

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright

In the Matter of

**JULY 24, 2013 CIVIL INVESTIGATIVE DEMANDS
ISSUED TO NATIONAL PROCESSING CO. AND
VANTIV, INC.**

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)
) **File No. 1323105**
)
) **September 6, 2013**
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**OPINION AND ORDER DENYING PETITION TO QUASH
CIVIL INVESTIGATIVE DEMANDS**

By WRIGHT, Commissioner:

On August 15, 2013, Petitioners, National Processing Co. (“NPC”) and Vantiv, Inc. (collectively the “Vantiv Entities”) filed a timely Petition to Quash Commission Civil Investigative Demands (“CIDs”) dated July 24, 2013. For the reasons set forth below, the Commission denies the Petition to Quash (“Petition”) and orders the Vantiv Entities to comply with the CIDs on or before September 13, 2013.

I. BACKGROUND

The Commission’s investigation of the Vantiv Entities concerns activities that are distinct from, but related to, the acts and practices that led to the Commission enforcement action, *FTC v. A+ Financial Center, LLC, et al.*, No. 12-CV-14373-DLG (S.D. Fla. filed Oct. 23, 2012), filed under the authority of 15 U.S.C. §53(b). The *A+ Financial* complaint alleges that the defendants violated Section 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §45(a), and the Commission’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, by deceptively marketing credit card interest rate reduction services to consumers struggling with high credit card debt, illegally collecting an advance fee for their purported services, and illegally using prerecorded calls to contact consumers. Neither NPC nor Vantiv is a defendant in the *A+ Financial* enforcement action. Nonetheless, from December 2009 through October 2012, NPC (a credit card processor) processed the majority of the allegedly illegal advance fees that

consumers paid to the *A+ Financial* defendants. Vantiv acquired NPC as a wholly-owned subsidiary in November 2010.

On July 24, 2013, the Commission issued a separate CID to each of the Vantiv Entities as part of its investigation into the Vantiv Entities' role in, and knowledge of, the illegal acts and practices of the *A+ Financial* defendants. The documents sought in these CIDs (the "July 24, 2013 CIDs") will help the Commission evaluate whether the Vantiv Entities violated the FTC Act or the TSR. Each CID contains 14 identical document production specifications and a single interrogatory requesting an explanation for the spoliation, if any, of responsive documents.

On August 6, 2013, after it issued the CIDs, the Commission served the Vantiv Entities with subpoenas under Fed. R. Civ. P. 45. The subpoenas seek the same documents as the CIDs. Commission counsel issued these subpoenas, in part, because the presiding judge in the *A+ Financial* enforcement action had suggested that Commission counsel consider sharing any documents produced by the Vantiv Entities with the court-appointed receiver in that enforcement action. However, as a consequence of statutory and regulatory restrictions, Commission counsel could not readily share documents produced in response to a CID with the receiver.¹ The return date on the Rule 45 subpoenas was August 19, 2013. On that date, in a letter to Commission counsel, the Vantiv Entities objected to the subpoenas without producing any documents.

On August 15, 2013, the Vantiv Entities responded to the issuance of the Commission's CIDs by filing a Petition to Quash.² In their Petition to Quash, the Vantiv Entities argue that the Commission's authority to issue the CIDs terminated when Commission counsel issued Rule 45 subpoenas seeking the same information in the *A+ Financial* enforcement action.

II. ANALYSIS

The Commission has broad authority under 15 U.S.C. §57b-1 to issue CIDs to further any "Commission investigation"—*i.e.*, "any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §57b-1(a)(2). The Commission may issue CIDs at any time before it starts an "adjudicative proceeding." 15 U.S.C. § 57b-1(j)(1).

It is settled that, until the Commission names a person as a defendant or a respondent in a complaint, the Commission is not engaged in an adjudicative proceeding with regard to that person and remains solely in an investigative posture. *Genuine Parts Co. v. F.T.C.*, 445 F.2d

¹ Documents produced to the Commission in response to a CID are non-public, and their disclosure is subject to various statutory and regulatory restrictions. 15 U.S.C. §57b-2; 16 C.F.R. §4.10. Documents produced to the Commission in response to Rule 45 subpoenas are not subject to these restrictions.

² See 15 U.S.C. §57b-1(f) and 16 C.F.R. §2.10. This Petition stayed compliance with the CIDs' original August 19, 2013, return date. 16 C.F.R. §2.10(b).

1382, 1388 (5th Cir. 1971); *United States v. Anaconda Co.*, 445 F. Supp. 486, 496-97 (D.D.C. 1977); *United States v. Associated Merch. Corp.*, 261 F. Supp. 553, 558 (S.D.N.Y. 1966). See also *In re: Subpoena Duces Tecum Addressed to Atlantic Richfield Co., et al.*, No. 741-0019, 1978 WL 434436, at *6 (F.T.C. June 2, 1978) (discussing *In re: Horizon Corp.*, No. 9017, 88 F.T.C. 208, 1976 WL 180725, at *1 (July 28, 1976), where the Commission properly issued investigative subpoenas to investigate third-party lenders who had financed the land development activities of respondents in an FTC administrative adjudicative proceeding).

Because the Commission did not name either of the Vantiv Entities as a defendant in the *A+ Financial* enforcement action, it necessarily follows that the Commission may issue CIDs to them. The cases cited by the Petitioners (Petition at 6-7) do not suggest otherwise. Indeed, they uniformly hold that the Commission may issue CIDs to anyone *at least* until the Commission commences an adjudicatory proceeding against that person.³

Nor is there any inconsistency in the contemporaneous issuance of CIDs and Rule 45 subpoenas. The Commission has good reason to pursue this dual-track effort: the CIDs are justified by the Commission's ongoing investigation of the conduct of the Vantiv Entities for violations of the FTC Act and the TSR, and the Rule 45 subpoenas are justified by the Vantiv Entities' business relationship with the defendants. The issuance of the Rule 45 subpoenas does not somehow void otherwise valid CIDs. The July 24, 2013 CIDs and the Rule 45 subpoenas simply constitute alternative and appropriate routes to the same overriding Commission objective: prompt production of the documents the Commission needs.⁴

Finally, having denied the Petition to Quash, the Commission may now commence CID enforcement proceedings, pursuant to 15 U.S.C. §57b-1(e) and 16 C.F.R. §2.13(b), at any time after the new return date if the Vantiv Entities do not comply. We have full confidence that any proceedings to enforce the Rule 45 subpoenas and the July 24, 2013 CIDs will be managed in a manner that both expeditiously secures the necessary documents from the Vantiv Entities and promotes judicial economy.

³ The Commission may also issue CIDs to a party already in adjudication with the Commission where the Commission is investigating whether that party committed violations beyond those alleged in the pending adjudication. See *Resolution Trust Corp. v. Grant Thornton*, 41 F.3d 1539, 1545-46 (D.C. Cir. 1994) (“[A]n agency’s investigative powers survive the commencement of litigation where the agency seeks to uncover *additional wrongdoing*.” (emphasis in original)); Commission Letter to Mr. Glynn, Counsel to Dr. William V. Judy, Denying Petition to Quash, F.T.C. File No. X000069 (Sept. 10, 2002) (“It is axiomatic that the Commission’s authority to investigate one product is not cut off by the filing of a federal lawsuit relating to another.”); see also *United States v. Litton Indus., Inc.*, 462 F.2d 14, 16 (9th Cir. 1972); *FTC v. Waltham Watch Co.*, 169 F. Supp. 614, 619-20 (S.D.N.Y. 1959).

⁴ On August 22, 2013, after the return date on the Rule 45 subpoenas had passed and the Vantiv Entities had produced no documents, the Commission moved to compel compliance with the subpoenas in the federal district courts for the Southern District of Ohio (as to Vantiv) and the Western District of Kentucky (as to NPC). The Vantiv Entities’ responses are due on September 16, 2013.

III. CONCLUSION

For all the foregoing reasons,

IT IS HEREBY ORDERED THAT the Petition of Vantiv, Inc. and National Processing Co. be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Petitioners Vantiv, Inc. and National Processing Co. shall comply in all respects with the July 24, 2013 CIDs on or before September 13, 2013.

By the Commission.

Donald S. Clark
Secretary