

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 13-23437-MC-ROSENBAUM

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

NATIONAL PROCESSING CO. and VANTIV,
INC.,

Respondents.

ORDER GRANTING PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA

This matter is before the Court on the Federal Trade Commission's ("FTC") Petition to Enforce Administrative Subpoena [ECF No. 1]. In this action, the FTC seeks to compel compliance with two of its Civil Investigative Demands ("CIDs") that were issued to Respondents in relation to an ongoing FTC enforcement investigation. The Court issued an Order To Show Cause on October 23, 2013, directing Respondents to either comply with the CIDs or to show cause why they are not required to do so. ECF No. 6. Respondents filed a response to the Court's Order, and the Court held a hearing on the matter on November 25, 2013. For the reasons set forth below, the Court grants the FTC's Petition.

The CIDs at issue are related to an FTC enforcement action against A+Financial Center, LLC, brought in this district before Judge Graham. *See FTC v. A+Financial Ctr., LLC*, No. 2:12-CV-14373-DLG, ECF No. 1 (S.D. Fla. Oct. 23, 2012). The FTC's complaint in that case alleged that A+Financial violated Section 5(a) of the Federal Trade Commission Act ("FTC Act") and the Telemarketing and Consumer Fraud and Abuse Prevention Act by deceptively marketing credit-card

interest-rate-reduction services to consumers struggling with high credit-card debt, illegally collecting an advance fee for their purported services, and illegally using prerecorded calls to contact consumers. *See* ECF No. 1 at 4-5. The FTC avers that Respondent National Processing Co. (“NPC”) processed the purportedly illegal advance fees that consumers paid to A+Financial, and NPC is a wholly owned subsidiary of Respondent Vantiv, Inc. As a result, the FTC issued the CIDs to Respondents in order to investigate whether Respondents may have violated the FTC’s Telemarketing Sales Rules by assisting A+Financial’s violations. In the A+Financial action, the FTC subsequently served Respondents with subpoenas under Rule 45, Fed. R. Civ. P., seeking the same information. Respondents have complied with neither the Rule 45 subpoenas nor the FTC CIDs. Respondents contest the FTC’s present Petition on the grounds that the FTC is not permitted to seek the same information through both CIDs and Rule 45 subpoenas.

At the show-cause hearing, the parties acknowledged that the sole issue in this matter is whether the A+Financial litigation constitutes an adjudicatory proceeding as to NPC and Vantiv, such that the FTC lacks authority to enforce the CIDs in this matter. The FTC Act authorizes the FTC to gather information and to investigate “from time to time the organization, business, conduct, practices and management of any person, partnership, or corporation engaged in or whose business affects commerce.” 15 U.S.C. § 46(a). In this regard, the FTC is authorized to issue CIDs in aid of its investigative authority “before the institution of any proceedings.” 15 U.S.C. § 57-b-1(c)(1). What the parties dispute is whether the language “any proceedings” necessarily implies proceedings against the entity or individual subject to the CIDs. The FTC contends that because no enforcement action has yet been commenced against Respondents, the FTC retains its authority to investigate Respondents pursuant to the CIDs. Respondents argue, however, that the Rule 45 subpoenas issued

in the A+Financial litigation are adjudicative in nature and thus foreclose the FTC's ability to enforce the CIDs. Respondents conceded at the show-cause hearing that the Court's determination on this issue is dispositive of whether the Court should grant the FTC's Petition in this matter.

The FTC relies on several cases in support of its position that a "proceeding" with respect to a party does not begin until the filing of a complaint against that particular party. In *Genuine Parts Co. v. FTC*, 445 F.2d 1382 (5th Cir. 1971), the Fifth Circuit distinguished between investigatory and adjudicatory proceedings in determining the point at which due-process rights come to bear in an administrative action. The court noted that the purpose of an investigative proceeding "is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the (agency's) judgment, the facts thus discovered should justify doing so." 445 F.2d at 1388 (quoting *Okla. Press Publishing Co. v. Walling*, 327 U.S. 186, 201 (1946)) (internal quotation marks omitted). While an investigation discovers and produces evidence, an adjudication tests such evidence upon a record in an adversary proceeding. *Id.* With this distinction in mind, the court held that "there is no shift from the investigative to the adjudicative stage until a complaint is filed and served by a Commission on the party charged." *Id.*

In *United States v. Anaconda*, 445 F. Supp. 486 (D.D.C. 1977), the court held that actions of the Consumer Product Safety Commission do not enter the adjudicatory phase until issuance of a Notice of Enforcement. In that case, the respondents contested the Commission's investigatory subpoenas on the grounds that the proceedings had become adjudicative in nature. 445 F. Supp. at 496. Because no administrative complaint had been filed against the respondents, however, the court rejected the respondents' contention on this issue. *Id.* at 497.

Finally, in *In re Horizon*, 88 F.T.C. 208 (1976), the administrative-law judge denied a motion to quash subpoena duces tecum where the purpose of the subpoenas was to determine whether the respondent's lenders had themselves violated section 5 of the FTC Act. In so holding, the court noted that the FTC "may conduct such investigations a[s] it deems necessary even though such investigations may cover ground which is already the subject of an adjudicative proceeding." *Id.* (citing *FTC v. Waltham Watch Co.*, 169 F. Supp. 614, 620 (S.D.N.Y. 1959)).

Respondents are correct that none of these cases precisely addresses the situation at hand, namely, whether the FTC can simultaneously seek both CIDS and Rule 45 subpoenas. Nonetheless, the Court is persuaded that the FTC's authority to issue CIDS is not terminated upon the commencement of litigation against separate, albeit related, parties. The Court has found no support for Respondents' broad definition of "proceeding" under the statute. Logic in this instance dictates that reference to the commencement of a proceeding necessarily implies a proceeding against the party that is the subject of the agency's investigation. To hold otherwise would significantly hinder the FTC's investigative authority under the Act, as it would prevent the FTC from investigating other instances of wrongdoing any time any litigation commenced against a related party. There is simply no basis for Respondents' assertion that a lawsuit to which they are not parties summarily precludes enforcement of administrative CIDs.

Indeed, courts have upheld administrative subpoenas even where litigation had already commenced against the party subject to the subpoena. In *Resolution Trust Corp. v. Grant Thornton*, 41 F.3d 1539 (D.C. Cir. 1994), for example, the District of Columbia Circuit noted that an agency's investigative powers "survive the commencement of litigation where the agency seeks to uncover *additional wrongdoing*." (emphasis in original). Here, that is precisely what the FTC asserts that

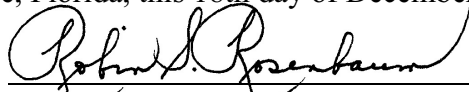
it is doing. Specifically, the FTC seeks to uncover additional wrongdoing by the Vantiv entities, separate and apart from A+Financial's alleged violations.

While the FTC has proceeded against A+Financial, no formal complaint has yet been filed against Respondents, nor has the FTC decided whether it will ultimately pursue legal action against them. The Rule 45 subpoenas do not alter this conclusion. The Court does not agree with Respondents' contention that the subpoenas render the proceeding adjudicatory as to them. Rule 45 is employed for the purpose of obtaining documents from non-parties. *See Palacio v. Citimortgage, Inc.*, No. 12-81058-CIV, 2013 WL 1092839, at *1 (S.D. Fla. Mar. 15, 2013) ("Rule 45 subpoenas are typically employed to obtain documents from non-parties and . . . the Federal Rules of Civil Procedure provide for other methods to obtain discovery documents from parties to a lawsuit."). While the rule is employed in an adjudicatory context insofar as the Federal Rules of Civil Procedure are utilized in civil proceedings, that mere fact does not make the proceeding adjudicatory as to the non-party that is subject to the subpoena. In short, the A+Financial litigation is not a "proceeding" that terminates the FTC's investigatory authority with respect to Respondents, and thus, the FTC retains its authority to issue CIDs to NPC and Vantiv.

Respondents also assert that the Petition should be denied because the FTC's issuance of the Rule 45 subpoenas is "nothing but an attempt to end-run the confidentiality provisions" with respect to the CID materials. ECF No. 7 at 10. In brief, CID materials are accorded certain confidentiality protections by statute that are not present under the Federal Rules of Civil Procedure. While the Court understands Respondents' confidentiality concerns, their dispute lies with the issuance of the Rule 45 subpoenas, which are not before this Court. The Court thus lacks authority to grant Respondents relief in this regard.

Accordingly, it is **ORDERED AND ADJUDGED** that the Petition to Enforce Administrative Subpoena [ECF No. 1] is **GRANTED**. Respondents NPC and Vantiv are ordered to comply with the FTC's CIDs. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in Fort Lauderdale, Florida, this 18th day of December 2013.



ROBIN S. ROSENBAUM
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of record