

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION :
 Petitioner :
 : :
v. : : CASE No.8:16-MC-18TGW
 : :
TRACERS INFORMATION : :
SPECIALISTS, INC. : :
 Respondent :

ORDER

THIS CAUSE came on to be heard upon the Petition of the Federal Trade Commission for an Order Enforcing Administrative Investigative Process (Doc. 1), the respondent's response (Doc. 6), and the petitioner's reply (Doc. 9). The FTC issued to Tracers Information Specialists, Inc., a civil investigative demand to answer interrogatories, produce documents, and provide oral testimony in connection with its investigation regarding whether Tracers' acquisition or sale of personal and consumer report information violates federal law. The respondent refuses to fully comply with the CID, objecting to many areas of inquiry on the grounds of confidentiality, irrelevance, and undue burden.

The objections will not be considered because the respondent failed to exhaust its administrative remedies in accordance with 15 U.S.C.

57b-1(f) and 16 C.F.R. 2.10. Therefore, the Petition of the Federal Trade Commission for an Order Enforcing Administrative Investigative Process (Doc. 1) will be granted.

I.

The respondent, Tracers Information Specialists, Inc., provides its customers internet-based search services, such as searches of business and personal assets, court records, licenses, and personal identification information (e.g., social security number, birthdate, address) (Doc. 1-2, ¶3). Its customers include debt collectors, law enforcement agencies, and attorneys (*id.*).

The petitioner, Federal Trade Commission (FTC), opened an investigation into Tracers' business after a Tracers customer committed identity fraud using Social Security numbers that he obtained through Tracers' services (*id.*). Tracers is not implicated in the fraudulent conduct. Rather, the investigation seeks to determine whether Tracers' practices in the acquisition, handling, and sale of personal information and consumer report information violate the Federal Trade Commission Act or the Fair Credit Reporting Act (*id.*, ¶¶1, 5).

In this regard, the Commission issued to Tracers on August 20, 2015, a civil investigative demand — a form of compulsory process — that

required Tracers to produce documents, answer interrogatories, and give oral testimony regarding its products and services, its sources of information, costs, prices and profits, and its procedures for vetting new customers and auditing existing customers (CID) (Doc. 1-2, ¶8; Doc. 1-6). The CID required Tracers to produce the documents and answer the interrogatories by September 23, 2015 (Doc. 1-6). The front page of the CID also stated (id., p. 2)¹:

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in item 5.

A detailed set of instructions accompanied the CID which, among other things, informed Tracers to "Meet and Confer" with the FTC in order to "discuss compliance and to address and attempt to resolve all issues" within 14 days after receipt of the CID, or before the deadline for filing a petition to quash, whichever is first (Doc. 1-6, p. 8, ¶B). The instructions included another paragraph discussing "Petitions to Limit or Quash," which

¹Citations refer to the page numbers assigned by the CM/ECF system at the top of each page.

reiterated the 20-day deadline, elaborated on the required contents of the petition, and advised that, absent extraordinary circumstances, the Commission would “consider only issues raised during the meet and confer process in the petition” (*id.*, pp. 9-10, ¶F).

On September 16, 2015, Tracers and FTC staff participated in a meet-and-confer session, during which Tracers sought modifications of certain requests as overly burdensome (Doc. 1-2, ¶10; Doc. 6, p. 3, ¶10). The FTC staff granted Tracers’ requests to narrow the scope of information sought in several interrogatories and document requests, and “[c]ounsel for Tracers had informed FTC staff by phone that these modifications would resolve Tracers’ concerns about burden” (Doc. 1-2, ¶10).

Tracers also requested a 30-day extension of time to respond to the CID, stating that changes in ownership and management since the issuance of the CID delayed its ability to respond (Doc. 1-2, ¶9). The FTC staff granted an extension through October 23, 2015 (Doc. 6, p. 4). The FTC subsequently granted Tracers’ request for an additional thirty-day extension to November 23, 2015 (*id.*, pp. 5-6, ¶15).

On November 23, 2015, Tracers submitted responses to some of the CID requests, but objected to providing several categories of documents and information on the grounds that the demands were overly burdensome,

irrelevant, and/or sought confidential and proprietary information (Doc. 1-2, ¶15; see Doc. 6, pp. 6-10). Tracers, however, did not file a petition to limit or quash the CID, or seek additional time to do so (see Doc. 1-2, ¶14). Furthermore, the FTC states that Tracers asserted objections in its November response that Tracers was required to raise at the parties' meet and confer (see Doc. 1-2, ¶13; Doc. 1-12, p. 3).

In correspondence dated December 1, 2015, the FTC informed Tracers that its November 23, 2015, objections were "untimely and unpersuasive, and they do not excuse noncompliance with the CID's specifications" (Doc. 1-12, p. 2). The FTC stated (id., p. 3) (emphasis in original, footnote omitted):

Under Commission rules, Tracers was required to file any objection to limit or quash the CID with the Secretary of the Commission no later than twenty days after service of the CID. See 16 C.F.R. §2.10(a)(1). Moreover, Tracers' failure to raise any relevance, vagueness, or confidentiality objections at the September 16 meet and confer is a further bar to these objections now. As memorialized in our letter of September 28, Tracers only raised objections to certain Interrogatories and Document Requests as overly burdensome, all of which we subsequently modified.

The FTC summarized, “Tracers [is] in default of its obligations to fully comply with the CID by the extended deadline of November 23, 2015” (*id.*, p. 4). However, it added that it would forbear from recommending the matter for enforcement in federal district court if Tracers provided the information demanded in the CID (*id.*).

On December 16, 2015, Tracers informed FTC staff that it would not produce anything further without a court order (Doc. 1-2, ¶20). Furthermore, on January 7, 2016, Tracers submitted additional objections to the CID (*id.*, ¶21).

In February 2016, the FTC filed this Petition for an Order Enforcing Administrative Investigative Process (Doc. 1), arguing that Tracers’ objections to the CID are untimely and meritless. See 15 U.S.C. 57b-1(e) (the Commissioner is authorized to petition in the district court for an order enforcing the CID). Thereafter, Tracers was ordered to file a written response to the petition, and to appear on April 5, 2016, to show cause why the FTC’s petition should not be granted (Doc. 2).

Tracers argues in its opposition memorandum (Doc. 6) that the objections were timely and meritorious. In support of its position, Tracers submitted an affidavit from Terry Kilburn, an officer, shareholder, and director of Tracers (Doc. 6-5). The FTC, with leave of court, filed a reply

(Docs. 7, 9). The hearing was subsequently continued until May 2, 2016, upon Tracers' emergency motion (Doc. 11, 13).

II.

The FTC contends that Tracers' failure to exhaust administrative remedies precludes Tracers from raising objections to the judicial enforcement of the CID (Doc. 1, pp. 14-16). This argument is meritorious.

A CID may be challenged, in whole or in part, by filing a petition to quash or limit the CID with the Commission. 15 U.S.C. 57b-1(f). Specifically, the statute provides:

(f) Petition for order modifying or setting aside demand

(1) Not later than 20 days after the service of any civil investigative demand...or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding 20 days after service or in excess of such return date as may be prescribed in writing...such person may file with the Commission a petition for an order by the Commission modifying or setting aside the demand.

(2) The time permitted for compliance with the demand in whole or in part, as deemed proper and ordered by the Commission, shall not run during the pendency of such petition at the Commission, except that such person shall comply with any portions of the demand not sought to be modified or set aside.

See also 16 C.F.R. 2.10(b) (“The timely filing of a petition to limit or quash any Commission compulsory process shall stay the remaining amount of time permitted for compliance as to the portion or portions of the challenged specifications or provisions.”).

The implementing regulations set forth, in detail, the required contents of the Petition to Limit or Quash. Specifically, 16 C.F.R. 2.10(a)(1) states:

Such petition shall set forth all assertions of protected status or other factual and legal objections to the Commission compulsory process, including all appropriate arguments, affidavits, and other supporting documentation. Such petition shall not exceed 5,000 words, including all headings, footnotes, and quotations, but excluding the cover, table of contents, table of authorities, glossaries, copies of the compulsory process order or excerpts thereof, appendices containing only sections of statutes or regulations, the statement required by paragraph (a)(2) of this section, and affidavits and other supporting documentation.

Furthermore, 16 C.F.R. 2.7(k) provides that the recipient of the CID:

shall meet and confer with Commission staff... to discuss compliance and to address and attempt to resolve all issues.... The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process.

In sum, the statute and implementing regulations set forth a detailed administrative procedure by which a respondent may challenge a CID, in whole or in part.

Tracers did not comply with the prescribed administrative procedure. Thus, it did not file a petition to quash or limit the CID, nor did it seek an extension of time to file a petition. See 16 C.F.R. 2.10(a)(5) (delegating the authority to rule upon requests for extensions of time within which to file petitions to limit or quash); 15 U.S.C. 57b-1(f)(1) (the petition may be filed in “excess of ... [the] return date as may be prescribed in writing”). Further, the FTC asserts that “the conclusory objections that Tracers offered at the production deadline were no substitute for a properly documented petition to limit or quash” (Doc. 9, p. 3). Consequently, the FTC argues that Tracers’ objections should not be considered in this action.

“The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law.” McKart v. United States, 395 U.S. 185, 193 (1969). “The doctrine provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” Id. (citation and quotations omitted). The Supreme Court elaborated Id. at 194-195:

Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

Cf. Brown v. General Services Administration, 425 U.S. 820, 833 (1976) (exhaustion requirements and time limitations would be “driven out of currency” were immediate access to the courts permissible).

This exhaustion requirement applies to FTC investigatory proceedings. United States v. Morton Salt Co., 338 U.S. 632, 653-54 (1950) (applying doctrine of administrative exhaustion in the context of the FTC administrative power); Casey v. Federal Trade Commission, 578 F.2d 793 (9th Cir.1978); XYZ Law Firm v. Federal Trade Commission, 525 F. Supp.

1235, 1237 (N.D. Ga. 1981) (“The exhaustion requirement is applicable to FTC investigatory proceedings.”).

It therefore follows that Tracers’ failure to comply with the administrative procedure provided by the statute and the implementing regulations bars its assertion of substantive objections to the CID in court. See EEOC v. Cuzzens of Georgia, Inc., 608 F.2d 1062, 1063 (5th Cir.1979) (recipient of compulsory process may not challenge judicial enforcement of that process when the recipient neglected to exhaust available administrative remedies); Federal Trade Commission v. O’Connell Associates, Inc., 828 F. Supp. 165, 170 (E.D.N.Y. 1993) (it is inappropriate to intervene and consider objections that could have been addressed by the administrative process).

Tracers does not dispute the applicability of the exhaustion doctrine, but argues that it did exhaust its administrative remedies by stating its objections in the Responses to the Schedule for Interrogatories and Request to Produce, submitted on November 23, 2015, and in supplementary objections provided on January 7, 2016 (Doc. 6, pp. 17-18; see Docs. 6-1 - 6-4). In this regard, Tracers contends that the back page of the CID permits the filing of objections in lieu of a petition to quash or modify the CID (see Doc. 6, pp. 2-3, ¶5 (citing FTC Form 144-Back)).

The instruction form on the back of the CID is not the law and, therefore, it does not replace the administrative procedure provided under the statute and the implementing regulations. Regardless, the argument is unavailing, as the respondent clearly reads more into this form than is there.

The CID directs that, “response[s] to this demand must be made under a sworn certificate, in the form printed on the second page of this demand...” (Doc. 1-6, p. 2). The second page, which is the back page of the CID (and the form upon which Tracers bases its argument) states the requirements of that certification (id., p. 3):

Form of Certificate of Compliance

I/We do certify that all of the documents and information required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objection to such interrogatory or uncompleted portion and the reasons for the objections have been stated.

Thus, the form simply directs the CID recipient to certify, under oath, that it has provided all information responsive to the CID, with the exception of those demands to which it has properly objected. This form does not indicate that objections may be submitted in lieu of filing a petition to limit or quash the CID.

The instructions accompanying the CID confirm that the back page of the CID is nothing more than a sworn statement of compliance with the CID. Thus, under the CID Instructions it states (Doc. 1-6, p. 10) (emphasis added):

H. Certification: A responsible corporate officer shall certify that the response to this CID is complete. This certification shall be made in the form set out on the back of the CID form, or by a declaration under penalty of perjury as provided by 28 U.S.C. §1746.

See also Doc. 1-6, p. 2 (The first page of the CID states under “Instructions and Notices” that “[t]he production of documents or the submission of answers and report in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand...”).²

²Moreover, the statute specifies that, during the pendency of a petition to limit or quash, the time permitted for compliance with those portions of the CID shall not run. 15 U.S.C. 57b-1(f)(2). The respondent does not cite to a corresponding statutory stay of compliance with regard to objections generally, which also shows that this form does not permit objections in lieu of a petition to limit or quash a CID.

Accordingly, there is no merit to the contention that the instructions on the back page of the CID provide an alternative procedure to that established by the statute and regulations.

Tracers argues further that “[o]bjections are likewise permitted in lieu of a response under 15 U.S.C. §57b-1(c)(13)” (Doc. 6, pp. 2-3, ¶5). That provision, however, also pertains to the sworn certificate of compliance with the CID. It states:

Each reporting requirement or question in a civil investigative demand shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer, and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by any person responsible for answering each reporting requirement or question, to the effect that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

Thus, this statute sets forth the requirement that reports and answers to questions be accompanied by a sworn certificate of compliance with the CID, and also specifies the format for responding to those matters. It does not indicate that an objection may be stated in lieu of filing a petition to quash or modify, nor does Tracers cite any legal authority supporting such

a contention (see Doc. 6). Contra Federal Trade Commission v. O'Connell Associates, Inc., supra, 828 F. Supp. at 169 (a petition to limit or quash is the exclusive means for a party to exhaust administrative remedies in response to a CID). To the contrary, the statute specifies that the CID recipient “shall comply with any portions of the demand not sought to be modified or set aside” in the petition. 15 U.S.C. 57b-1(f).

Tracers' contention is clearly untenable when considering that the corresponding statutory subsections governing the production of documentary material and tangible things state the requirement for a sworn certificate of compliance, but do not mention objections. See 15 U.S.C. 57b-1(c)(11), (12). Therefore, according to Tracers' argument, the statute permits objections to interrogatories in lieu of a petition to limit or quash, but there is no such option for objectionable documents and tangible things. Not only is this an unreasonable interpretation of the statute, it would leave Tracers without a legal justification for failing to file a petition to quash or limit regarding the documents it has refused to produce.

Moreover, the Commission's administrative role, and the intent of the statute and implementing regulations, would be minimized, if not rendered meaningless, if a CID recipient could circumvent the rigorous requirements and time limitations set forth in the petition to quash or limit.

See United States v. Morton Salt Co., *supra*, 338 U.S. at 653-54 (1950); *cf.* Brown v. General Services Administration, *supra*, 425 U.S. at 833 (a statute’s “rigorous administrative exhaustion requirements and time limitations would be ‘driven out of currency’ were immediate access to the courts under other, less demanding statutes permissible”). Thus, the petition to quash or limit was the method that Congress provided as the first step in challenging the CID, and the detail in this administrative process underscores the importance attributed to it. See 15 U.S.C. 57b-1(f); 16 C.F.R. 2.10(k); *cf.*, Brown v. General Services Administration, *supra*, 425 U.S. at 833 (“It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented” by the plaintiff’s argument).

In this connection, the Commission avers that “Tracers’ non-compliance with the CID has burdened, delayed, and impeded the Commission’s investigation” (Doc. 1-2, ¶22). Thus, Tracers asserted its objections in a piecemeal manner; it raised some objections at the meet and confer in September, stated additional objections in its November 2015 Responses, and submitted supplemental objections in January 2016. This is contrary to the strict statutory and regulatory time limits for the filing of a

petition to quash or limit, and the requirement that such petition be limited to those issues raised during the meet and confer.

Furthermore, Tracers' boilerplate objections to many requests, and the filing of Kilburn's affidavit in this litigation (which had not been presented to the Commission), do not comply with the administrative requirements that the petition include all appropriate arguments, affidavits and other supporting documentation. See 16 C.F.R. 2.7(k), 2.10(a)(1); 15 U.S.C. 57b-1(f)(2). Therefore, Tracers' argument that the statute permits the objections process that it employed is unpersuasive because that process has obstructed the purpose of the statutory administrative procedure, which is the expedited and efficient resolution of the investigation.

Additionally, Tracers argues that the FTC "waived" its contention that Tracers failed to exhaust its remedies because the FTC first mentioned in December 2015 that the deadline to file a petition to limit or quash a CID was 20 days after service of the CID (Doc. 6, pp. 10-11). This contention is baseless.

"[W]aiver is the intentional relinquishment or abandonment of a known right." United States v. Olano, 507 U.S. 725, 733 (1993). Tracers has not identified any conduct by the FTC that constitutes waiver. Thus, the

FTC's silence regarding the deadline for filing the petition to limit or quash does not constitute waiver because it is not the intentional relinquishment or abandonment of a known right. See id.; see, e.g., EEOC v. Turner, 1994 WL 779621 at *3 (D. N.M. 1994) (the County cannot rely on the EEOC's failure to disclose the existence of an administrative remedy to excuse failure to exhaust administrative remedies).

Thus, it is Tracers' obligation to ascertain the applicable law. Heckler v. Community Health Services of Crawford Cty., Inc., 467 U.S. 51, 63 (1984) ("the general rule [is] that those who deal with the Government are expected to know the law"); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947) ("Regulations [a]re binding ... regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance."). This rule is especially apt in this case, where the front page of the CID states that the Petition to Limit or Quash must be filed within 20 days after service and cites the applicable statute, and the instructions accompanying the CID that repeat this information.

Moreover, the Commission did not unduly delay informing Tracers that its objections were untimely, as the FTC states that it was not until "November 19, 2015, [that] Tracers informed FTC staff for the first time

that it intended to lodge objections to certain interrogatories and document requests and to withhold production of certain responsive documents” (Doc. 1-2, ¶14). Tracers documented those objections in its responses dated November 23, 2015 (*id.*, ¶15), and the FTC informed Tracers in correspondence dated December 1, 2015 – approximately one week later – that those objections were untimely (Doc. 1-12, pp. 2-3).

Finally, Tracers argues that, “[h]aving obtained extensions of time to respond to the requests at issue, Tracers likewise necessarily had extensions of time to raise objections” (Doc. 6, p. 18). The FTC granted Tracers two extensions of time to respond to the CID, meaning that the FTC “extended the deadlines ... for compliance” (Doc. 1-12, p. 2). Further, the FTC’s correspondence specified that “[n]o other modifications of dates and terms set forth in the CID are intended or offered” (*see, e.g.*, Doc. 1-9, p. 2). Thus, the correspondence did not purport to extend any deadline for objecting to the CID, which, as discussed, was to be presented in a petition to limit or quash. Furthermore, Tracers could have, but did not, request an extension of time to file a petition to limit or quash. Rather, as counsel stated at the hearing, he was attempting to set a conciliatory tone with the Commission, and resolve Tracers’ objections to the CID informally. However, that failed

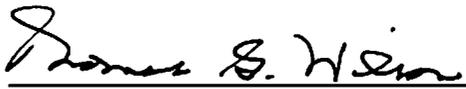
strategy cannot be remediated by arguing that a petition to limit the CID was optional.

It is, therefore, upon consideration

ORDERED:

That the Petition of the Federal Trade Commission for an Order Enforcing Administrative Investigative Process (Doc. 1) is hereby **GRANTED**. Tracers is **ORDERED** to fully comply with the CID in 30 days, or a date selected by the FTC, whichever is later.

DONE and ORDERED at Tampa, Florida, this 10th day of June, 2016.



THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE