

ALDEN F. ABBOTT, General Counsel
JOEL MARCUS, Deputy General Counsel
MICHAEL D. BERGMAN, Attorney (*pro hac vice*)
mbergman@ftc.gov
Attorneys for Defendant the Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Telephone: (202) 326-3184

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

COMPLETE MERCHANT SOLUTIONS,

Plaintiff,

vs.

FEDERAL TRADE COMMISSION,

Defendant.

Case No. 2:19-cv-00963-HCN-EJF

**FEDERAL TRADE COMMISSION'S
OPPOSITION TO PLAINTIFF'S MOTION
FOR LEAVE TO AMEND COMPLAINT
UNDER F.R.C.P. 15(a)(2)**

Judge Howard C. Nielson, Jr.

More than three months after plaintiff Complete Merchant Solutions (CMS) sued the FTC to preempt an investigation into its business practices – and after briefing on the FTC’s motion to dismiss was complete – CMS seeks to add three new counts to its complaint. The new claims challenge the FTC’s requests to companies from which it has sought information in the course of its investigation that they keep the matter confidential. The attempt to add new counts should be denied as futile under Fed. R. Civ. P. 15(a) because “the complaint, as amended, would be subject to dismissal.” *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007) (cleaned up).

One new count alleges that the FTC has defamed CMS, but an agency of the United States may not be sued for defamation. Moreover, the FTC’s confidentiality request cannot be defamatory as a matter of law because it is wholly truthful. The new counts challenging the legality of the confidentiality request are doomed to fail because a cover letter asking its recipient to do something voluntarily is not a reviewable agency action. The FTC’s request for confidentiality was within the agency’s authority in any event.

BACKGROUND

The FTC moved to dismiss CMS’s complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1). Doc. 35. Briefing was completed by March 16. Three days later, and more than three months after filing the initial complaint, CMS sought to amend its complaint under Fed. R. Civ. P. 15(a)(2) to add three new claims. All of them concern a cover letter sent to business partners of CMS, none of which are parties to this case, accompanying a Civil Investigatory Demand

(CID) issued in the course of the FTC’s nonpublic investigation.¹ The letter asked each CID recipient to maintain the confidentiality of the investigation as follows:

Please keep this request, and the FTC’s investigation, confidential. The attached CID is part of an ongoing, non-public investigation. Disclosing it could interfere with our law-enforcement efforts. If you choose to take any action that could alert the target(s) to the investigation (such as suspending service), please contact FTC counsel before taking any such action.

See Proposed Amended Complaint (PAC) (Doc. 42-1) ¶ 106; *see also* Motion at 4. CMS characterizes that request as an “improper confidentiality instruction” that exceeds the agency’s authority and defames CMS by telling the recipient that CMS is the subject of a law-enforcement investigation. PAC ¶¶ 122-135. It therefore asks to add three new counts to its complaint. Proposed Counts III and IV allege that the confidentiality request exceeds the FTC’s authority under its statute and regulations, and proposed Count V alleges that the confidentiality request falsely states that the FTC’s inquiry into CMS “is part of a law-enforcement investigation” and “suggests that CMS would . . . interfere” with the investigation if the CID recipient told CMS about the CID.² PAC ¶ 130. CMS principally seeks a ruling that the confidentiality request is

¹ The confidentiality request CMS cites in its proposed amendment is one that it received in August 2019 asking for information about a target in a separate nonpublic FTC investigation. PAC ¶ 106. The requests about which CMS complains here are substantially identical. Accordingly, CMS was aware of the nature of the request months before it filed this suit, but never complained or expressed confusion about it to the FTC. Yet it objected to FTC staff in January 2020 when it found out that the same request had been sent to third parties in this investigation, which it contended prohibited those companies from disclosing the CID to CMS. Doc. 43-1 at 2. FTC staff told CMS that the request did not prohibit the third party from contacting CMS about the CID and volunteered to contact any CID recipient that was uncertain about the request. But staff was unaware of any such recipient and CMS never identified one to the agency. Doc. 43-2 at 1.

² Each of the counts refers to the “confidentiality instructions in CIDs,” *e.g.*, PAC ¶¶ 123,126, 129, and in fact the first page of each CID itself contained confidentiality language similar to that

illegal and an injunction that bars use of the confidentiality request in future CIDs issued to third parties in this investigation and compels the FTC to tell current CID recipients that they may contact CMS. PAC ¶¶ 104-05, 122-35 and at 41-42 (Prayer for Relief).³

LEAVE TO AMEND SHOULD BE DENIED AS FUTILE

Rule 15(a) permits leave to amend a complaint “when justice so requires,” but such leave is inappropriate where amendment is futile because the new charges “would be subject to dismissal.” *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007) (cleaned up). When amendment would be futile, the party opposing the request to amend need not show prejudice. *First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1132–33 (10th Cir. 1987). Leave to amend should be denied here because each of the proposed claims would be subject to dismissal.

I. THE PROPOSED DEFAMATION CLAIM WOULD BE SUBJECT TO DISMISSAL

In Count V, CMS proposes to add a claim for defamation for which it seeks an injunction. PAC ¶¶ 128-35. A claim against the federal government must be dismissed for lack of jurisdiction where there is no federal cause of action or waiver of sovereign immunity. *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Such waiver must be “unequivocally expressed” and must be “strictly construed” in favor of the government. *Id.* at 261. The same principles govern requests to amend complaints. *DeHaan v. United States*, 3 Fed. Appx. 729, 731

in the cover letter. But CMS complains about the confidential request in the cover letter. *Id.* ¶¶ 106, 129.

³ Contrary to CMS’s assertions (Motion at 6, 10), the Magistrate Judge at the March 5 hearing in the FTC’s CID enforcement suit did not state that amendment to include its claims about confidentiality request would be proper in this case or that the court would have the authority or jurisdiction to consider those claims here. *See* Doc. 43-5 at 62:10-22.

(10th Cir. 2001) (unpublished); *Fent v. Oklahoma Water Res. Bd.*, 235 F.3d 553, 556-37 (10th Cir. 2000); *see also Sanders v. Anoatubby*, 631 Fed. Appx. 618, 622-23 (10th Cir. 2015) (unpublished) (amendment denied where claims failed to show a waiver of sovereign immunity to cure jurisdictional defect). CMS cannot show a waiver of sovereign immunity or a federal cause of action to support its defamation claim.

Defamation is state common law tort claim, but the United States has not waived its sovereign immunity for such claims. *United States v. Standard Oil Co. of Calif.*, 332 U.S. 301, 307 (1947). The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-80, provides a limited waiver of sovereign immunity for state-law tort claims against the United States for money damages, but it expressly exempts intentional torts like defamation. *Id.* §§ 1346(b)(1), 2680(a), (h); *see Garling v. United States Env'tl. Prot. Agency*, 849 F.3d 1289, 1298-99 (10th Cir. 2017).

CMS also cannot show there is a federal statutory or common law claim for defamation. *See El-Shifa Pharm. Indus. Co. v. United States.*, 607 F.3d 836, 853-54 (D.C. Cir. 2010) (Kavanaugh, J., concurring). In the absence of a federal cause of action, the Court lacks jurisdiction over the defamation count. *See Blue Fox*, 525 U.S. at 260. CMS relies (Motion at 2, 9) on *Lifevantage Corp. v. Domingo*, 208 F. Supp. 3d 1202, 1220 (D. Utah 2016), but that case involved a private party defamation suit, not one against the federal government. By contrast, where parties attempt to assert defamation claims against federal agencies like the FTC, courts properly deny leave to do so. *See, e.g., FTC v. Dotauthority.com, Inc.*, No. 16-62186-CIV, 2017 WL 3669526 (S.D. Fla. Aug. 22, 2017) (unpublished). CMS acknowledges it lacks an independent federal cause of action for defamation because it alleges jurisdiction for this claim under its supplemental jurisdiction, 28 U.S.C. § 1367. PAC ¶ 11. But there can be no

“supplemental” jurisdiction where no jurisdiction exists in the first place. Proposed Count V, CMS’s defamation claim, would be dismissed if it were asserted, and CMS therefore should not be allowed to amend its complaint to assert a futile claim.

Finally, even if the Court could review this claim, it would be dismissed because it fails to state a claim on which relief could be granted. As a matter of law, a statement can be defamatory only if it is false; truth is an absolute defense. *Brokers’ Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1107 (10th Cir. 2017). Proposed Count V alleges two ways in which the CID cover letter was defamatory: first, that it falsely told CID recipients that CMS was the subject of a law enforcement investigation; and second, that it falsely suggested that CMS would interfere with the investigation. PAC ¶ 130. The first claim is completely true. CMS is the subject of a law-enforcement investigation. The FTC, a law-enforcement agency, is investigating CMS to determine if it violated the FTC Act or other statutes, and if it believes the answer is yes it may bring an enforcement lawsuit against CMS. The second claim misconstrues the request, which on its face states that “[d]isclosing [the CID] could interfere with our law-enforcement efforts.” *That* statement, which accuses CMS of nothing and states a true principle of all non-public investigations, amounts at most to an opinion grounded in past FTC experience and (as described below) congressional concerns. Such statements are not actionable. *See, e.g., Turner v. Wells*, 198 F. Supp. 3d 1355, 1367-68 (S.D. Fla. 2016) (opinion based on uncontroverted facts cannot be considered libel), *aff’d*, 879 F.3d 1254 (11th Cir. 2018).

II. THE PROPOSED CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF WOULD BE SUBJECT TO DISMISSAL

For the reasons set out in our motion to dismiss the original complaint, CMS must have a federal cause of action to support this Court’s jurisdiction for its two proposed claims for

declaratory and injunctive relief. PAC ¶¶ 122-24 (Count III); *id.* ¶¶ 125-27 (Count IV). As we explained, the federal law CMS cites (PAC ¶¶ 9-10), the FTC Act and the Declaratory Judgment Act, do not provide a private right of action. Rather, the only statute which could provide one is the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. *See* Motion to Dismiss (Doc. 35) at 7-10. The APA permits judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. But the clause in a letter that CMS complains of is not agency “action” at all, let alone “final” agency action. *See Colorado Farm Bureau Fed’n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000).

The APA defines “agency action” as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). Here, CMS wishes to challenge a confidentiality request made in a cover letter, which does not nearly resemble a rule, order, or their equivalent. The request asks the recipient to “please” keep the matter confidential. PAC ¶¶ 106, 129. It makes no demand, and suggests no consequence for rebuffing the request. Quite to the contrary, the confidentiality request goes on to ask that if the recipient “choose[s] to take any action” that would reveal the investigation, it contact the FTC first. *Id.* That phrasing indicates that the recipient has a *choice* to talk to CMS. It contains no legal requirement, benefit conferred, or anything else remotely resembling an agency action. “Action” under the APA covers ways “an agency may exercise its power,” *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 478 (2001), such as by implementing or interpreting law or policy, disposing matters, providing permits or other kinds of permission, and imposing prohibitions. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004). Asking the recipient of agency process to keep the matter private rises nowhere near this level.

Even if the FTC’s cover letter could somehow amount to agency action, it is impossible to see how it is “final agency action” under the APA. Action is final when it marks the consummation of an agency decisionmaking process or determines legal rights or obligations. *See Bennett v. Spear*, 520 U.S. 154, 156, 177-78 (1997) (cleaned up). There is no decision process in a cover letter, and this letter obviously did not determine rights or obligations for the reasons set forth above.⁴

In any event, even if they could be reviewed, proposed Counts III and IV are dismissible because they fail to state a claim on which relief could be granted. They seek declarations that the FTC’s confidentiality request “exceeded its statutory authority under 15 U.S.C. §§ 57b-1, 57b-2, and 57b-2a,” and its regulatory “authority under 16 C.F.R. §§ 2.6, 2.7, and 2.17.” PAC ¶¶ 124, 127.

The proposed amendments provide no explanation of how the confidentiality requests violate the agency’s statutes or rules, and it is obvious that they do not. The statutes relied on, about 20 pages of text containing dozens of subdivisions, broadly set out the FTC’s authority to

⁴ One court has recognized there may be “nonstatutory review” of the authority of agency action outside of the APA, *see Trudeau v. FTC*, 456 F.3d 178, 189-90 (D.C. Cir. 2006), but courts in the Tenth Circuit have recognized that nonstatutory review, if available at all, is limited to “exceptional circumstances” and that the great weight of authority favors review of agency conduct exclusively under the APA. *See Ketcham v. Nat’l Park Service*, No. 16-cv-00017-SWS, 2016 WL 4257509 (D. Wy. May 5, 2016) (unpublished). Justice Scalia opined that “if review is not available under the APA it is not available at all . . . unless *specifically* excluded.” *Webster v. Doe*, 486 U.S. 592, 607 n.* (1988) (Scalia, J., dissenting) (emphasis in original) (citations omitted). The Tenth Circuit likewise has established that (outside one narrow exception not applicable here) the APA is the proper framework to evaluate challenges to federal agency action. *See, e.g., Robbins v. Bureau of Land Management*, 438 F. 3d 1074 (10th Cir. 2006); *Olenhouse v. Commodity CreditCorp.*, 42 F.3d 1560, 1573 (10th Cir. 1994); *Simmat v. U.S. Bureau of Bureau of Prisons* 413 F.3d 1225 (10th Cir. 2005).

issue Civil Investigative Demands and associated requirements. Not a single provision even suggests – and CMS identifies none – that the agency may not ask recipients of CIDs to keep the matter private. To the contrary, Section 57b-1(c)(14)(B) requires that when depositions are taken pursuant to a CID, the FTC investigator “shall exclude from the place where the testimony is to be taken all other persons except the person giving the testimony, his attorney” and other directly pertinent persons. 15 U.S.C. § 57b-1(c)(14)(B). Sections 57b-2a(c) & (g) allow the FTC to seek an ex parte judicial order “prohibiting the recipient of compulsory process issued by the Commission from disclosing to any other person the existence of the process, notwithstanding any law or regulation of the United States,” when the court finds that disclosure could result in “flight from prosecution,” “the destruction of, or tampering with, evidence,” “the intimidation of potential witnesses,” or “otherwise seriously jeopardizing an investigation.” 15 U.S.C. § 57b-2a(c) & (g). Those statutes plainly contemplate both the need for FTC investigations to remain confidential and the potential consequences of disclosure. The FTC’s request to CID recipients that they keep the matter under wraps is fully consistent with the statutes.⁵

The same is true of the FTC’s regulations governing CIDs. Again, CMS identifies nothing in the regulations it relies on even suggesting that the agency may not ask CID recipients

⁵ CMS argues that there is no need to maintain confidentiality in this case because it already knew about the investigation. Motion at 4. But FTC staff asked for confidentiality because the CIDs also asked about the targets of other nonpublic investigations. CMS also contends that in communications with the agency in January 2020, it argued that even in the criminal context law enforcement cannot bar witnesses from sharing information with the target of an investigation. *Id.* (citing Doc. 43-1 at 1-2). CMS relied on several cases involving federal criminal grand jury proceedings. Those cases are entirely inapposite. First, they involved demands rather than requests to maintain confidentiality. Second, they involved violations of Fed. R. Crim. P. 6(e)(2), which provides that no obligation of secrecy may be imposed upon grand jury witnesses. That rule does not apply here, and there is no analogous rule governing the FTC’s civil law enforcement investigations.

to maintain confidentiality. To the contrary, Rule 2.6 provides that “investigations are generally nonpublic” and allows FTC staff to disclose investigations “to the extent necessary to advance the investigation.” 16 C.F.R. § 2.6. The FTC’s rules are fully consistent with a request that third-party witnesses likewise maintain confidentiality.

The FTC’s statutes and rules, and agency practice like the confidentiality request in the cover letter, ensure that FTC investigations remain private. Doing so protects individuals or businesses under investigation from premature adverse publicity, promotes orderly investigational procedures, and prevents the premature disclosure of an investigation that can lead to the destruction of evidence, hiding of assets, or unavailability of witnesses.

CONCLUSION

The Court should deny CMS’s motion for leave to amend its complaint under FRCP 15.

DATED: April 2, 2020

ALDEN F. ABBOTT, General Counsel

JOEL MARCUS, Deputy General Counsel

/s/ Michael D. Bergman

MICHAEL D. BERGMAN, Attorney

Attorneys for Defendant

FEDERAL TRADE COMMISSION