

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:13-MC-23437

_____)
FEDERAL TRADE COMMISSION,)
)
Petitioner,)
v.)
)
NATIONAL PROCESSING CO., and)
)
VANTIV, INC.,)
)
Respondents.)
_____)

**MEMORANDUM IN SUPPORT OF PETITION OF THE FEDERAL TRADE
COMMISSION FOR AN ORDER TO ENFORCE CIVIL INVESTIGATIVE DEMANDS**

PRELIMINARY STATEMENT

The Federal Trade Commission (“FTC” or “Commission”), petitions this Court, pursuant to Section 20 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 57b-1 and Fed. R. Civ. P. 81(a)(5), to compel compliance with two of its Civil Investigative Demands (“CIDs”).¹ The Commission issued the two CIDs to further an investigation to determine whether Respondents National Processing Company (“NPC”) and Vantiv, Inc. (“Vantiv”) (collectively, “the Vantiv Entities”) have violated laws within the Commission’s authority to enforce. The Vantiv Entities have refused to comply with the CIDs.

¹ CIDs are a type of investigative administrative subpoena. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1087 (D.C. Cir. 1992); *General Finance Co. v. FTC*, 700 F.2d 366, 367 (7th Cir. 1983); *FTC v. LabMD, Inc., et al.*, Case 1:12-cv-3005-WSD (N.D. Ga. Nov. 26, 2012) (slip op.). Administrative process enforcement proceedings are initiated by a petition and order to show cause (rather than by complaint and summons) and are summary in nature. *See, e.g., FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *FTC v. MacArthur*, 532 F.2d 1135, 1141-42 (7th Cir. 1976); *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1388 (5th Cir. 1971).

This CID enforcement matter is closely related to a case pending before the Hon. Donald L. Graham, in which the Vantiv Entities appear as interested non-parties. *See FTC v. A+ Financial Center, LLC, et al.*, No. 12-CV-14373-DLG (S.D. Fla.).² In that case, the Commission has issued two subpoenas under Rule 45 that direct the Vantiv Entities to produce the same documents that the Commission seeks in the CIDs at issue here.³ The Commission has moved to compel compliance with those subpoenas in the districts where the Vantiv Entities are headquartered, and it has asked that those motions be transferred to this Court so that all of these proceedings may be considered together in one forum. The Vantiv Entities have not produced any of the documents required by these subpoenas.

The Vantiv Entities have likewise defied the CIDs at issue here, and the Commission now moves to enforce these CIDs under its independent powers of compulsory administrative process. Significantly, the standards that apply to enforcement of CIDs differ from the standards that apply to enforcement of Rule 45 subpoenas. The proper scope of Rule 45 subpoenas is cabined by the scope of discovery allowed by Fed. R. Civ. P. 26(b) and the presiding judge. The reach of a CID is bounded only by the scope of a Commission investigation, which may be quite broad. *See e.g., United States v. Morton Salt*, 338 U.S. 632, 642-43 (1950). Here, the

² The *A+Financial* defendants are telemarketers who the Commission alleges violated §5(a) of the FTC Act and the Telemarketing Sales Rule by deceptively marketing credit card interest rate reduction services to consumers, illegally collecting an advance fee for their purported services, and using prerecorded calls. From December 2009 through October 2012, NPC processed the majority of the illegal advance fees that consumers paid to the *A+ Financial* defendants. Since November 2010, NPC has been a wholly-owned subsidiary of Vantiv. While the activities of the Vantiv Entities are separate and distinct from those of the *A+ Financial* defendants, they are related to the defendants' activities. (Declaration of Bikram Bandy (attached to the Petition as Petition Exhibit ("PX") 1) at ¶¶ 3-6).

³ Each CID also contains a single interrogatory, requesting an explanation for any spoliation of responsive documents.

Commission has properly issued these CIDs because it needs the documents at issue to aid its investigation of the Vantiv Entities themselves, just as it properly issued the Rule 45 subpoenas because it needs those same documents in the A+ litigation, to which the Vantiv Entities are not currently parties. The Vantiv Entities could easily resolve all of these proceedings by either complying in full with the subpoenas, or by complying with the CIDs and agreeing that the Commission could share the CID responses with the Receiver. Thus far, however, the Vantiv Entities have steadfastly refused to do either.⁴

JURISDICTION AND VENUE

The jurisdiction and venue of this Court in this proceeding are conferred by Sections 20(e) and (h) of the FTC Act, 15 U.S.C. §§57b-1(e) and (h), which authorize the Commission to seek district court orders to enforce its CIDs in any jurisdiction in which the recipient of a CID “resides, is found, or transacts business.” As set out below, both NPC and Vantiv transact business in this District.

STATEMENT OF FACTS

A. The Parties

The Commission is an administrative agency of the United States, organized pursuant to the FTC Act, 15 U.S.C. § 41 *et seq.* Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), authorizes the Commission to prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108, likewise authorizes the

⁴ The procedural history underlying the CIDs and the Rule 45 discovery subpoenas is set out in PX 1 at ¶¶ 11-16.

Commission to issue and enforce rules prohibiting deceptive or abusive telemarketing practices. See 15 U.S.C. §§ 6102, 6105(b); 16 C.F.R. Part 310 (“TSR”).

Respondent NPC maintains its principal offices at 5100 Interchange Way, Louisville, Kentucky 40229. It provides credit card payment-processing services to merchants, including the defendants in the *A+ Financial* litigation. From December 2009 through October 2012, NPC processed most of the fees that consumers paid to the *A+ Financial* defendants. Since November 2010, NPC has been a wholly-owned subsidiary of Vantiv. NPC transacts business in this District. (PX 1 at ¶¶ 4 and 9).

Respondent Vantiv is a publicly traded Delaware corporation (NYSE: VNTV), that maintains its principal offices at 8500 Governors Hill Drive, Symmes Township, Ohio, 45249. Since November 2010, when NPC became its wholly-owned subsidiary, Vantiv has been actively involved in supervising and managing NPC’s business relationship with the *A+ Financial* defendants. Vantiv transacts business in this District through its involvement with the *A+ Financial* defendants. (PX 1 at ¶¶ 3 and 9).

B. Background

1. The CIDs

The Commission has not decided whether to sue the Vantiv Entities for substantive legal violations, but it is investigating their relationship with the *A+ Financial* defendants. As part of that investigation, the Commission issued CIDs to the Vantiv Entities on July 24, 2013. (PX 1 at ¶ 12; PXs 2 and 3). The Commission is authorized to issue CIDs to assist in any “Commission investigation,” which means “any inquiry. . . for the purpose of ascertaining whether any person is or has been engaged in any unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. §57b-1(a)(2). Each CID contains 14 document production specifications and a single

interrogatory requiring a narrative response. (PX 1 at ¶ 12; PXs 2 and 3). The CIDs have been issued pursuant to a valid investigatory resolution; as required, a Commissioner signed both CIDs, and the Commission's Secretary served them pursuant to the Commission's Rules. *See* 16 C.F.R. § 2.7. (PX 1 at ¶ 12). The CIDs' return date was August 19, 2013. (*Id.* at ¶ 12; PXs 2 and 3).

On August 15, 2013, the Vantiv Entities filed an administrative petition to quash the CIDs pursuant to 16 C.F.R. §2.10(b). (PX 1 at ¶ 16; PX 5). The petition noted that the CIDs seek essentially the same materials as the subsequent Rule 45 subpoenas served in the *A+ Financial* civil action, and it argued that the Commission's authority to issue CIDs terminated when Commission counsel issued Rule 45 Subpoenas seeking the same information. (PX 5 at 5-7). On September 6, 2013, the Commission denied the petition to quash. (PX 1 at ¶ 17; PX 7). It explained that, because the Vantiv Entities are not parties in the pending *A+ Financial* civil action, the Commission is necessarily in an investigative – not adjudicative – posture with regard to them. And the Commission explained that it has a valid and independent need for the documents in this investigation of the Vantiv Entities, quite apart from its needs for the documents in the *A+ Financial* matter. (PX 7 at 2-3). The Commission order established September 13, 2013, as the revised return date for producing the required materials. (PX 1 at ¶ 17; PX 7 at 4). Respondents have disregarded both the Commission's order and follow-up inquiries from FTC staff. (PX 1 at ¶ 22).

2. The Rule 45 Subpoenas

Shortly after the Commission issued its CIDs, Judge Graham suggested in the *A+ Financial* litigation that, to preserve limited receivership assets, the Commission consider sharing with a court-appointed receiver all documents that the Vantiv Entities might produce to

the Commission. (PX 1 at ¶ 14). Documents produced pursuant to a CID, however, are subject to certain limitations on sharing that do not apply to documents produced pursuant to a Rule 45 subpoena.⁵ To accommodate Judge Graham's suggestion, therefore, the Commission served Rule 45 subpoenas on Vantiv and NPC. It issued those subpoenas in the Southern District of Ohio and Western District of Kentucky, where Vantiv and NPC maintain their respective principal places of business. The subpoenas were issued on August 6 and specified a return date of August 19. (*Id.*) On August 19, the Vantiv Entities served written objections to the subpoenas and refused to produce the requested documents. (*Id.* at ¶ 19.) On August 22, once it became clear that the Vantiv Entities would not comply, the FTC filed motions to compel in those two courts. (*Id.* at ¶ 20).

On September 4 and 5, to avoid the risk of conflicting orders, the Commission moved to transfer those motions to this Court.⁶ The Vantiv Entities' oppositions (if any) to the transfer motions are due on September 30, 2013.⁷ (PX 1 at ¶ 20).

ARGUMENT

Like any administrative agency, the FTC has broad authority to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it,

⁵ 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10.

⁶ As Judge Graham of this Court recited in an order entered on September 12 and making reference to a sealed Order dated August 19, 2013 (D.E. 117), he had previously ruled on "the third parties' failure to produce documents in response to the Rule 45 subpoenas served on them by the FTC." *FTC v. A+ Financial Center, LLC*, 12-CV-14373, D.E. 145 at 1 (S.D. Fla. Sep. 12, 2013)(PX 1 at ¶ 21; PX 10).

⁷ Respondents filed their substantive oppositions to the Commission's motions to compel on September 16, 2013. The Commission has until October 3 to reply to the oppositions.

too, may take steps to inform itself as to whether there is a probable violation of the law.” *Morton Salt*, 338 U.S. at 642-43. A court’s role in a proceeding to enforce an agency’s investigative process is thus “sharply limited.” *United States v. Florida Azalea Specialists*, 19 F.3d 620, 623 (11th Cir. 1994)(quoting *EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991)). While “the court’s function is ‘neither minor nor ministerial,’ the scope of issues which may be litigated in a [compulsory process] enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity.” *FTC v. Texaco Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (internal citation omitted). Actions enforcing administrative process are “to be handled summarily and with dispatch.” *In re: Office of the Inspector Gen’l*, 933 F.2d 276, 277 (5th Cir. 1991).

“The court may inquire into (1) whether the administrative investigation is within the agency’s authority, (2) whether the agency’s demand is too indefinite, and (3) whether the information sought is reasonably relevant.” *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449, 450 (11th Cir. 1996) (citing *Morton Salt*, 338 U.S. at 652; *Florida Azalea*, 19 F.3d at 623). Significantly, Vantiv raised no challenge concerning the second and third of those criteria in its administrative petition to quash the CIDs.⁸ And having failed to raise those challenges administratively, the Vantiv Entities may not raise them here. *EEOC v. Cuzzens of Georgia, Inc.*, 608 F.2d 1062, 1063-64 (5th Cir. 1979).

Instead, respondents’ sole objection was that the Commission lacked authority to proceed with the CIDs at the same time that it was proceeding with the subsequently issued Rule 45

⁸ The CIDs are narrowly tailored to uncover the Vantiv Entities’ knowledge of, and involvement in, the alleged illegal acts and practices of those defendants. This information will assist the Commission in determining whether it has reason believe that either or both of the Vantiv Entities have violated Section 5 of the FTC Act or the TSR. (PX 1 at ¶¶ 10 and 12). The information sought by the CIDs is plainly relevant to the Commission’s investigation. *See Texaco*, 555 F.2d at 872; *see also Florida Azalea*, 19 F.3d at 622-23 (an agency “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not,” quoting *Morton Salt*, 338 U.S. at 642-43).

subpoenas in the *A+ Financial* enforcement action. No case law supports that proposition, and the Commission properly rejected it. This Court should do so too.

The Commission has broad authority to issue CIDs to further any “Commission investigation”—*i.e.*, “any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. §57b-1(a)(2). As the Commission observed, it may issue CIDs in an investigation of a party any time before it begins an “adjudicative proceeding” against that party. (PX 7 at 2, citing 15 U.S.C. § 57b-1(j)). Moreover, until the Commission has named an individual as a defendant or respondent in an adjudicative complaint, litigation against him has not commenced. *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1388 (5th Cir. 1971); *United States v. Anaconda Co.*, 445 F. Supp. 486, 496-97 (D.D.C. 1977); *United States v. Associated Merch. Corp.*, 261 F. Supp. 553, 558 (S.D.N.Y. 1966). *See also In re: Subpoena Duces Tecum Addressed to Atlantic Richfield Co.*, 1978 WL 434436, at *6 (FTC 1978) (discussing *In re: Horizon Corp.*, 88 FTC 208, 1976 WL 180725, at *1 (Jul. 28, 1976), where the Commission properly issued administrative subpoenas to investigate third-party lenders who had financed the land development activities of respondents in an FTC administrative adjudicative proceeding).

As discussed, the Commission’s complaint in the *A+Financial* civil action does not charge the Vantiv Entities with wrongdoing, let alone name them as defendants. Because it has not sued either of them, the Commission properly issued its CIDs to determine whether, in fact, they have committed any unlawful acts and, if so, whether it would be appropriate to sue them. Although the Commission issued Rule 45 subpoenas in pending litigation involving *other parties*, that step does not somehow invalidate the Commission’s independent authority to obtain

the same materials to aid its pending investigation of the Vantiv Entities. *See, e.g., Florida Azalea*, 19 F.3d at 623.⁹

CONCLUSION

The Court should issue a Show Cause Order and, if the Vantiv Entities fail to produce the materials sought by the CIDs, issue its own order requiring them to comply fully with the CIDs within seven days.

Respectfully submitted,

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⁹ The documents sought in the subpoena go to the very heart of the FTC's claims in the A+ *Financial* litigation regarding the A+ Defendants' business practices, the harm incurred by victims of the scam, and potential recovery for those victims – whether directly from the A+ Defendants or from third parties that may have assisted and facilitated the A+ Defendants.