



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

April 7, 2011

VIA E-MAIL AND EXPRESS MAIL

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RE: *Petition to Limit or Quash Civil Investigative Demands Directed to Carey V. Brown, Credit Payment Services, Inc., Credit Protection Depot, Inc., Discount Advances Dot Com, Inc., Midland Financial Management Corp., and My Cash Now, Inc.*

Dear Counsel:

On February 23, 2011, the Federal Trade Commission (“FTC” or “Commission”) received your Petition to limit or quash six civil investigative demands (“CIDs”) issued by the Commission on January 25, 2011, and directed to your clients, Carey V. Brown, Credit Payment Services, Inc., Credit Protection Depot, Inc., Discount Advances Dot Com, Inc., Midland Financial Management Corp., and My Cash Now, Inc. (collectively, “Petitioners”). This letter advises you of the Commission’s disposition of the Petition, effected through the issuance of this ruling by Commissioner Julie Brill, acting as the Commission’s delegate.¹

For the reasons explained below, the Petition is denied, and the information required by the CIDs must now be produced on or before May 6, 2011. Further, Petitioner Brown is required to appear and testify before a representative of the Commission, as described below. Petitioners have the right to request review of this ruling by the full Commission, and any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling.² The timely filing of a request for review of this ruling by the full Commission does not stay the return dates established by this ruling.³

¹ See 16 C.F.R. § 2.7(d)(4).

² *Id.* § 2.7(f). This letter ruling is being delivered by email and express mail. The email copy is provided as a courtesy, and the deadline by which an appeal to the full Commission must be filed shall be calculated from the date Petitioners receive the ruling by express mail. *Id.*

³ *Id.*

I. THE CIVIL INVESTIGATIVE DEMANDS

On January 25, 2011, pursuant to Section 20 of the FTC Act, 15 U.S.C. § 57b-1, the Commission issued CIDs to Petitioners requiring them to respond to interrogatories and to produce several categories of documents. The CID issued to Petitioner Brown also directed him to appear before the Commission and provide oral testimony.

Two different Commission resolutions were attached to the CIDs. The first resolution authorizes the use of compulsory process to investigate

whether, in the process of collecting debts, unnamed persons, partnerships or corporations may be engaging in, or may have engaged in, acts or practices in violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, and/or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended.⁴

The second resolution authorizes compulsory process

to determine whether certain unnamed creditors may be engaged in violations of the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* (1970), as amended, and Regulation Z, 12 C.F.R. § 226, *et seq.*, and whether they may be engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended⁵

The CIDs included specifications requiring the production of materials directly related to compliance with both the FDCPA and TILA, and to debt collection or lending practices generally.⁶

On February 15, 2011, at the request of five of the six Petitioners, Commission staff extended the return date of the CIDs and shortened the applicable time period for the specifications. On February 23, 2011, Petitioners filed the instant Petition.⁷

⁴ FTC Resolution No. 9923140 (Apr. 15, 1999).

⁵ FTC Resolution No. 7823071 (May 20, 1982).

⁶ The five CIDs to the corporate Petitioners contain identical specifications. The sixth CID — to Petitioner Brown — is substantially similar.

⁷ U.S. Postal Service records show that the CIDs were delivered to Petitioners no later than February 2, 2011. The Commission received the Petition to Limit or Quash on February 23, 2011. The Petition was therefore untimely. *See* 16 C.F.R. § 2.7(d)(1) (requiring any petition to

II. ANALYSIS

A. The authorizing resolutions provide sufficient notice of the purpose and scope of the investigation.

Petitioners argue that the authorizing resolutions do not provide sufficient notice or information regarding the nature and scope of the investigation or the conduct at issue. Petitioners' argument is unavailing. Courts have repeatedly concluded that Commission resolutions that cite statutes regulating specific conduct or imposing specific compliance obligations sufficiently notify CID recipients of the purpose and scope of an investigation.⁸ The resolutions attached to the CIDs directed to Petitioners likewise identified particular statutes that provided adequate notice of the purpose and scope of the investigation.⁹

Petitioners also speciously claim that the CIDs are impermissibly vague because, in describing the subject of the investigation, the cover sheet of each CID states "See attached resolutions." As explained in the previous paragraph, the resolutions, which were attached

limit or quash to be filed within twenty of service of CID or subpoena). "[T]he Commission expects strict adherence to all procedural rules," *In re Postal Careers, Inc.*, 125 F.T.C. 1317, 1318 (1998), and Petitioners' failure to comply with Rule 2.7(d)(1) is an independent and sufficient basis for denying the Petition. However, in the exercise of its discretion, the Commission will accept the late submission, and this letter ruling will address the merits of Petitioners' arguments.

⁸ See, e.g., *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992) (upholding enforcement of a similarly worded resolution); *FTC v. Carter*, 636 F.2d 781, 787 (D.C. Cir. 1980) (holding that resolution citing Cigarette Labeling and Advertising Act provided sufficient notice); *FTC v. O'Connell Assocs.*, 828 F. Supp. 165, 170-71 (E.D.N.Y. 1993) (holding that resolution citing Fair Credit Reporting Act not overly broad).

Furthermore, the CIDs themselves contain numerous specifications referring to debt collection, lending, compliance with the FDCPA, and compliance with TILA, that clearly indicate that the FTC is investigating Petitioners' compliance with these statutes and Petitioners' lending and debt collection practices generally. See, e.g., Credit Payment Services CID at III.A.13-32 (20 interrogatories), III.B.11-27 (17 document requests).

⁹ Because the authorizing resolutions and the CIDs themselves provided sufficient notice of the purpose and scope of the investigation, the CIDs comported with the requirements of the FTC Operating Manual, which provides that "[f]or each type of CID, the Commission is required to state in the demand, 'the nature of the conduct constituting the alleged violation.'" FTC Operating Manual § 3.3.6.7.5.3 (quoting 15 U.S.C. § 57b-1(c)(2)). In any event, the Operating Manual, by its own terms, provides only "guidance," is "advisory and instructional," and confers no substantive legal rights to challenge the staff's or Commission's actions. *Id.* § 1.1.1.

directly behind the CID cover sheet, sufficiently put the Petitioners on notice as to the purpose and scope of the investigation. Simply because the cover sheet incorporated the resolutions by reference does not somehow vitiate that notice.

B. The inadvertent omission of the date and time for oral testimony is of no consequence.

In their Petition, Petitioners correctly state that the CID compelling Petitioner Brown to provide oral testimony fails to identify the date and time for such testimony, as required by the FTC Act.¹⁰ However, this inadvertent omission is no basis for quashing the CID “in [its] entirety,” as Petitioners request. The FTC Act specifies different requirements for different kinds of informational demands, and the failure to specify the date and time for oral testimony at best renders only the demand for testimony invalid. It does not follow that valid accompanying demands for documents or written answers to interrogatory questions are also deficient.¹¹

To cure the deficiency with respect to the demand for oral testimony, the Commission has reissued the CID with a specific date, time and place for Brown’s testimony. The re-issued CID is being served upon Brown under separate cover; a courtesy copy of the new CID is attached to this ruling.

C. The CIDs are not unduly burdensome.

Petitioners also argue that the CIDs are unduly burdensome and should therefore be limited or quashed. First, Petitioners argue that the CIDs are unduly burdensome because they include interrogatories in excess of the number permitted by the discovery provisions of the Federal Rules of Civil Procedure and the Commission’s Rules of Practice for adjudicative proceedings.¹² Those provisions, however, only apply to the discovery of facts in litigation. This is an investigation, not litigation.

Over half a century ago, the United States Supreme Court recognized that the Commission “does not depend on a case or controversy for power to get evidence, but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”¹³ Subsequent lower court cases have repeatedly affirmed this

¹⁰ 15 U.S.C. § 57b-1(c)(6)(A).

¹¹ *See id.* § 57b-1(c)(3) (demands for documents), (c)(5) (demands for written reports or answers to questions).

¹² *See* Fed. R. Civ. P. 33(a)(1); 16 C.F.R. § 3.35(a).

¹³ *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

principle.¹⁴ In light of this broad authority, a CID does not present an undue burden merely because it includes more requests than would be permitted under the default discovery provisions governing litigated disputes.

Petitioners also argue that the CIDs are unduly burdensome because they will require the review of millions of pages of documents. In support of this claim, Petitioners present an affidavit from an employee of Petitioner Credit Payment Services, stating that for that company and “its related entities,” even for the shortened time period resulting from staff’s modification, their records include over 1 million loans, over 1.1 million unique loan applications, and 6.6 million loan notations.

Petitioners’ argument is unpersuasive. Compliance with the requirements of a CID becomes an undue burden only when it threatens to seriously impair or unduly disrupt the normal operations of the recipient’s business.¹⁵ The target of a CID must expect to incur some burden in responding to a CID and the evidence required to demonstrate an undue burden increases when the burden is in large part attributable to the magnitude of the recipient’s business operations and the comprehensive nature of the investigation.¹⁶ Thus, in *FTC v. Texaco*, for example, the D.C. Circuit enforced a Commission CID even though Texaco claimed compliance would require 62 work-years and \$4 million (in 1977 dollars, or roughly \$14.4 million today).¹⁷

¹⁴ See, e.g., *Invention Submission Corp.*, 965 F.2d at 1090 (“At the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint.”); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (citing *Morton Salt*).

¹⁵ See *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1976).

¹⁶ See *Texaco*, 555 F.2d at 882 (“There is no doubt that these subpoenas are broad in scope, but the FTC’s inquiry is a comprehensive one and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers’ business operations.”); *In re FTC Corporate Patterns Report Litig.*, Nos. 76-0126, 76-0127, 1977 WL 1438, at *16 (D.D.C. July 11, 1977) (concluding that “there is no doubt that the relative size and complexity of the corporate parties’ business operations contribute to the compliance burden” and noting that “the cost of compliance for the corporate parties, even if high in an absolute sense, is not high compared to other costs borne by such large corporations”).

¹⁷ 555 F.2d at 922.

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The responsibility of establishing undue burden rests wholly on Petitioners.¹⁸ “[T]he presumption is that compliance should be enforced to further the agency’s legitimate inquiry into matters of public interest.”¹⁹ But here, Petitioners have not established undue burden.

As modified, the time period covered by the CIDs is from January 2008 to the present, a period of slightly over three years. To the extent that the CIDs require Petitioners to review millions of loan, applications, or notes generated during that period, the burden is “in large part attributable to the magnitude of [Petitioners’] business operations.” Moreover, these are business records that are presumptively not privileged and therefore require little or no review.

In addition, Petitioners’ supporting affidavit is unclear as to whether any potential burden from these documents is limited to Petitioner Credit Payment Services, or is somehow shared by the other Petitioners. The affidavit also fails to describe how many of the records at issue are stored electronically. Electronically stored information (“ESI”) can be searched or reviewed using automated processes that can significantly reduce the cost and burden of reviewing and producing ESI.²⁰ In an era in which most corporate records are maintained as ESI, Petitioners’ failure to provide this sort of description precludes any possible showing of undue burden.

Petitioners bear the responsibility of demonstrating burden, and vague references to large numbers of documents, without more, are insufficient to support a claim of undue burden.²¹ The Petition will therefore be denied.

III. CONCLUSION AND ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition to Limit or Quash CIDs be, and it hereby is, **DENIED**;

¹⁸ *In re Nat’l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998)

¹⁹ *Shaffner*, 626 F.2d at 38.

²⁰ *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (“Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying.”); John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, NEW YORK TIMES, Mar. 4, 2011, at A1, available at, <http://www.nytimes.com/2011/03/05/science/05legal.html>.

²¹ *Shaffner*, 626 F.2d at 38 (rejecting “conclusory allegation that compliance . . . would ‘severely interfere, disrupt and temporarily terminate’” recipient’s business).

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IT IS FURTHER ORDERED THAT the responses to interrogatories and documents required by the CIDs to all Petitioners must now be produced on or before May 6, 2011; and

IT IS FURTHER ORDERED THAT Petitioner Carey V. Brown is required to appear and testify before Sana Coleman Chriss or other designated person, at the Office of the Attorney General of Tennessee, 540 McCallie Avenue, Chattanooga, Tennessee, 37402 at 10:30 a.m. on May 16, 2011. The CID to Mr. Brown has been reissued accordingly as of the date of this letter ruling. A courtesy copy of the CID is enclosed.

By direction of the Commission.

Donald S. Clark
Secretary

Encl.