Court.

Pursuant to Local Rule 7.1(a)(3)(A), the undersigned counsel hereby certifies that he has

conferred with the Receiver and Defendants' counsel, and neither object to the relief requested.

WHEREFORE, for the above stated reasons, the FTC respectfully requests that this Court enter an order: (a) partially lifting the stay in this matter to allow the parties to serve subpoenas on non-parties pursuant to Rule 45 of the Federal Rules of Civil Procedure; (b) keeping all other aspects of the existing stay in place, including prohibiting the parties from serving discovery requests upon each other without leave of Court; and (c) otherwise maintaining all provisions and requirements set forth in the Court's Preliminary Injunction Order [D.E. 23], as modified [D.E. 22, 25, 45, 68].

Dated: August 1, 2013

Respectfully submitted,

/s/ William T. Maxson

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Attorneys for Plaintiff

FEDERAL TRADE COMMISSION

CERTIFICATE OF SERVICE

I certify that the foregoing PLAINTIFF'S UNOPPOSED MOTION FOR PARTIAL LIFTING OF STAY TO AUTHORIZE SERVICE OF RULE 45 SUBPOENAS was served on all counsel of record via CM/ECF on August 1, 2013.

/s/ William T. Maxson

William T. Maxson