

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

_____	)	
	)	
FEDERAL TRADE COMMISSION,	)	
	)	
Petitioner,	)	
	)	
v.	)	Misc. No. 1:13-mc-00131-AKH
	)	
THE WESTERN UNION COMPANY,	)	(Nature of Case M 18-304:
	)	Administrative Subpoena Proceedings)
and	)	
	)	
LONNIE KEENE, MONITOR,	)	
	)	
Respondents.	)	
_____	)	

**MEMORANDUM OF LAW IN SUPPORT OF APPLICATION OF THE FEDERAL  
TRADE COMMISSION FOR ORDER TO SHOW CAUSE WHY THE WESTERN  
UNION COMPANY SHOULD NOT BE HELD IN CIVIL CONTEMPT**

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## **INTRODUCTION**

The FTC and Western Union last appeared before this Court on May 28, 2013. On that date, and by order dated June 7, 2013, this Court directed Western Union to comply with the FTC's Civil Investigative Demand ("CID"). Among other directives, the Court ordered Western Union to produce documents responsive to Specification 2 of the CID – *i.e.*, all documents “referring or relating to communications with the Monitor” – in accordance with a search protocol to be finalized by the FTC after consultation with Western Union. The June 7 order was quite clear: “Western Union *shall accept* the FTC's” final choice of search protocol and shall “within 15 days ... produce all of the documents identified as a result of its execution of the protocol,” subject only to the FTC's discretion to grant extensions. Dkt. 47 ¶ 14 (emphasis added). On June 21, 2013, this Court denied Western Union's Motion for Clarification and/or Reconsideration.

More than five months have passed since the June 7 order directing Western Union to “accept” the FTC's choice of search protocol and “produce all of the documents” so identified. Western Union has flatly defied that order:

- It has produced *no documents* pursuant to the Court-ordered protocol;
- It has rejected the FTC's final search protocol on the grounds that the numbers of custodians and search terms are burdensome, even though the June 7 order compelled Western Union to accept that protocol, and even though the FTC had developed the protocol after two consultations with the Monitor, had voluntarily reduced the number of custodians, and had revised the search terms at Western Union's request;
- Western Union even rejected the FTC's offer to absorb most of Western Union's costs by using the FTC's own litigation support staff to run the search protocol and an

independent “taint team” to identify and segregate any privileged documents; and

- Western Union continues to stonewall by advancing new arguments for noncompliance well after the deadlines for such arguments have passed. Some of these arguments contradict positions that Western Union itself previously advanced before the Commission and this Court.

In short, Western Union has flouted this Court’s CID enforcement order and has thereby impeded the FTC’s investigation. The Court should now order Western Union to show cause why it should not be held in civil contempt of the June 7 order. The Court should thereafter find Western Union in civil contempt and impose daily monetary sanctions until it complies with the June 7 order. In the alternative, the Court should order Western Union to do by December 20, 2013, what it should have done months ago: “accept” the search protocol reflected in the FTC’s letter of August 8, 2013 and “produce all of the documents identified as a result of its execution of the protocol.” Dkt. 47 ¶ 14. .

### **FACTUAL BACKGROUND**

#### **1. The FTC’s investigation.**

The FTC is investigating the adequacy of Western Union’s policies and procedures to detect and deter fraud-induced money transfers, the practice by which consumers are deceived into wiring money to third parties using a variety of pretenses. Dkt. 1 ¶¶ 6-11. The FTC instituted this enforcement proceeding when Western Union refused to comply with a CID, even after months of negotiation and the Commission’s denial of Western Union’s Petition to Quash.

#### **2. The Court’s order enforcing the CID (June 7, 2013).**

On June 7, 2013, this Court issued an order enforcing the CID in full, save for a provision that required Western Union to produce consumer complaints and related documents pertaining

to money transfers transmitted by senders in foreign countries to recipients in foreign countries. Dkt. 47; *see also* Dkt. 41 at 20-21. Among other requirements, the June 7 order created a four-step process by which the parties would develop a protocol for Western Union to use to locate electronically stored documents “referring or relating to communications with the Monitor.” Dkt. 47 ¶¶ 13-14. In particular:

- “Western Union shall, within 14 days of the entry of this Order, produce a proposed protocol” for the relevant document search;
- “The FTC shall respond in a timely fashion to Western Union’s proposed protocol and may provide additional or alternative search terms or additional or alternative steps for searching for, identifying, and producing documents”;
- “Within 5 days, Western Union shall advise the FTC whether any of the additional or alternative search terms or steps are either overinclusive or underinclusive, with a statement of the specific reasons for its position and supporting data”; and
- “[T]he FTC shall promptly respond to Western Union’s information,” and “Western Union *shall accept* the FTC’s response and, within 15 days of the FTC’s response, or at such later time as may be agreed by the FTC, *produce all of the documents identified as a result of its execution of the protocol and the FTC’s response.*”

Dkt. 47 ¶¶ 13-14 (emphasis added). There is no ambiguity here: the FTC’s “response” in the fourth step was binding on Western Union and triggered a duty to produce “all of the documents” promptly.

### **3. Search protocol discussions (June 20 – August 8, 2013).**

On June 20, 2013, Western Union presented the FTC with an initial search-protocol proposal, which contradicted Western Union’s own prior advocacy before this Court.

Previously, in opposing the Specification 2’s request for “[a]ll documents referring or relating to communications with the Monitor,” Western Union had represented to this Court that “no fewer than 57” custodians would have to be searched for responsive documents if that request is enforced according to its terms. Dkt. 41 at 24. Once Western Union lost that argument and was ordered to comply with Specification 2 as written, it suddenly took the contradictory position that its discovery obligations were in fact quite narrow. Its proposal to the FTC thus included only 10 custodians and a total of 17 search terms – 7 “base” terms to be combined with 10 “limiting” terms.<sup>1</sup> Dkt. 41 at 24; Contempt Exh. 1 ¶ 7; Contempt Exh. 2.

The FTC viewed this proposal as unduly narrow, particularly given the company’s own prior representation that faithful enforcement of Specification 2 by its terms would require searches for “no fewer than 57” custodians. The FTC thus undertook a detailed review of the Monitor’s reports and consulted with the Monitor. It sought in particular to identify those search terms and custodians most likely to lead to responsive documents and to enable both Western Union and the FTC to avoid the costs of reviewing unresponsive documents. Contempt Exh. 1 ¶¶ 8-9. In light of this review, the FTC proposed 135 custodians (in lieu of Western Union’s 10) and proposed 57 specific search terms (in lieu of Western Union’s 17). Contempt Exh. 3. This proposal was tailored to capture those document custodians whom the Monitor himself has identified for their involvement in his project. Contempt Exh. 1 ¶¶ 8-9.

At this point, the June 7 order required Western Union to “advise the FTC whether any of

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<sup>1</sup> The “base” and “limiting” terms are to be applied in combination. Western Union would only be required to review and produce documents “hit” by a combination of a “base” and a “limiting” term. A hit by only a “base” term or only a “limiting” term would not be sufficient to require review.

the additional or alternative search terms or steps are either overinclusive or underinclusive” and to include “a statement of the specific reasons for its position and supporting data.” Dkt. 47 ¶ 14. Western Union ignored that directive. Instead, it merely objected to the *numbers* of custodians and search terms but did not provide a specific cost justification for its objections or provide data to support its view that the Commission’s proposal was improper. Contempt Exh. 1 ¶¶ 11-12; Contempt Exh. 4.

The FTC agreed nonetheless to undertake yet another detailed review of its proposed custodians and search terms. FTC staff re-reviewed the Monitor’s report and consulted with the Monitor a second time regarding those Western Union employees with whom he had communicated. After this additional due diligence, which went beyond the Commission’s obligations under the order, the FTC – anxious to move the investigation forward – agreed to shorten the custodian list from 135 to 74 (a reduction of 45%) and to further revise the search terms. Contempt Exh. 1 ¶¶ 13-14; Contempt Exh. 6.

By letter dated August 8, the FTC presented its revised protocol to Western Union, thus triggering provisions of the June 7 order that required Western Union not only to “accept” that protocol, but to run it and produce responsive documents on a tight timeframe. Contempt Exh. 6. Specifically, the Commission advised Western Union that, to comply with the order, it needed to make an initial production and provide a schedule for production within 15 days (*i.e.*, August 23, 2013), *see* Dkt. 47 ¶ 14, and to complete the entire production by October 31, 2013, a date based on Western Union’s own projections that it could retrieve and process e-mail for 32 custodians in 30 days, a rate of roughly one custodian per day. Accordingly, the FTC set the deadline 74 days from August 8 – or October 21 – and then allowed 10 additional days, bringing the deadline to October 31, 2013. Contempt Exh. 6.

**4. Post-deadline negotiations (August 27, 2013 – October 18, 2013).**

Western Union did not run the search protocol or meet the deadlines specified by the FTC. Instead, on August 27, 2013, the company provided a letter and a report from its vendor, UnitedLex, in which it raised for the first time the issue of compliance costs.<sup>2</sup> Contempt Exh. 7. In its letter, the company extrapolated from a set of only three custodians to estimate that the costs required to execute the protocol would exceed \$3.7 million. *Id.* The company also cited the UnitedLex report, which collected hit rates for various search term combinations proposed by the FTC in documents collected from the three test custodians. *Id.* Based on this, the company requested further reductions in the search protocol and asked for another meet-and-confer. *Id.*

Counsel for the FTC and Western Union met on September 10, 2013. At that meeting, Western Union raised an entirely new set of issues for the Commission to address (Contempt Exh. 9):

**a. Western Union provided new information regarding its e-mail system.**

The company disclosed for the first time that it was in the midst of converting its e-mail system from Lotus Notes to Microsoft Exchange and converting its e-mail archives from an older system to a newer system, a project that it claimed would impose additional costs and delay in production of materials from the identified custodians. *Id.*; *see also* Contempt Exh. 11 ¶¶ 10-15.

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<sup>2</sup> Although it was required to do so to exhaust its administrative remedies, *see* 16 C.F.R. §§ 2.7(k), 2.10(a)-(b), Western Union did not object to the burden of compliance in its petition to the Commission to quash the CID. At the show cause hearing before this Court, Western Union raised the issue of burden but provided no specific estimates as to what that burden might be; instead, the company only asked the FTC to consider search terms as a way of mitigating this presumed burden. Dkt. 41 at 24-26.



**b. Western Union made new requests for changes to the search protocol without substantial support.**

Western Union also demanded further changes in the search protocol – namely, to set aside entirely the 24 search terms that referenced specific topics and issues in its communications with the Monitor. It further stated that it would not begin conducting searches and reviewing results until agreement was reached. The company also indicated that it wanted reductions to the numbers of custodians beyond the 45% reduction the Commission already made. Western Union did not provide any supporting data to explain why such cuts were necessary. To the contrary, the report provided by Western Union with its August 27 letter reflected a substantial number of hits using the very search terms that Western Union now wanted the FTC to set aside. *See* Contempt Exhs. 7, 9.

**c. Western Union abandoned its earlier position regarding the scope of Specification 2.**

As noted, Western Union had previously objected that enforcement of the CID’s demand for “[a]ll documents referring or relating to communications with the Monitor” would subject Western Union to onerous production obligations. Dkt. 41 at 24-25. In particular, the company had argued that the CID’s definition of “referring or relating to” – namely, “discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part” – was so broad that it would require document searches for “no fewer than 57” custodians. Dkt. 41 at 24; *see also* Pet. Exh. 4 (Dkt. 1 at 28-29); Dkt. 21 at 22-23. This Court nonetheless enforced this portion of the CID as written. *See* Dkt. 41 at 21.

In the teeth of Western Union’s prior representation, the company now announced to the FTC that it intended to reduce its obligations under the CID by limiting its production to

documents that referred to *specific or direct* communication with the Monitor or a member of his team. As stated in its August 27, 2013, letter, “It bears remembering that Specification 2 of the CID seeks ‘[a]ll documents referring or relating *to communications with the Monitor* . . .’ Specification 2 does not seek all documents ‘referring or relating *to the Monitor*.’” Contempt Exh. 7 (emphasis in original). That position makes no sense as a matter of logic: the FTC seeks only documents *relating to communications* with the Monitor (rather than hypothetical documents about the Monitor unrelated to those communications, such as where he lives or who his parents are). But the CID makes clear that it seeks all documents “referring or relating to” such communications, and it broadly defines “referring or relating to” in terms that flatly preclude Western Union’s interpretation. In short, Western Union’s position contradicts both the plain meaning of the CID and its own prior representation to this Court about the production obligations that would be imposed by a plain-meaning interpretation of Specification 2.

After the meet-and-confer, Western Union advised the Commission that as of September 12, 2013, it had completed collecting and processing e-mail for only 9 of the 74 identified custodians, Contempt Exh. 8, even though the Commission had served Western Union with process more than 9 months earlier and had obtained court enforcement in June of this year.

**5. The FTC’s proposal to alleviate Western Union’s burden (October 18, 2013).**

On October 18, 2013, in the interests of moving the investigation forward and avoiding further litigation, the Commission offered Western Union two options.<sup>3</sup> Contempt Exh. 9. Under the first, Western Union could execute the final search protocol, as proposed by the

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<sup>3</sup> The Commission would have responded earlier but was closed due to the government shutdown from October 1 to 16, 2013.

Commission in its letter of August 8, 2013. Contempt Exhs. 6, 9. The second option addressed all of Western Union's complaints about the cost and burden of production. Specifically, the Commission proposed that Western Union produce the complete document collections for the 74 custodians identified by the FTC. Contempt Exh. 9. The FTC would then absorb virtually all the costs of production by running the search protocol to identify responsive documents. *Id.* To protect Western Union's privilege, the FTC further proposed to conduct an electronic privilege screen and to have any apparently-privileged documents screened out by an independent "taint team" prior to substantive review by investigating staff. *Id.* The FTC also proposed seeking entry of a clawback order that would protect Western Union from claims of waiver under Federal Rule of Evidence 502(d), even as to third parties. *Id.*; *see also* Fed. R. Evid. 502(d). In short, this second option was designed to allow Western Union to avoid the cost and burden of human review – the only reason that Western Union had advanced for refusing to accept the Commission's search protocol. Contempt Exh. 9; Contempt Exh. 11 ¶¶ 16-20. The Commission asked Western Union to respond to this proposal no later than October 25, 2013.

**6. Western Union's rejection of the Commission's proposal (October 29, 2013).**

Western Union did not respond until October 29, 2013, when it rejected both of the FTC's proposed options and said it would not meet the Commission's extended deadline of November 18, 2013. Contempt Exh. 10. Instead, having failed to produce even a single "relating to" document pursuant to the Court-ordered protocol, it merely invited the FTC to engage in further negotiations on the numbers of custodians and search terms and announced that it would not proceed until these were finalized. *Id.*

## ARGUMENT

### I. The FTC has satisfied all of the elements of civil contempt.

It is long-established that district courts have the inherent power to enforce compliance with their lawful orders through civil contempt. *See Shillitani v. United States*, 384 U.S. 364, 370 (1966); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (“‘Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.’”); *Abrams v. Terry*, 45 F.3d 17, 23 (2d Cir. 1995); *D’Orange v. Feely*, 959 F. Supp. 631, 634–35, 637 (S.D.N.Y. 1997). This power is “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Chambers*, 501 U.S. at 43 (internal quotation marks omitted).

Through this inherent power, the Court may hold a party in civil contempt if the moving party shows that “[i] the order being enforced is clear and unambiguous, [ii] the proof of noncompliance is clear and convincing, and [iii] the defendants have not been reasonably diligent and energetic in attempting to accomplish what was ordered.” *EEOC v. Local 638*, 753 F.2d 1172, 1178 (2d Cir. 1985) (internal quotation marks omitted). The Court need not find that the noncompliant party’s disobedience was willful. *Id.*; *SEC v. Universal Express, Inc.*, 546 F. Supp. 2d 132, 134 (S.D.N.Y. 2008). Each of the required factors is present here, and Western Union should thus be held in contempt.

#### A. The June 7 order was clear and unambiguous.

The June 7 order gave the parties clear directions for formulating a search protocol. Western Union would first make an initial proposal, to which the FTC could respond. Dkt. 47 ¶¶ 13-14. Western Union could then advise the FTC if its response was overinclusive or

underinclusive and, following this, the FTC would respond again and provide Western Union with a final search protocol. *Id.* ¶ 14. Indeed, at no point has Western Union disputed the meaning of paragraphs 13 and 14, and its noncompliance does not result from any dispute over the meaning of the governing provisions.<sup>4</sup> *See NBA v. Design Mgmt. Consultants, Inc.*, 289 F. Supp. 2d 373, 377 (S.D.N.Y. 2003) (“An order is clear and unambiguous where it is specific and definite enough to apprise those within its scope of the conduct that is being proscribed or required.”) (internal quotation marks omitted).

**B. The proof of Western Union’s noncompliance is clear and convincing.**

In the context of civil contempt, “the clear and convincing standard requires a quantum of proof adequate to demonstrate a reasonable certainty that a violation occurred.” *Levin v. Tiber Holding Corp.*, 277 F.3d 243, 250 (2d Cir. 2002) (internal quotation marks omitted). As summarized above and related in detail in the accompanying declarations, undisputed facts establish beyond a reasonable certainty that Western Union has defied the requirements of the CID enforcement order. Specifically:

- Western Union has not produced even one of the documents “referring or relating to communications with the Monitor” resulting from the search protocol, even though these may be the most probative documents in the current investigation. Contempt Exh. 1 ¶ 20.

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<sup>4</sup> Western Union filed a Motion for Clarification and/or Reconsideration on June 17, 2013. Dkts. 44-45. That motion requested clarification as to which of several alternative proposals for order provisions this Court intended to select. The Court denied the motion, finding that Western Union merely sought to relitigate issues the Court had already addressed.

- Western Union failed to meet the 15-day deadline to provide the initial production and schedule as required by the FTC. *See* Dkt. 47 ¶ 14.
- Western Union has stated that it will not review or produce documents required by the order without further negotiations and a new agreement on a more limited number of custodians and different search terms. Dkt. 47 ¶ 14; Contempt Exhs. 9, 10.
- Western Union has not met the October 31 deadline and has announced that it would not meet an extended November 18 deadline either. Dkt. 47 ¶ 14; Contempt Exh. 10. Indeed, Western Union has refused to specify any deadline for production.
- Abandoning its prior construction of the CID, Western Union has announced that, wholly apart from its objections to the search protocol, it will not produce “documents referring or relating to” all communications with the Monitor, as required by Specification 2. Instead, it will select for production only those documents that refer to specific or direct communications with the Monitor, even though nothing in the CID or this Court’s June 7 order permits limiting Specification 2 that way, and even though the time for making such interpretive arguments has long since passed. Dkt. 47 ¶¶ 13-14; Contempt Exhs. 1 ¶ 16.c., 7, 9, 10.

**C. Western Union has not been “reasonably diligent” or “energetic” in attempting to comply with the June 7 order.**

If it means anything at all, “reasonable diligence” requires a party to develop reasonably effective methods of complying with a court order. *See, e.g., King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058-59 (2d Cir. 1995); *Cancer Research Inst., Inc. v. Cancer Research Soc’y, Inc.*, 744 F. Supp. 526, 530 (S.D.N.Y. 1990); *Musalli Factory for Gold & Jewelry Co. v. N.Y. Fin. LLC*, No. 06 Civ. 82(AKH), 2010 WL 2382415, at \*3 (S.D.N.Y. June 14, 2010); *Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, No. 06 Civ. 0085(LBS), 2007 WL 2982295, at \*5

(S.D.N.Y. Oct. 10, 2007). Reasonably energetic compliance, at a minimum, requires a party “to energetically police” the effectiveness of its compliance measures and, when advised that such measures have fallen short, to modify them accordingly. *Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd.*, 885 F.2d 1, 4-5 (2d Cir. 1989) (internal quotation marks and citation omitted).

Western Union has not been “reasonably diligent,” let alone “energetic.” This Court’s order required Western Union to accept the FTC’s final protocol and start producing documents. Yet in the more than three months since the search protocol was finalized, *Western Union has not produced a single document in response*. Indeed, the FTC has not received even a limited production of such documents from any of Western Union’s preferred slate of custodians, using its own search terms and applying its own, cramped interpretation of the breadth of Specification 2. Nor has Western Union produced even hard copy documents that would not impose the “burdens” of electronic search and review.

Although Western Union has produced limited information in response to the CID’s Specification 1, that is no excuse for the company’s defiance of its independent obligation to comply with the June 7 order as it relates to Specification 2. Many of the Specification 1 documents provided thus far have been essentially token productions of information that were easy to obtain and simple to produce. For instance, the Monitor’s own reports amounted to only 335 pages of documents, while consumer complaints were primarily produced in the form of spreadsheets. Contempt Exh. 1 ¶ 19.

As this Court has found, such partial productions do not excuse contempt. In *Cordius Trust v. Kummerfeld Associates, Inc.*, for example, this Court found that defendants were in contempt of a discovery order, even after the defendants made a partial production, and even though they subsequently completed production in the course of responding to the plaintiff’s

contempt motion. 658 F. Supp. 2d 512, 516-17 (S.D.N.Y. 2009) (“[W]hile production may now be complete, Kummerfeld cannot remedy his noncompliance with this Court’s order by belatedly producing documents, and only after the filing of a motion for contempt.”).

Similarly, in *National Basketball Ass’n v. Design Management Consultants, Inc.*, this Court found defendants in contempt for providing a partial response to an order that required them to produce an accounting of sales and profits and supporting documentation. 289 F. Supp. 2d at 376-78. Indeed, *National Basketball* is markedly similar to the present matter because, like Western Union, the defendants claimed their noncompliance was caused by technical difficulties – specifically, an “extremely rudimentary accounting system” that forced them to conduct a manual review of invoices. *Id.* at 375. As a result, they argued, compliance with the order would be both expensive and time-consuming. *Id.* at 375-78. This Court, however, summarily rejected those difficulties as an excuse for their failure to comply. *Id.* at 377-78.

Apart from its failure to produce even a single document responsive to Specification 2, Western Union’s shortcomings are shown most clearly by its course of conduct. As of August 7 – two months after the Court entered its order – Western Union had not yet begun to collect electronic documents from likely custodians. Contempt Exh. 5. And as of September 12 – a full nine months after receipt of the CID and three months after the Court enforced the CID – Western Union had processed e-mails for only 9 of the 74 custodians identified by the FTC. Contempt Exh. 8.

Further, Western Union withheld from the FTC critical information about its pending e-mail conversion project, which it now claims will increase its retrieval costs and delay production. Western Union disclosed this obstacle to its compliance only after the FTC issued the final search protocol and after the initial deadlines for the search protocol had run. *See*



Contempt Exh. 11 ¶ 13. Western Union’s silence about the state of this project defeats any notion that the company was reasonably diligent or energetic in obeying the Court’s order to provide the FTC documents. If Western Union had notified the FTC earlier of the problems posed by this conversion, the parties could have worked cooperatively to develop a solution. *Id.* For example, even if Western Union faced some exigency requiring it to undertake the conversion before production, Western Union and the FTC could have arranged for the company to convert e-mails from those custodians identified by the FTC first in order to avoid unnecessary delay in search and review. *Id.*

Indeed, counsel conceded in that meeting that the company had considered disclosing the project to the FTC earlier, but had elected not to do so. *Id.* Although Western Union, through counsel’s letters, alluded to certain difficulties, including that the system was undergoing “maintenance,” that the system’s “search and export capabilities are limited,” and that the system was being upgraded, these statements in no way alerted the FTC to the comprehensive e-mail project described by counsel on September 10. At that meeting, Western Union revealed that it was overhauling its e-mail and storage systems, and that this overhaul required the company to undertake duplicate searches for e-mail and prevented the production of documents until the conversion could be completed. See Contempt Exh. 11 ¶¶ 10-15.

In any event, even if Western Union had informed the FTC of difficulties with its e-mail system, that would not excuse its failure to use reasonable diligence and apply energetic efforts to comply with the Court’s order. *National Basketball Ass’n*, 289 F. Supp. 2d at 375. Nor can Western Union rely upon such difficulties in calculating its compliance costs – a party cannot create burdens or obstacles for itself and then claim these costs affect its production obligations. *See, e.g., Quinby v. WestLB AG*, 245 F.R.D. 94, 104 (S.D.N.Y. 2006) (“[I]f a party creates its

own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data.”) (citing, *inter alia*, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)).

Similarly, the fact that Western Union has yet to offer sufficient data to support its assertions of burden undercuts any claim that it has been diligent in attempting to comply. The Court’s order required Western Union to support its position with “specific reasons” and “supporting data.” Dkt. 47 ¶ 14. To date, however, Western Union has offered only limited data, extrapolations, and questionable estimates, some of which it has based on a sample of documents from as few as three custodians.<sup>5</sup> Furthermore, as its most recent letter indicates, Western Union is insisting that unless the FTC agrees to further negotiations, it will withhold information discussing some of the FTC’s 74 selected custodians and their relationship to the Monitor – information that at this point is already more than three months overdue. Contempt Exh. 10 at 8; Dkt. 47 ¶ 14. Such conduct is the antithesis of a “reasonably diligent or energetic” effort to comply.

In any event, even if Western Union’s cost projections were supported by hard data, the time for considering such objections passed long ago. Western Union advanced this claim of burden in opposing the Commission’s enforcement petition, and did not prevail. *See* Dkt. 21 at 24-25; Dkt. 41 at 24-26. In fact, the Court concluded that the CID was *not* “too onerous” and

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<sup>5</sup> Moreover, Western Union multiplies the number of base terms and the number of limiting terms to support its claim that the FTC is asking for 1,692 searches and that this is unduly burdensome. The company overlooks, however, that these searches can be combined and run electronically. *See* Contempt Exh. 11 ¶ 19.

directed the parties to exchange and refine search terms in precisely the manner captured in the June 7 order. Dkt. 41 at 25-26. Western Union may not relitigate the merits of the underlying order in defense of an application for civil contempt. “A ‘contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.’” *N.Y. State Nat’l Org. for Women v. Terry*, 697 F. Supp. 1324, 1334 (S.D.N.Y. 1988) (quoting *Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 441 n.21 (1986)); accord *United States v. Rylander*, 460 U.S. 752, 756–57 (1983).

Finally, this is not a case in which there is even a colorable basis for contending that compliance is impossible. See *Badgley v. Santacroce*, 800 F.2d 33, 36-37 (2d Cir. 1986) (quoting *United States v. Rylander*, 460 U.S. 752, 757 (1983)). “[C]ompliance must be beyond the realm of possibility, not just difficult to achieve, before a party will be exonerated in a contempt proceeding.” *Nat’l Basketball Ass’n*, 289 F. Supp. 2d at 377; see also *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995). In raising such a defense, the party subject to the order bears the burden of production, which “may be difficult to meet, particularly in cases such as this where the defendants have a long history of delay and the plaintiffs’ needs are urgent.” *Badgley*, 800 F.2d at 36 (citations omitted). Western Union has never asserted, and indeed, cannot assert, that compliance with the June 7 order is impossible. Indeed, in responding to Specification 1, the company has shown that it can produce information when it chooses to – or when it is directly ordered to do so.

## **II. The Court should impose coercive relief, including daily monetary sanctions.**

Judicial sanctions following an order of civil contempt may be imposed both to compel compliance with the court's order and to compensate injury suffered as a result of the violations.

*In re Grand Jury Witness*, 835 F.2d 437, 441 (2d Cir. 1987) (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 448-49 (1911)); *S. New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 146 (2d Cir. 2010). The Court has “broad discretion to fashion an appropriate coercive remedy ... based on the nature of the harm and the probable effect of alternative sanctions.” *EEOC v. Local 28 Sheet Metal Workers Int'l Ass'n*, 247 F.3d 333, 336 (2d Cir. 2001) (ellipsis in original); see also *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 657 (2d Cir. 2004). For the reasons stated below, this Court should impose sanctions in the form of daily monetary fines to bring Western Union into compliance with the Court's order.

In calculating a coercive fine, a district court considers “several” factors “including ‘the character and magnitude of the harm threatened by continued contumacy,’ the ‘probable effectiveness of any suggested sanction in bringing about [compliance],’ and the contemnor's ability to pay.” *Paramedics*, 369 F.3d at 658 (quoting *Perfect Fit Indus. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir. 1982)); see also *IBM Corp. v. United States*, 493 F.2d 112, 115 (2d Cir. 1973) (“In regard to the amount of the coercive fine it was proper for the court to take into account the contemnor's resources and ability to pay.”).

Here, Western Union's contempt deprives the FTC of documents that this Court ordered it receive and that are central to the FTC's investigation of Western Union's policies and procedures. The Commission's investigation is compromised without these documents. Contempt Exh. 1 ¶ 20. Daily monetary sanctions will be effective in bringing about compliance because Western Union will face the choice of either providing the required information or paying the avoidable and unnecessary expense of daily fines. Finally, Western Union has a substantial ability to pay daily monetary sanctions. According to the company's public filings, it

had a net income of \$1,025,900,000. *See id.* ¶ 22; Western Union, Annual Report at 84-85 (Form 10-K) (Feb. 22, 2013), available at <http://www.sec.gov/Archives/edgar/data/1365135/000136513513000008/wu-12312012x10k.htm>. In *IBM Corp.*, the district court imposed daily monetary sanctions for IBM's failure to produce documents in response to a pretrial discovery order. The Court of Appeals affirmed the sanction – \$150,000 per day – finding that sum only 5% of IBM's given daily earnings. 493 F.2d at 116. A comparable fine of 5% of Western Union's daily earnings would be \$140,534. Contempt Exh. 1 ¶ 22.

In sum, the FTC respectfully requests that the Court enter an order directing Western Union to appear and show cause why it should not be held in contempt for violating the June 7 order and why the following relief should not be granted against it:

*First*, that the Court order Western Union to comply with the June 7 order by executing the final search protocol issued by the FTC on August 8, 2013 and begin producing the results to the FTC no later than November 18, 2013 ("Contempt Order");

*Second*, that the Court further direct Western Union to complete production of all responsive information and provide the certification of compliance required by paragraph 16 of the June 7 order no later than December 20, 2013;

*Third*, that the Court impose upon Western Union coercive sanctions of \$140,534 per day for (1) each day between November 18, 2013 and the first production of information to the FTC resulting from execution of the final search protocol, and (2) for each day between December 20, 2013 and production of the certification of compliance pursuant to paragraph 16 of the June 7 order; and

For such other relief as the Court deems just and proper; or

*Alternatively*, should the Court determine that coercive daily monetary sanctions are not warranted, the Court should nonetheless find Western Union in contempt and order that the company comply with the final search protocol and produce the responsive documents by December 20, 2013.

### **CONCLUSION**

For the reasons set forth above, the FTC respectfully requests that the Court enter an Order to Show Cause why Western Union should not be held in civil contempt for violating the June 7 order.

Respectfully submitted,

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