UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of AEGIS MOBILE, LLC Petitioner.	FTC FILE

AEGIS MOBILE, LLC'S PETITION TO QUASH
THE FEDERAL TRADE COMMISSION'S
AUGUST 29, 2013 CIVIL INVESTIGATIVE DEMAND

LACKI & COMPANY, LLC

David J. Lacki, Esq.
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Counsel for Petitioner

Petitioner Aegis Mobile, LLC ("Aegis") petitions the Federal Trade Commission ("FTC"), pursuant to 15 U.S.C. § 57b-1(f) and 16 C.F.R. § 2.7(d) for an order quashing the Civil Investigative Demand ("CID") issued to Aegis on August 29, 2013, pursuant to Sections 6(j) and 20 of the FTC Act, 15 U.S.C. §§ 46(j), 57b-1. Aegis received the CID on September 4. By agreement of the FTC and counsel for Aegis, the return date for the CID is September 30, 2103; whereby, the time to file this Petition was extended to September 24, 2013, the date that is twenty (20) days after the date of service of the CID (16 C.F.R. § 2.10(a)(1)). *See* Federal Express proof of delivery as signed by A. Adriane, executive assistant for Aegis, attached hereto as Exhibit A; and, September 23, 2013 letter from James Reilly Dolan to David J. Lacki, attached hereto as Exhibit B (stating the FTC grant of extension in which to respond and granting the new return date for the CID).

FACTUAL SUMMARY

The FTC issued the CID at the request of the Canadian Competition Bureau (the "Canadian Bureau") to aid the Canadian Bureau with obtaining evidence in support of its civil litigation in Canada. The Canadian Bureau's Commissioner of Competition (the "Canadian Commissioner") filed civil litigation against the Canadian Wireless Telecommunications Association ("CWTA"), Rogers Communications Inc., Bell Canada, and TELUS Corporation (collectively, the "Canadian Defendants") in the Ontario Superior Court of Justice, Court File No. 12-55497, on September 14, 2012, alleging that the Canadian Defendants allowed deceptive advertisers to use their services.

Almost one year after litigation was filed and a case management judge appointed, the Canadian Bureau requested the FTC's assistance in obtaining discovery from Aegis, an American company that performs an audit and monitoring function for the CWTA.

Pursuant to the Canadian Bureau's request, the FTC issued the CID to Aegis. The documents requested by the CID directly relate to services provided by Aegis to the CWTA and does not relate to U.S. consumers whatsoever. In Aegis' counsel's discussions with the FTC, the FTC indicated that it is not investigating Aegis for potential violations of U.S. law but, rather, only issued the CID to provide assistance to the Canadian Bureau. *See* September 20, 2013 letter from William L. Vanveen to David Wingfield, attached hereto as Exhibit C (stating that the FTC's CID to Aegis seeks documents "related to the civil litigation the [Canadian] Commissioner has commenced against CWTA, Rogers, Bell and Telus."); and September 23, 2013 letter from David R. Wingfield to William L. Vanveen, attached hereto as Exhibit D (confirming that the request was related to litigation).

Because the CID was issued to assist with current litigation, and not in an effort to assist with an investigation, it exceeds the FTC's powers and is improper. For the reasons explained below, Aegis requests the FTC's CID be quashed.

ARGUMENT

I. THE FTC DOES NOT HAVE THE AUTHORITY TO ISSUE THE CID

a. The FTC's Limited Authority to Issue CIDs

Pursuant to 15 U.S.C. § 57b–1, Congress has empowered the FTC to issue CIDs in support of its pre-complaint investigation procedures. *See* 15 U.S.C. § 57b–1 (stating that the Commission may issue a CID "before the institution of any proceedings under this subchapter"). The CID is a pre-complaint discovery tool made available to administrative agencies to assist with their determination of whether to file a complaint. It is clear by the statute's own terms that the FTC can only issue a CID prior to instituting a proceeding against a company.

b. The FTC Does Not Have The Authority to Issue a CID to Assist the Canadian Bureau With Obtaining Discovery During Active Litigation

Here, the FTC has issued the CID to Aegis (a U.S. company) in an effort to assist a foreign antitrust authority under 15 U.S.C. § 46(j). However, nothing in either 15 U.S.C. § 46(j) or 15 U.S.C. § 6202 (governing international antitrust enforcement assistance) provides the FTC with the power to exceed the limits of its own authority.

Pursuant to 15 U.S.C. § 6202(b), "the Attorney General and the Commission may, *using their respective authority to investigate possible violations of the Federal antitrust laws*, conduct investigations to obtain antitrust evidence relating to a possible violation of the foreign antitrust laws administered or enforced by the foreign antitrust authority with respect to which such agreement is in effect under this chapter . . . ." (emphasis added). Thus, under 15 U.S.C. § 6202's own terms, the FTC is only permitted to assist a foreign entity in ways in which it is authorized to act under its respective authority. Similarly, under 15 U.S.C. § 46(j)(1), the FTC can provide assistance to a foreign agency, such as the Canadian Bureau, for "practices substantially similar to practices prohibited by any provision of the laws administered by the Commission."

Additionally, the FTC's Resolution Authorizing Use of Compulsory Process to Provide Investigative Assistance to Canadian Law Enforcement Agencies, File No. 112-3026 (Dec. 28, 2010), attached to the CID, is instructive. It states that "The Federal Trade Commission hereby resolves and directs that any and all compulsory processes *available to it* be used in connection with requests for investigative assistance by any of the designated Canadian law enforcement agencies for a period not to exceed three years from the date of issuance of this resolution." (emphasis added). Thus, the FTC can only invoke processes available to it. Here, the FTC does not have the authority to issue a CID during pending litigation. As discussed

above, the CID is a pre-complaint investigative process and is improper once litigation is ongoing.

Here, because the FTC would not be able to use the CID process to obtain discovery for litigation pending in the United States, it cannot use that procedure to obtain discovery for litigation pending in Canada. To obtain evidence during litigation or an adjudicative proceeding, the FTC must rely on the discovery procedures available under the Federal Rules of Civil Procedure or Part III of the FTC's Rules of Practice governing adjudicative proceedings. The use of a CID during litigation is not authorized under these litigation and adjudication discovery authorities. *See* 16 C.F.R. § 3.31(a) (providing for depositions, written questions, written interrogatories, production of documents or things for inspection and other purposes, and requests for admission, but not authorizing the use of a CID during an adjudicative proceeding); Fed. R. Civ. Pro. 45 (providing procedures for obtaining discovery from third-party through the use of a subpoena). The FTC uses the Rule 45 subpoena process once litigation is commenced. *See,e.g., F.T.C. v. Trudeau*, No. 1:12-MC-022, 2012 WL 6100472, at *3 (S.D. Ohio Dec. 7, 2012); *F.T.C. v. Am. Mortgage Consulting Grp., LLC*, No. SACV12-01561 DOC, 2012 WL 4718927, at *10 (C.D. Cal. Oct. 1, 2012). Additionally, by circumventing the proscribed discovery processes, the Canadian Bureau has caused the FTC to impose an artificial urgency and burden on Aegis given the status of the currently pending litigation and the fact that Aegis has agreed to preserve the documents. Moreover, since the documents are obtainable through regular discovery channels in Canada, the Canadian Bureau is essentially circumventing the judicial oversight that would govern discovery in the Canadian litigation.

Courts have consistently held that it is improper to issue a CID for any purpose other than to determine whether there is sufficient evidence to file suit. *United States v. Witmer*, 835 F. Supp. 208, 219 (M.D. Pa. 1993) *aff'd*, 30 F.3d 1489 (3d Cir. 1994); *see also United States v. FMC Corp.*, 717 F.2d 775, 778 (3d Cir. 1983) ("The CID is the conventional means by which the [DOJ] obtains information prior to the filing of a complaint."); *F.T.C. v. Mt. Olympus Fin., L.L.C.*, 211 F.3d 1278 (10th Cir. 2000) ("The initial inquiry is whether the FTC issued the CIDs for a lawful investigative purpose."). There is no authority that Aegis is aware of that upholds any federal agency's ability to issue a CID to obtain discovery to aid ongoing civil litigation.

The Commission itself recently recognized that CIDs are investigative instruments, not discovery devices, when it observed, "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." *In re July 24, 2013 Civil Investigative Demands Issued to National Processing Co. and Vantiv, Inc.*, File No. 1323105 (Sept. 6, 2013) In the litigation in that case, the Commission conducted discovery under the Federal Rules. It was in a separate investigation that the Commission issued CIDs. There is no question that the FTC's authority to issue CIDs is proper only when it is investigating a party for the purpose of determining whether to commence litigation, and that the use of a CID is not proper as a discovery tool for litigation.

Here, the only purpose of the CID is to effectuate discovery for a party in litigation. Mr. Wingfield states that "parties are entitled to prepare for litigation and collect evidence from witnesses — and to do so in confidence — so long as they comply with the rules respecting discovery." There is no rule of discovery in the United States that authorizes a party

in litigation to use a CID. Such a rule would undermine the ability of a court to control discovery, to weigh burden and relevance and to resolve parties disputes.

Because the FTC does not have the authority to issue a CID to obtain discovery for litigation after it has filed or issued a complaint, it likewise cannot issue a CID to obtain discovery for the Canadian Bureau once the Canadian Bureau has commenced litigation. For this reason, Petitioner Aegis' Motion to Quash the CID should be granted.

II. THE CID CIRCUMVENTS DISCOVERY PROCEDURES AND REQUESTS CONFIDENTIAL DOCUMENTS REQUIRING A BURDENSOME REVIEW

By using the CID as a discovery tool, the FTC is circumventing its own rules established for the benefit of respondents in FTC administrative proceedings. Like a federal court, an Administrative Law Judge in a FTC proceeding should quash or limit any subpoena [CID] that is unduly burdensome or requires the disclosure of privileged or confidential and proprietary information, or information rising to the level of trade secrets. 16 C.F.R. § 3.31(c)(2)(iii) (use of subpoena and other discovery methods "shall be limited by the Administrative Law Judge" where the "burden and expense of the proposed discovery outweigh its likely benefit"); 16 C.F.R. § 3.31(d) (authorizing Administrative Law Judge to "enter a protective order denying or limiting discovery to preserve" a privilege); Fed. R. Civ. P. 45(c)(3) (a court "shall quash or modify the subpoena if it . . . requires disclosure of privileged or other protected matter . . . [or] subjects a person to undue burden").

In American court proceedings, information is not discoverable if it is not relevant. Fed. R. Civ. P. 26(b)(1). As presented by the CID, issues of relevancy of the information sought as it relates to allegations of the Canadian Bureau complaint, to the relief proposed therein, or to the Respondents' defenses, are not at issue, and therefore Aegis cannot make the legal determinations that are required of it.

Moreover, the CID calls for a large volume of documents, potentially tens of thousands, which Aegis is contractually bound to protect from disclosure. The production of these documents would require an extensive review for privilege and responsiveness, a burden that neither the Commission nor Aegis has the means to weigh against the relevance of the information to the proceeding in which the material is sought. These are the types of issues that a Canadian judge would be in a position to resolve, if Mr. Wingfield had taken advantage of the traditional discovery devices he described in his letter.

CONCLUSION

For the reasons discussed above, Petitioner Aegis requests that the Commission quash the CID. Petitioner Aegis also respectfully requests a hearing on this Petition.

Date: September 23, 2013

Respectfully Submitted,

LACKI & COMPANY, LLC

David J. Lacki, Esq.
2 Wisconsin Circle, Suite 700
Chevy Chase, MD 20815
Phone: (240) 235-5020
Fax: (240) 465-2335

Counsel for Petitioner

CERTIFICATION

Pursuant to 16 C.F.R. §2.7(d)(2), undersigned counsel hereby certifies that counsel met and conferred with FTC counsel in a good faith effort to resolve by agreement the issues set forth in this Petition, but were unable to reach agreement.

David J. Lacki

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2013, I caused the original and twelve (12) copies of Aegis Mobile, LLC's Petition to Quash the Civil Investigative Demand to be filed by hand delivery with the Secretary of The Federal Trade Commission, 601 New Jersey Avenue, NW, Washington, D.C. 20001; and one (1) copy of same to be filed by hand delivery with Guilherme Roschke, Esq., Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

David J. Lacki

Exhibit A

Federal Express proof of delivery as
Signed by A. Adriane,
executive assistant for Aegis

FedEx®

September 20,2013

Dear Customer:

The following is the proof-of-delivery for tracking number **796585100505**.

Delivery Information:

Status:	Delivered	**Delivered to:**	Receptionist/Front Desk
Signed for by:	A.ADRIANE	**Delivery location:**	Columbia, MD
Service type:	FedEx 2Day	**Delivery date:**	Sep 4, 2013 15:11
Special Handling:	Deliver Weekday		
	Direct Signature Required		

Signature image is available. In order to view image and detailed information, the shipper or payor account number of the shipment must be provided.

Shipping Information:

Tracking number:	796585100505	**Ship date:**	Aug 30, 2013
		Weight:	0.5 lbs/0.2 kg

Recipient:
Columbia, MD US

Shipper:
Washington, DC US

Reference 1323247/566503
Purchase order number: 0612

Thank you for choosing FedEx.

Exhibit B

September 23, 2013

Letter from

James Reilly Dolan to David J. Lacki

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

David J. Lacki
LACKI & COMPANY, LLC
2 Wisconsin Circle, Suite 700
Chevy Chase, MD 20815
djlacki@lackico.com

Via Email

September 23, 2013

Re: Civil Investigative Demand issued to Aegis Mobile, LLC on 8/29/13

Dear Mr. Lacki:

It is my understanding, that you seek a one week extension of time to respond to the above referenced Civil Investigative Demand. You have represented to Federal Trade Commission staff that Aegis Mobile, LLC requires more time to convert responsive documents from a native format, and to review the estimated 10,000 documents. Based on the representations you have made to staff, I find good cause to grant the one week extension. Accordingly, the new return date for the Civil Investigative Demand is September 30, 2013.

Sincerely,

James Reilly Dolan
Acting Associate Director
Division of Financial Practices

Exhibit C

September 20, 2013

Letter from

William L. Vanveen to David Wingfield

gowlings

montréal · ottawa · toronto · hamilton · waterloo region · calgary · vancouver · beijing · moscow · london

2013 SEP 20 A 10:08

William L. Vanveen
Direct 613-786-0153
william.vanveen@gowlings.com

Facsimile

To:	David Wingfield		
Company:	Competition Bureau, Legal Services	**City/Country:**	Gatineau, Canada
Fax Number:	819-953-9267	**Phone Number:**	819-994-7714

Date: September 20, 2013
Re: Commissioner of Competition v. CWTA et al.
Total Pages: (including cover) 4
File Number: 03390081
CopyTrak #: 1352

Please see attached.

If there is a problem with transmission or all pages are not received, please call Lois Isaac at 613-233-1781 Ext. 57369 for retransmission.

BY FACSIMILE

September 20, 2013

William L. Vanveen
Direct 613-786-0153
william.vanveen@gowlings.com

Mr. David Wingfield
Executive Director and Senior
General Counsel
Department of Justice, Canada
Competition Bureau
Legal Services
Place due Portage, Phase I
22nd Floor
50 Victoria Street
Gatineau, Quebec K1A 0C9
E-mail: David.Wingfield@bc-cb.gc.ca

Dear Mr. Wingfield:

Re: Commissioner of Competition v. CWTA et al. - Ontario Superior Court File No. 12-55497

I am writing as legal counsel to Canadian Wireless Telecommunications Association (CWTA). It has come to our attention that, at the request of the Commissioner of Competition, the United States Federal Trade Commission (FTC) has issued a Civil Investigative Demand (CID) to Aegis Mobile, LLC, in the United States, seeking documents from Aegis related to the civil litigation the Commissioner has commenced against CWTA, Rogers, Bell and Telus. The documents relate to services provided by Aegis to CWTA under a contract of services between the parties.

As you know, the CID process is a secret, compulsory process, used for confidential investigations. It is not appropriate to use a secret, investigative process in this matter at this time, given that you are now engaged in open, public civil litigation in Ontario concerning the matters related to the CID.

In 2012, the Commissioner of Competition investigated the subject matter of the litigation and conducted an extensive Request For Information (RFI) process in May, June, 2012, in which the Commissioner requested and received thousands of documents from CWTA, Bell, Rogers and Telus. My client provided all of the documents that were requested and the Commissioner has never alleged that my client's responses to the RFI were incomplete. My client never refused any request for documents in the RFI process. If you did not receive documents from CWTA that fall within the CID, you have never asked CWTA for those documents.

Subsequent to the RFI process, the Commissioner chose to commence civil litigation respecting this matter in the Ontario Superior Court, in September, 2012 (one year ago). The Commissioner now seeks to bypass the *Rules of Civil Procedure* applicable to this matter in the Ontario Superior Court. As you know, there are rules respecting the production of documents. Neither the Commissioner nor the Respondents in the civil litigation have commenced document production as of yet, but as you know, if the Commissioner is not satisfied with the document production of CWTA or any of the other Respondents in the civil litigation, the Commissioner may resort to Rules of Court and bring a motion seeking further and better production of documents. There are also Rules of Court permitting you to seek production from third parties, and also rules permitting you to seek letters rogatory to obtain the assistance of the courts in the United States to obtain evidence there.

All of these rules are subject to oversight by the court in which the Commissioner has chosen to sue. The Commissioner is seeking to bypass the *Rules of Civil Procedure* and to bypass court oversight by resort to the CID process. Moreover, the Commissioner requested and was granted case management of the civil litigation, and the matter is now managed by Justice Hackland, the Regional Senior Justice of the Ontario Superior Court and the parties have already appeared before Justice Hackland who has been engaged in this matter since shortly after its commencement. Not only is the Commissioner seeking to bypass the Rules of Court, but also he is seeking to bypass the case management of Justice Hackland that the Commissioner requested.

There is no justification for resort to secret investigative processes applicable to confidential investigations when the matter is now one of civil litigation with applicable rules and court oversight.

I am advised by counsel for Aegis that Aegis will undertake to preserve all the documents that it has related to this matter. Aegis is a trustworthy party with a history of cooperation with the FTC. Therefore, please advise that the Commissioner will withdraw the request to the FTC and ask them not to pursue it, so that we can address your request for documents in an open manner under the Ontario Rules of Court. If the Commissioner will not agree to address the situation appropriately under the Rules of Court, we will take steps to protect our client's rights in the Ontario court and/or the courts in the USA.

Yours truly,

William L. Vanveen

WLV:li

gowlings

cc Mr. David Lacki,
Counsel for Aegis Mobile LLC

* * * TRANSMISSION RESULT REPORT(IMMEDIATE TX) (SEP. 20. 2013 9:59AM) * * *

FAX HEADER 1: GOWLINGS CANADA INC
FAX HEADER 2:

DATE	TIME	ADDRESS	MODE	TIME	PAGE	RESULT	USER NAME	FILE
EP. 20.	9:57AM	#9828199539267	ES	1'18"	P. 4	OK		1614

# :BATCH	C :CONFIDENTIAL	$:TRANSFER	P :POLLING
M :MEMORY TX	L :SEND LATER	@ :FORWARDING	E :ECM
S :STANDARD	D :DETAIL	F :FINE	O :300dpi
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!$:REMOTE TRANSFER	B :FAX ON DEMAND	* :PC	+ :ROUTING
Q :RECEPT. NOTICE REQ.	A :RECEPT. NOTICE		

Exhibit D

September 23, 2013

Letter from

David R. Wingfield to William L. Vanveen

Ministère de la Justice Canada
Department of Justice Canada

Bureau de la concurrence
Services juridiques

Place du Portage, Tour I
22e étage
50, rue Victoria
Gatineau QC K1A 0C9

Competition Bureau
Legal Services

Place du Portage, Phase I
22nd Floor
50 Victoria Street
Gatineau, QC K1A 0C9

Cote de sécurité – Security classification

PROTÉGÉ B – PROTECTED B

Notre référence – Our file

BIMS : 3106698

Date : **2013-09-23** (AA/YY-MM-JJDD)

Téléphone/Telephone
(819) 994-7714

Télécopieur/Fax
(819) 953-9267

23 September 2013

VIA EMAIL : William.Vanveen@gowlings.com

Mr. William L. Vanveen
Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Dear Mr. Vanveen:

Re: Assistance from the United States Federal Trade Commission

I am responding to your letter of 20 September 2013.

In your letter you ask the Commissioner of Competition ("Commissioner") to withdraw his request for investigative assistance from the United States Federal Trade Commission ("FTC").

Neither of the reasons you give for asking the Commissioner to withdraw his request are sound. The Commissioner of Competition is an independent law enforcement officer who maintains his investigatory mandate when he commences litigation. Moreover, a defendant to a civil action is not entitled to prevent the Commissioner, or any other plaintiff for that matter, from gathering evidence after litigation has been started. Though it is true that the Ontario Rules of Civil Procedure permit judges of the Ontario Superior Court of Justice to order the production of documents from persons who are not parties to a legal proceeding, those parties are not required to use this process. To the contrary, parties are entitled to prepare for litigation and collect evidence from witnesses — and to do so in confidence — so long as they comply with the rules respecting discovery.

.../2

Furthermore, the fact that CWTA provided some documents to the Commissioner voluntarily does not mean that the Commissioner is precluded from requesting assistance from the FTC with respect to documents that might be in the possession of both the CWTA and a witness who is located in the United States, as is the case with Aegis Mobile LLC. Should your client be concerned that once Aegis has produced documents pursuant to the FTC's Civil Investigation Demand it will become evident that your client's voluntary production of some documents to the Commissioner was inadequate, the solution is for your client promptly to provide additional production to the Commissioner, not to resist production of documents to the Commissioner from Aegis.

I therefore trust that the Commissioner's position is clear: he will not be withdrawing his request of the FTC.

Sincerely yours,

David R Wingfield
Executive Director and
Senior General Counsel

c.c. Guilherme Roschke
United States Federal Trade Commission

Derek Leschinsky
Competition Bureau Legal Services