

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

|                           |   |                    |
|---------------------------|---|--------------------|
| _____                     | ) |                    |
| FEDERAL TRADE COMMISSION, | ) |                    |
|                           | ) |                    |
| Petitioner,               | ) |                    |
|                           | ) |                    |
| v.                        | ) | Misc. No. 2:18mc20 |
|                           | ) |                    |
| MONSHAY SWAIN,            | ) |                    |
| DAMILARE ADEBAYO,         | ) |                    |
| GIO-CRYSTAL, LLC, and     | ) |                    |
| EBDM LLC,                 | ) |                    |
|                           | ) |                    |
| Respondents.              | ) |                    |
| _____                     | ) |                    |

**FEDERAL TRADE COMMISSION’S MEMORANDUM IN SUPPORT OF  
PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMANDS**

The Federal Trade Commission (“FTC” or “Commission”) brings this proceeding to enforce Civil Investigative Demands (“CIDs”) issued to Respondents Monshay Swain, Damilare Adebayo, Gio-Crystal, LLC, and EBDM LLC during the course of an FTC law enforcement investigation. Respondents have not provided any of the documents required by the CIDs, nor have they appeared for investigational hearings, failings that have frustrated and impeded the FTC’s investigation. The FTC respectfully seeks an order of the Court directing Respondents to comply with the CIDs by producing all of the specified documents within 10 days of the order, and by appearing for investigational hearings at dates and times to be determined by the FTC.

**Argument**

The facts present a clear-cut case for enforcement of the pending CIDs.<sup>1</sup> The FTC, under the authority of the FTC Act, initiated a law enforcement investigation into Respondents’ alleged

<sup>1</sup> This memorandum incorporates by reference the statements of fact in its accompanying petition and declaration of John D. Jacobs.

misconduct. Pursuant to that investigation, the FTC issued equally lawful CIDs specifically and narrowly tailored to elicit information that would prove or disprove the allegations. Respondents completely ignored the CIDs, and did not avail themselves of the administrative remedies provided to them. Because these actions have prevented the FTC from obtaining the information it needs, the FTC is entitled to relief from the Court.

### **I. Standards For Enforcing Agency Process**

A CID is a form of administrative compulsory process, akin to a subpoena. *In re Oral Testimony of a Witness Subpoenaed Pursuant to Civil Investigative Demand No. 98-19*, 182 F.R.D. 196, 201 (E.D.V.A. 1998) (citing *FTC v. Invention Submission Corp.* 965 F.2d 1086, 1087 (D.C. Cir. 1992) (treating an FTC CID as an administrative subpoena)). Proceedings to enforce administrative subpoenas are summary proceedings that are properly instituted through a petition and order to show cause, rather than a complaint and summons. *See United States v. Am. Target Advert.*, 257 F.3d 348, 353 (4th Cir. 2001); *EEOC v. Md. Cup Corp.*, 785 F.2d 471, 475 (4th Cir. 1986).

The role of the Court in such proceedings is “sharply limited.” *Am. Target Advert.*, 257 F.3d at 351 (quoting *EEOC v. Lockheed Martin Corp., Aero & Naval Systems*, 116 F.3d 110, 113 (4th Cir.1997)). Specifically, the Court should enforce process once the agency establishes that “(1) it is authorized to make such an investigation; (2) it has complied with statutory requirements of due process; and (3) the materials requested are relevant.” *EEOC v. Am. & Efird Mills*, 964 F.2d 300, 302-03 (4th Cir. 1992) (citing, *inter alia*, *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 216-17 (1946) and *United States v. Morton Salt*, 338 U.S. 632, 652 (1950)); *EEOC v. Randstad*, 685 F.3d 433, 442 (4th Cir. 2012). Once it has made such a showing, the agency is entitled to enforcement unless the recipient of the compulsory process can demonstrate that

compliance would be unduly burdensome. *Randstad*, 685 F.3d at 442 (citing *EEOC v. Md. Cup Corp.*, 785 F.2d 471, 476 (4th Cir. 1986); *cf. Morton Salt*, 338 U.S. at 653-54. Respondents cannot make such a showing here.

**II. The CIDs Were Properly Authorized, Complied With Due Process, Were Relevant, And Were Not Unduly Burdensome**

As shown below, the FTC has satisfied all of the requirements necessary to justify judicial enforcement of the CIDs. The FTC is authorized to investigate Respondents and to issue CIDs in furtherance of the investigation. The CIDs complied with all requirements of due process and are relevant to the investigation. Moreover, Respondents have not even attempted to come forward to make any argument that compliance would be unduly burdensome.

**A. The FTC Has Authority To Investigate And Issue CIDs To Respondents**

Section 5(a) of the FTC Act declares unlawful and directs the FTC, with certain exceptions not relevant here, “to prevent persons, partnerships, or corporations” from using “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). In furtherance of this mandate, Section 20 of the FTC Act empowers the Commission to issue CIDs whenever it “has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible thing, or may have information, relevant to unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 57b-1(c)(1). The FTC issued the CIDs at issue pursuant to a valid Commission resolution encompassing the conduct at issue. *See, e.g.*, Pet. Ex. 2 at 14; Pet. Ex. 3 at 14.

**B. The FTC Complied With All Statutory Due Process Requirements**

The process for issuing a CID is governed by the FTC Act, with supporting provisions in the FTC’s Rules of Practice. At the outset, a CID can be issued only upon the signature of a Commissioner acting under a Commission resolution. 15 U.S.C. § 57b-1(i); 16 C.F.R. § 2.7(a).

A CID must state the nature of the alleged violation under investigation and the law applicable to such violation. 15 U.S.C. § 57b-1(c)(2); 16 C.F.R. § 2.6. A CID for the production of documentary material must describe that material with sufficient “definiteness and certainty” to allow it to be identified, prescribe a reasonable return date, and name the custodian to whom the material should be made available. 15 U.S.C. § 57b-1(c)(3); 16 C.F.R. § 2.7(b)(1). A CID demanding oral testimony must name the date, time, and place for the investigational hearing, name the FTC investigator who will conduct such hearing, and name the custodian to whom transcripts of the hearing will be submitted. 15 U.S.C. §§ 57b-1(c)(6), (c)(14)(C); 16 C.F.R. § 2.7(b)(4). And a CID must be served personally, or at the residence, principal office, or place of business of the recipient, within the territorial jurisdiction of a U.S. Court. 15 U.S.C. § 57b-1(c)(7) – (9); 16 C.F.R. § 4.4(a)(3). The FTC complied with all of these requirements here, as set forth in ¶¶ 10-14 of the Petition.

The FTC Act and Rules of Practice also provide for CID recipient to challenge a CID by filing a petition to limit or quash. *See* 15 U.S.C. § 57b-1(f); 16 C.F.R. § 2.10. Respondents, however, chose not to avail themselves of the administrative remedies. Pet. Ex. 1, ¶ 24.

### **C. The Documents And Information Sought Are Relevant To The FTC’s Investigation**

The purpose of an FTC investigation is to determine whether there is reason to believe that the law has been, or is being, violated and, if so, whether the issuance of a complaint by the Commission would be in the public interest. Indeed, the FTC “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *Texaco*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (quoting *Morton Salt*, 338 U.S. at 642-43). A CID is not limited to seeking information necessary to prove specific charges; to the contrary, a CID may call for documents and information that are relevant “to the investigation” – a

boundary that is “not especially constraining” and that may be broadly defined by the agency. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) (emphasis omitted); *EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 113 (4th Cir. 1997) (quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1983)). The resolution in this case is consistent with other FTC resolutions that provide a general description of the conduct at issue against which to measure relevance. *See Invention Submission* at 1088, 1090 (approving resolution authorizing investigation of “false or misleading representations made in connection with the advertising, offering for sale and sale of services related to the promotion of inventions or ideas”).

The information sought by the CID is directly relevant to the investigation. As described in the accompanying declaration of John Jacobs, the requested documents and testimony will enable the FTC to identify possible victims of unfair or deceptive conduct targeting consumers, to determine the extent of Respondents’ involvement in the wrongful conduct, to identify people who received funds from the Respondents, and to identify possible witnesses. Pet. Ex. 1, ¶¶ 12, 15. Each category of information will directly assist Commission staff in determining whether Respondents or their affiliates have violated the FTC Act or other applicable laws.

#### **D. The CIDs Are Not Overly Burdensome**

Because the FTC has met these three basic requirements, it is entitled to enforcement of the CID unless Respondents show the CIDs are unduly burdensome. *See Am. & Efird Mills*, 962 F.2d at 302-03. This is a high standard, requiring a party to show that compliance “would seriously disrupt its normal business operations.” *EEOC v. Md. Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986). Respondents, however, have not even attempted to try. They have made no response to the CIDs, nor have they filed a petition to limit or quash the CIDs on grounds of

burden as permitted by the FTC Act and Rules of Practice. 15 U.S.C. § 57b-1(f); 16 C.F.R. § 2.10. Pet. Ex. 1, ¶ 24.

It is a longstanding principle of law that a party must exhaust its administrative remedies before seeking relief in court. “Generally, one who has neglected the exhaustion of available administrative remedies may not seek judicial relief.” *EEOC v. Cuzzens of Georgia, Inc.*, 608 F.2d 1062, 1063 (5th Cir. 1979); *see also McKart v. United States*, 395 U.S. 185, 193-94 (1965). That principle applies fully to FTC compulsory process enforcement. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 653-54 (1950); *FTC v. O’Connell Assocs., Inc.*, 828 F. Supp. 165, 168-70 (E.D.N.Y. 1993); *FTC v. Tracers Information Specialists, Inc.*, No. 8:16-mc-00018-VMC-TGW, 2016 WL 3896840, at \*4 (M.D. Fla. June 10, 2016). As a result, the “failure to comply with the administrative procedure provided by the statute and the implementing regulations bars . . . assertion of substantive objections to the CID in court.” *Tracers*, 2016 WL 3896840, at \*4; *see also O’Connell Assocs., Inc.*, 828 F. Supp. at 170. Having failed to pursue their administrative remedies by filing an administrative petition to quash, respondents may not now claim the CIDs are unduly burdensome.

**Conclusion**

For all the foregoing reasons, the Court should grant the Commission's petition to enforce the CIDs and enter its own order requiring Respondents to produce the requested documents and interrogatory responses within 10 days and requiring Respondents Swain and Adebayo to appear for testimony at a date, time, and place identified by the Commission.

Respectfully submitted,

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