



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF FEBRUARY 13,
2013 CIVIL INVESTIGATIVE DEMAND
TO JERK, LLC

File No. P954807

Pursuant to 16 C.F.R. §2.7(d), Jerk, LLC petitions to quash the Civil Investigative Demand (“CID”) issued on February 13, 2013 and served on Jerk, LLC on February 22, 2013.

I. BACKGROUND

Jerk, LLC operates the website Jerk.com which features user generated content about individuals. The information contained in this background has all been previously supplied to the FTC in response to a CID for written answers to questions pursuant to 16 C.F.R. §2.7(b)(3). Profiles are submitted to Jerk.com by users by choosing the “post a jerk” option. Information collected and displayed on jerk.com may include photographs, names, ages, schools attended, and opinions. The content in profiles often displays information that is publicly available in a Google internet search as well as newly created user generated content. Jerk.com has almost 100,000 visitors per day.

The Terms and Conditions of the jerk.com website prohibit use by children under the age of 14. Every person who uses the website consent to the Company's information collection, use and disclosure practices pursuant to the Terms and Conditions which provide that use of the website constitutes agreement to the Terms and Conditions. If an abusive user submits information about a child by posting it online in violation of Jerk.com's terms of service, such information is stored on its servers and displayed on the site until removed. If the fact that the profile is of a child is brought to the attention of Jerk.com, it is or if there is a request to remove information about a child under the age of 14, the content is removed and the poster is banned.

Jerk.com offers the following paid services: Bid or vote for Jerk or Saint of the day - \$1.00; Customer support - \$25.00; Paid Subscriptions - \$30.00; Redirect/Link forwarding - \$90.

Paid customer support (\$25.00) may be used by users to request removal of a profile from Jerk.com. Removal requests are also received through email and through Jerk.com's DMCA agent. Children's profiles are removed regardless of the source of the removal request. Jerk.com also routinely removes photographs in response to DMCA notices.

In the "Remove Me!" link of the Jerk.com website, it once stated: "No one's profile if ever removed because Jerk is based on searching free open databases and it's not possible to remove things from the internet." The quoted statement, that removal from the Internet is not possible, is meant to educate consumers that removal from Jerk.com is not removal of the content from the source on the Internet. The quote is

meant to explain that content displayed on Jerk.com is often content displayed elsewhere in other publicly accessible databases. That quote has been removed.

In 2012, Jerk.com only had 22 people subscribe to its service and its total revenue was approximately \$3,000.

II. ARGUMENT

A subpoena from the FTC is not self-enforcing. *Wearly v. FTC*, 616 F.2d 662, 665 (3d Cir. 1980). The FTC must seek an order from the federal court compelling compliance. *Id.* Federal courts, however, do not act as a rubber stamp; instead, they act as an independent reviewing authority with "the power to condition enforcement upon observance of safeguards to [a petitioner's] valid interests." *Id.*; see also *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946) (noting that the courts serve as a safeguard against agency abuse); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978) (citations omitted) ("The federal courts stand guard, of course, against abuses of ... subpoena-enforcement processes.").

In *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950), the United States Supreme Court established the standard for determining when a CID should be quashed. A CID is not enforceable if (i) it is not "within the authority of the agency," (ii) is "too indefinite," or (iii) is not "reasonably relevant [to the inquiry]." *Id.* at 652. Courts applying this test have consistently held that an administrative subpoena must be "reasonable." See, e.g., *U.S. v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996).

A governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power of the agency.

In *SEC v. Blaclifoot Bituminous, Inc.*, 622 F.2d512 (10th Cir. 1980), the Court of Appeals for the Tenth Circuit confirmed that "an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met.

A party challenging a subpoena can also successfully do so on the grounds that compliance would be overly burdensome or unreasonable. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). An administrative agency may not use its investigative powers to go on a fishing expedition. *FDIC v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997); *FTC v. Nat'l Claims Serv., Inc.*, No. S. 98-283,1999 WL 819640, at * 1 (B.D. Cal. Feb. 9, 1999). *See also* S. Rep. 96-500 at 4, 96th Congress 1st Session (1979) ("The FTC's broad investigatory powers have been retained but modified to prevent fishing expeditions undertaken merely to satisfy its 'official curiosity.'").

In *FTC v. Am. Tobacco Co.* 264 U.S. 298,306 (1924), the Supreme Court stated that "[i]t is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

The FTC may not demand information unless the CID is signed by a Commissioner acting pursuant to an FTC resolution. 15 U.S.C. § 57b-1(i). "Any person ... under investigation compelled or requested to furnish information or documentary material shall be advised of the purpose and scope of the investigation, the nature of the

acts or practices under investigation, and the applicable provisions of law.” 16 C.F.R. §2.6. The FTC Operating Manual requires that “Investigational resolutions must ... be specific enough to enable a court in an enforcement action to determine whether the investigation is within the authority of the Commission and the material demanded by the compulsory process is within the scope of the resolution.” (at§ .3.6.7.4.1) A court may only look at the resolution to evaluate the scope of an investigation. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992).

Here, the CID is purported issued pursuant to a Resolution directing use of compulsory process in nonpublic investigation of acts and practices related to consumer privacy and/or data security. The nature and scope of the investigation is stated to be to determine whether unnamed persons are engaged or have been engaged in deceptive or unfair acts or practices related to consumer privacy and/or data security including the collection, acquisition, use, disclosure, security, storage, retention or disposition of consumer information. The language of the Resolution is so broad that it would seem to permit the FTC to investigate any website, such as Facebook, that contains user profiles, and any website that permits users to provide any information whatsoever about another person. There is no way to determine whether the information identified in the CID as the subjects of the testimony bears any relation to a lawful investigation. This is contrary to the statutory requirements imposed on the FTC. *See, e.g., FTC v. Carter*, 636 F.2d 781,788 (D.C. Cir. 1980) (the bare recitation of “Section 5’s prohibition of unfair and deceptive practices ... standing broadly alone would not serve very specific notice of [a resolution’s] purpose”); *FTC v. Foremost-McKesson, Inc.*, 1981 WL 2029, at *4

S.D.N.Y.) (noting that the FTC Improvements Act of 1980 “is intended to limit the practice of the Commission of giving a vague description of the general subject matter of the inquiry and provide a standard by which relevance may be determined).

During the good faith attempt to resolve the issues raised in this Petition, the FTC cited to the April 11, 2012 Commission Letter granting in part and denying in part the Petition to Quash filed by Wyndham Hotels & Resorts, LLC and Wyndham Worldwide. In that Letter, the Commission determined that the authorizing resolution adequately delineated the purpose and scope of the investigation as “[t]o determine whether unnamed persons, partnerships; corporations, or others are engaged in, or may have engaged in, deceptive or unfair acts or practices related to consumer privacy and/or data security, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended”

While the scope of investigation found to be adequate in Wyndham was almost identical to the scope of the investigation in this matter, the facts dictate a different result. In Wyndham, the CID was issued nearly two years after the investigation commenced, was issued after substantial ongoing communications, and the production of over a million pages of documents at significant expense. Most importantly, in Wyndham, it was abundantly clear that the investigation was the result of breaches of Wyndham’s computer networks that resulted in access to hundreds of thousands of credit card numbers. When a company that knows that it is being investigated for failure to secure the credit card data of its customers, a Resolution that describes the scope of the investigation as engaging in deceptive or unfair acts or practices related to consumer

privacy and/or data security, may very well be adequate disclosure of the scope of the investigation. Here, however, Jerk, LLC has been led to believe that the investigation relates to the display on Jerk.com of photographs that are publicly available on the Internet. Jerk, LLC does not have an understanding of what is claimed to be improper about that display and the Resolution adds no clarity.

On this basis, the CID should be quashed in its entirety.

In addition, CID states an incredibly overbroad description of the subject matters of the requested testimony. The CID defines the Company as “Jerk, LLC, its wholly or partially owned subsidiaries, including unincorporated divisions, joint ventures, operations under assumed names, and affiliates, including and (sic) all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.” The Specifications section of the CID requires the appearance of one or more officers, directors, or managing agents to testify regarding ten subjects and 21 subparts. Specification A, B, and C relates to the interrogatories, requests for documents and responses contained in the Commission’s July 27, 2012 CID. That CID, however, stated a different nature and scope of the investigation than this CID. There, the FTC cited alleged COPPA violations.

Specification D is the subject of “the Company’s” relationship with a list of ten individuals and entities. In light of the very broad definition of “the Company,” this subject includes the relationship between each of the ten listed individuals and entities and every agent, consultant and affiliate of Jerk, LLC, including undersigned counsel. That clearly implicates attorney client privilege and is incredibly broad. Moreover, it is

entirely unclear what that subject matter has to do with the investigation of deceptive or unfair acts or practices related to consumer privacy and/or data security including the collection, acquisition, use, disclosure, security, storage, retention or disposition of consumer information.

Subjects E and F relate to Jerk.com's use of the Facebook platform and photos obtained from Facebook and Twitter. This subject is particularly disturbing in light of the purported purpose of the CID. The subject matter expressly relates to publicly available information, the exact opposite of the Resolution.

Subjects G through J are extremely broad general topics regarding how Jerk.com works, information that has either previously been provided or is readily ascertainable from the website itself.

III. CONCLUSION

The CID requests the personal appearance in California of an individual or individuals who are knowledgeable about a wide range of broad topics related to Jerk.com. It is clearly a fishing expedition and it is being conducted at the expense and burden of Jerk, LLC. The CID should be quashed in its entirety.

DATED: March 15, 2013



Maria Crimi Speth
Jaburg & Wilk, P.C.
3200 North Central Avenue
Suite 2000
Phoenix, Arizona 85012
Tel: (602) 248-1089
Fax: (602) 248-0522
mcs@jaburgwilk.com

Counsel for Petitioner

CERTIFICATION

Pursuant to 16 C.F.R. § 2.7(d)(2), counsel for Petitioner hereby certifies that counsel engaged in good faith talks to attempt to resolve by agreement the issues set forth in this Petition. The good faith talks occurred telephonically on March 15, 2013 at 10:30 a.m. Pacific Time between Sarah Schroeder, Kerri O'Brien and undersigned counsel. Despite a discussion lasting more than an hour, we were unable to resolve the issues.



Maria Crimi Speth

CERTIFICATE OF SERVICE

I certify that, on March 15, 2013, I deposited the original and twelve (12) copies of Jerk, LLC's Petition to Quash Civil Investigative Demand with Federal Express for overnight delivery to the Secretary of the Federal Trade Commission at the following address:

Federal Trade Commission
600 Pennsylvania Avenue, NW, H-113
Washington, D.C. 20580

I also certify that, on March 15, 2013, I emailed and mailed via first class mail, a copy of Jerk, LLC's Petition to Quash Civil Investigative Demand, to the following address:

Sarah Schroeder
Federal Trade Commission, Western Region
901 Market Street, Suite 570
San Francisco, CA 94103


