

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,

Petitioner,

v.

THE WESTERN UNION COMPANY,

and

LONNIE KEENE, MONITOR, STATE OF
ARIZONA v. WESTERN UNION
FINANCIAL SERVICES, INC., KEENE
CONSULTING ARIZONA, LLC,

Respondents.

Misc. No.

(Nature of Case M 18-304:
Administrative Subpoena Proceedings)

MEMORANDUM IN SUPPORT OF PETITION OF THE
FEDERAL TRADE COMMISSION FOR AN ORDER ENFORCING
CIVIL INVESTIGATIVE DEMANDS

I. INTRODUCTION

Petitioner, the Federal Trade Commission (FTC or Commission), by its designated attorneys and pursuant to Section 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 57b-1, petitions this Court for an Order requiring Respondents The Western Union Company (Western Union) and Lonnie Keene, of Keene Consulting Arizona, LLC (Monitor), to comply with the civil investigative demands (CIDs) issued to them by the FTC. In its investigation, the Commission seeks to determine whether “telemarketers . . . or others assisting them” have engaged in unlawful conduct in violation of Section 5; the conduct covered by the resolution includes the “provision of substantial assistance or support . . . to telemarketers engaged in

unlawful practices.” The CIDs at issue here seek documents and information relevant to that investigation – specifically, information about the perpetrators and victims of telemarketing fraud, and about the effectiveness of Western Union’s programs, policies, and procedures to reduce the instances of money transfers connected with such fraud in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

Western Union has refused to comply with the CID, even after its administrative petition to quash the CID was denied by the Commission. In a detailed ruling, the Commission found that, without exception, Western Union’s arguments as to why it should not comply lacked merit and it ordered the company to produce the specified information no later than March 18, 2013. For his part, the Monitor submitted an objection, but has not otherwise complied.

This non-compliance has materially impeded the Commission’s investigation, prevented it from assessing the effectiveness of Western Union’s anti-fraud programs, policies, and procedures, and hindered its ability to identify those directly involved in, or harmed by, telemarketing fraud. The Commission, accordingly, respectfully requests that the Court enter an order directing Western Union and the Monitor to appear and show cause why they should not comply in full with the CIDs. *See, e.g., SEC v. Finazzo*, 543 F. Supp. 2d 224 (S.D.N.Y. 2008) (Baer, J.) (enforcing administrative subpoena after issuance of show cause order).

II. JURISDICTION

Section 20 of the FTC Act authorizes the Commission to issue civil investigative demands, or CIDs, to require the production of documentary material relating to any matter under investigation.¹ 15 U.S.C. § 57b-1(c). If the recipient of a CID fails to comply, the

¹ A CID is a form of administrative compulsory process akin to a subpoena *duces tecum*

Commission may petition the appropriate district court for an order directing the recipient to comply. 15 U.S.C. § 57b-1(e), (h). The statute confers jurisdiction and venue on the district court of the United States in the district where the CID recipient “resides, is found, or transacts business” 15 U.S.C. § 57b-1(e). Western Union and the Monitor reside, are found, or transact business in this district. Pet. Exh. 1, ¶¶ 3-4.

Pursuant to Section 20, the Commission issued the CID to the Monitor on November 5, 2012, and issued the CID to Western Union on December 12, 2012. Because both recipients failed to comply with the CIDs, Section 20 of the FTC Act empowers this Court to “enter such order or orders as may be required” (e.g., a show cause order) to enforce the CIDs. 15 U.S.C. §§ 57b-1(e), (h).

III. STATEMENT OF FACTS

A. The Parties

The Commission is an administrative agency of the United States, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41, *et seq.* The Commission is authorized and directed by Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), to prevent “unfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce.” The Commission is also authorized by the Telemarketing Sales Rule to prevent deceptive or abusive telemarketing acts or practices. 16 C.F.R. pt 310. Section 3 of the FTC Act empowers the Commission to prosecute

or subpoena *ad testificandum*. The FTC’s authority to issue civil investigative demands under Section 20 of the FTC Act, 15 U.S.C. § 57b-1, was modeled on the Department of Justice’s authority to issue civil investigative demands under the Antitrust Civil Process Act, 15 U.S.C. § 1311. *See* H.R.Cong.Rep. No. 917, 96th Cong., 2d Sess. 32 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1143, 1149; S.Rep. No. 500, 96th Cong., 1st Sess. 23–25 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1124–26. *See also* *FTC v. O’Connell Assocs., Inc.*, 828 F. Supp. 165, 169 (E.D.N.Y. 1993).

any inquiry necessary to its duties in any part of the United States. 15 U.S.C. § 43. Section 6 of the Act empowers the Commission “[t]o gather and compile information concerning, 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,” with certain exceptions not relevant here. 15 U.S.C. § 46. Section 20 empowers the Commission to require by CID the production of documents or other information relating to any Commission law enforcement investigation. 15 U.S.C. § 57b-1.

Respondent Western Union is a publicly held company that offers a number of financial services, including money transfers, through a global network of 510,000 agents in 200 countries, with many in the Southern District of New York. Pet. Exh. 1, ¶ 3.

Respondent Lonnie Keene is a member of the New York Bar. His limited liability company, Keene Consulting Arizona, LLC, maintains a business address in the Southern District of New York. On November 24, 2010, Mr. Keene and Keene Consulting Arizona, LLC were appointed to serve as a Monitor pursuant to a settlement agreement between the Attorney General for Arizona and Western Union. *See State of Arizona v. Western Union Fin. Servs., Inc.*, No. CV-2010-005807 (Ariz. Super. Ct. Maricopa Cnty. Feb. 24, 2010). Keene Consulting Arizona, LLC, resigned as Monitor effective March 24, 2013. Pet. Exh. 1, ¶ 4; Pet. Exh. 5, at Exhs. B, C, D.

B. The Commission’s Investigation and the CIDs

As discussed in the Petition and supporting Declaration of Todd M. Kossow (Pet. Exh. 1), the FTC for some time has been involved in attempting to stop and remedy telemarketing frauds that employ fraud-based money transfers. The FTC has received over 100,000 complaints

from victims of fraud-based money transfers in one year alone, with reported losses exceeding \$450 million. The FTC has also learned that money transfer companies such as Western Union can play an important role in curbing the use of money transfer services to facilitate fraud. Pet. Exh. 1, ¶¶ 6-8.

Around January 2011, following a series of meetings and discussions, FTC staff asked Western Union to provide, on a voluntary basis, information that would enable the Commission to determine whether the company was acting to reduce fraud-induced money transfers. While Western Union agreed to provide complaints about fraud-induced money transfers that it receives from U.S. consumers, and provided the FTC with certain information about its anti-fraud program, it refused to produce reports prepared by the Monitor pursuant to the settlement with Arizona. Pet. Exh. 1, ¶¶ 9-10; Pet. Exh. 5, at Exhs. B, C, D.

On November 5, 2012, after it became clear that Western Union would not provide the Monitor's reports on a voluntary basis, the Commission issued a CID to the Monitor, pursuant to Resolution No. 0123145. This CID directed the Monitor to produce all documents referring or relating to his reports, including drafts, reviews, and correspondence with Western Union. Pet. Exh. 1, ¶¶ 12-13; Pet. Exh. 3.

On December 12, 2012, pursuant to Resolution No. 0123145, the Commission issued a CID to Western Union. The first specification required Western Union to produce all documents referring or relating to complaints by consumers worldwide relating to fraud-induced money transfers. The second specification required:

All documents referring or relating to communications with the Monitor appointed by the court in *State of Arizona ex rel. Horne v. Western Union Financial Services, Inc.*, No. CV 2010-005807, including, but not limited to, all information Western Union provided to the Monitor, and any reports, reviews, or

other documents prepared by the Monitor, including any drafts of such documents.

Pet. Exh. 4. Both the CID to the Monitor and the CID to Western Union were narrowly tailored to obtain information relevant to the Commission's inquiry. Pet. Exh. 1, ¶ 14.

After receiving the CID, the Monitor filed a motion in the settled Arizona case seeking leave to share his reports with the FTC. On January 28, 2013, the Arizona court did not grant the motion, but explicitly stated that "it ha[d] no jurisdiction, and ma[de] no attempt to determine the enforceability of the FTC's CID. . . . This Court's decision declining [the Monitor's] request in no way addresses the issue of whether the FTC has the authority to take them and what they may do with them if they get them." Pet. Exh. 5, at Exh. G, 3-4; *see also* Pet. Exh. 1, ¶ 16.

After further negotiations to obtain the Monitor's reports failed, Western Union, pursuant to FTC Rule of Practice 2.10, 16 C.F.R. § 2.10, filed a petition to quash the CID before the full Commission.² Pet. Exh. 1, ¶ 17.

C. Western Union's Petition to Quash and the Commission's Ruling

A petition to limit or quash is an administrative remedy provided by the FTC's Rules of Practice. *See* 16 C.F.R. § 2.10(a). Such petitions provide the opportunity for a CID recipient to raise "all assertions of protected status or other factual or legal objections to the Commission compulsory process" *Id.* In its petition, Western Union asserted several reasons why the CID should be quashed in full. On March 4, 2013, in a detailed and thorough ruling, the

² Western Union asserted it had standing to quash the CID issued to the Monitor, Pet. Exh. 5, at 7 n.3, but the Commission did not accept that position. Pet. Exh. 6, at 4-5 n.11.

Commission addressed each of these arguments, denying the petition in its entirety and directing Western Union to comply in full by March 18, 2013.³ Pet. Exh. 6.

At the outset, the Commission rejected Western Union's threshold claim that the investigational resolution was not sufficiently specific and that it did not notify the company of the purpose and scope of the inquiry. Pet. Exh. 5, at 9-10. The Commission disagreed; it found that the resolution was specific on its face, and that it was consistent with the applicable standards for providing notice, especially considering Western Union's "lengthy dialogue" with FTC staff. Pet. Exh. 6, at 6-7.

The Commission also rejected Western Union's claim that the Monitor's reports and related documents were not relevant to the investigation because, according to Western Union, these reports were limited to human smuggling and drug trafficking activities in the southwest border area. Pet. Exh. 5, at 13-15. The Commission disagreed. In its ruling, the Commission explained that, under the terms of the settlement, the Monitor was tasked with overseeing Western Union's anti-money laundering program, and that this program was directly relevant to Western Union's anti-fraud program, especially considering the broad standard of relevance afforded to administrative agencies. Pet. Exh. 6, at 8-13. As the Commission ruled, "the Monitor's reports and related materials are relevant to assessing Western Union's commitment to eliminating illegal transactions from its system, and thus are 'reasonably relevant' to the purposes of the Commission's investigation." Pet. Exh. 6, at 13.

As the Commission further noted, it was Western Union's burden to prove that these materials were "plainly irrelevant" – a burden Western Union could not meet in light of the

³ The Monitor did not himself seek to quash or limit the CID.

substantial similarities in the two programs. Pet. Exh. 6, at 8 (citing *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992)). The Commission observed that, until recently, the anti-money laundering program and the anti-fraud program had been part of the same business unit. Pet. Exh. 6, at 9-10. The Commission reviewed Western Union's anti-money laundering and anti-fraud programs in depth and identified significant overlaps between the policies, procedures, and tools used to detect and respond to money laundering and those used to detect and respond to fraud. Pet. Exh. 6, at 10-12. As a result, the Commission concluded, "the steps Western Union must take to eliminate various forms of any suspected illegal transactions from its system are essentially the same." Pet. Exh. 6, at 12. Finally, the Commission found that Western Union's "statutory and regulatory" obligations to develop and employ an anti-money laundering program "do not segregate [anti-money laundering] and antifraud programs[;]" as the Commission concluded, "from a regulatory perspective, there is substantial overlap between an [anti-money laundering] program and a program to detect consumer fraud and other illegal activities."⁴ Pet. Exh. 6, at 8-9.

The Commission also rejected Western Union's assertion that it lacked the authority to obtain the Monitor's reports and related documents because they were subject to confidentiality protections imposed by the Arizona state court and would not have existed but for the settlement with the state. Pet. Exh. 5, at 15-16. The Commission noted that the settlement itself did not prohibit sharing of materials, and in fact, contained several provisions allowing the Arizona Attorney General and the Monitor to share information with appropriate investigative agencies,

⁴ As a money transfer company, Western Union qualifies as a "money services business," a type of financial institution required to develop an anti-money laundering program. 31 U.S.C. §§ 5312(a)(2)(R), 5318(h); 31 C.F.R. §§ 1010.100(ff), 1022.210(d).

or in furtherance of the Attorney General's duties. Pet. Exh. 6, at 13-14. Indeed, as the Commission noted, although the state court declined the requests from the Attorney General and the Monitor to disclose the Monitor's reports to the FTC, it did not bar the FTC from obtaining the materials and expressly did not rule on "whether the FTC has the authority to take them and what they may do with them" Pet. Exh. 6, at 14-15; Pet. Exh. 5, at Exh. G, 4. The Commission further found that "confidentiality restrictions under state law must give way if they conflict with federal agencies' statutory power to gather evidence[.]" and cited several authorities enabling federal agencies to obtain information over confidentiality protections, even protections imposed by state statutes.⁵ Pet. Exh. 6, at 15 & nn.52-54. Finally, the Commission held that the fact that the Monitor's reports and related documents were created pursuant to a settlement did not prevent disclosure. Pet. Exh. 6, at 16-17 & nn.55-57. The Commission recognized that such materials can be obtained even in private settlements, and where public interests are involved, as they are here, the threshold showing to prevent disclosure is even higher. Pet. Exh. 6, at 16 & nn.55-56.

With regard to the requirement that Western Union produce the worldwide complaints, the Commission rejected Western Union's assertion that such a request would impermissibly extend the FTC's authority to foreign transactions. Pet. Exh. 5, at 10-12. As the Commission noted, the complaints specified by the CID are all maintained in the United States and therefore do not require a cross-border transfer. Pet. Exh. 6, at 19 n.63. Furthermore, the Commission

⁵ Western Union also claimed that the FTC was required to intervene in the state court proceeding. But the Commission rejected this assertion on the ground that an agency of the United States is not subject to the jurisdiction of a state court, and the state may not interfere with a valid exercise of federal law enforcement authority. Pet. Exh. 6, at 17 & n.59. The Commission noted that the Arizona court implicitly recognized this in its January 28, 2013

explained, Congress expressly enhanced the FTC's Section 5 jurisdiction to combat cross-border fraud in enacting the U.S. SAFE WEB Act of 2006. The worldwide complaints plainly fall within this enhanced jurisdiction over acts or practices that "involve material conduct occurring in the United States," or "cause or are likely to cause reasonably foreseeable injury within the United States." Pet. Exh. 6, at 17-20; *see also* 15 U.S.C. § 45(a)(4). The Commission found that the consumer complaints worldwide "involved material conduct occurring within the United States" because they provided evidence of Western Union's effectiveness in carrying out its anti-fraud program, a program that was developed and administered in the United States. Pet. Exh. 6, at 19-20. For the same reasons, the complaints related to acts or practices that "cause or are likely to cause reasonably foreseeable injury within the United States" since Western Union's failure to effectively police fraud in its money transfer system was reasonably likely to result in harms to U.S. consumers. Pet. Exh. 6, at 20. The Commission also found that Western Union's argument reflected a failure to properly comprehend that, in a worldwide network where payments often involve multiple transfers, a foreign transfer could still affect – and injure – U.S. consumers. Pet. Exh. 6, at 20.

Finally, the Commission rejected Western Union's broad and nonspecific claim that the request for worldwide complaints "implicates a host of foreign laws regarding data privacy, among other complicated issues." Pet. Exh. 5, at 12. The Commission noted that Western Union did not identify any such foreign data protection law preventing production of these complaints. Pet. Exh. 6, at 21. In any event, the Commission concluded that, if such laws existed, they could not be reconciled with Supreme Court precedent and other cases holding that

ruling. Pet. Exh. 6, at 17 (quoting Pet. Exh. 5, at Exh. G, 3).

a party could be required to produce information even where that disclosure is inconsistent with foreign law. Pet. Exh. 6, at 21-23. Western Union did not argue that the worldwide complaints are otherwise irrelevant to the Commission's investigation. *See* note 10 *infra*.

D. Events Following the Commission's Order and Deadline

Western Union did not comply with the Commission's order. Instead, in correspondence after the March 18, 2013 deadline, the company expressed a desire to comply but nonetheless reiterated many of the arguments and positions advanced and rejected by the Commission's ruling. *See generally* Pet. Exh. 7. Despite several discussions between Western Union and Commission staff, Western Union declined to produce any of the information specified in the CID. The Monitor has likewise not produced any information to the FTC.

IV. LEGAL STANDARD FOR ENFORCEMENT

The standards for the judicial enforcement of administrative compulsory process have long been settled; the court's role in a proceeding to enforce an administrative subpoena is "extremely limited." *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997) (citing *In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995); *see also* *FTC v. Texaco, Inc.*, 555 F.2d 862, 871-72 (D.C. Cir. 1977) (*en banc*); *Finazzo*, 543 F. Supp. 2d at 226, *aff'd*, 360 Fed. Appx. 169 (2d Cir. 2009). Indeed, "the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." *Texaco*, 555 F.2d at 872. Specifically, a court must enforce an agency's investigative subpoena "if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." *RNR Enters., Inc.*, 122 F.3d at 97; *accord* *McVane*, 44 F.3d at 1135; *FTC v. Rockefeller*, 441 F. Supp. 234, 240

(S.D.N.Y. 1977), *aff'd*, 591 F.2d 182 (2d Cir. 1977). An affidavit from a government official is sufficient to establish a prima facie showing that these requirements have been met, *McVane*, 44 F.3d at 1136; *Finazzo*, 543 F. Supp. 2d at 226, and the recipient must then bear the burden of showing that the materials sought are not reasonably relevant. *See, e.g., McVane*, 44 F.3d at 1135.

Accordingly, proceedings to enforce administrative process are entitled to summary disposition. They are properly instituted by a petition and order to show cause rather than by complaint and summons. *See, e.g., Finazzo; SEC v. F.N. Wolf & Co., Inc.*, No. 93 Civ. 0379 (LLS), 1993 U.S. Dist. LEXIS 18851, *2-3 (S.D.N.Y. Dec. 14, 1993) (FRCP “do not apply to restrict or control administrative subpoenas,” but “resort may be had to the simplified practice under the rules to aid in expeditious adjudication of the issue wherever they are helpful”) (quoting *Bowles v. Bay of N.Y. Coal & Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945)); *United States v. Associated Merch. Corp.*, 256 F. Supp. 318, 320-21 (S.D.N.Y. 1966).

And because they are summary in nature, discovery or evidentiary hearings may be granted only upon a showing of “extraordinary circumstances” – none of which are present here – otherwise, “discovery is improper in a summary subpoena enforcement proceeding.” *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980) (quoting *United States v. Exxon Corp.*, 628 F.2d 70, 77 n.7 (D.C. Cir. 1980)); *see also, e.g., Fed. R. Civ. P. 26(a)(1)(B)(v); SEC v. Knopfler*, 658 F.2d 25, 26 (2d Cir. 1981); *United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36, 42 n.9 (2d Cir. 1978).

V. ARGUMENT

Because the CIDs are within the lawful authority of the agency, because they seek information and documents relevant to the Commission's investigation, and because they are neither indefinite nor impose an undue burden, the Court should order Western Union and the Monitor to show cause why they should not fully comply. *RNR Enters., Inc.*, 122 F.3d at 97.

A. The CIDs are within the lawful authority of the agency.

The Commission properly issued the CIDs as part of an investigation concerning possible violations of Section 5 of the FTC Act, 15 U.S.C. § 45.⁶ The Commission issued the supporting investigational resolution on April 11, 2011. *See* Pet. Exh. 2.⁷ According to the resolution, the Commission seeks to determine whether “telemarketers . . . or others assisting them” have engaged in unlawful conduct in violation of Section 5; the conduct covered by the resolution includes the “provision of substantial assistance or support . . . to telemarketers engaged in unlawful practices.” Pet. Exh. 2. The Commission also resolved that “all compulsory process available to it be used in connection with this investigation” *Id.*

⁶ Section 5 provides, in relevant parts:

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

⁷ Specifically, the Resolution listed as the Commission's authority to conduct the investigation Sections 6, 9, 10, and 20 of the FTC Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; and FTC Procedures and Rules of Practice, 16 C.F.R. §§ 1.1 *et seq.*, and supplements thereto. Pet. Exh. 2.

As explained above, Section 20 and other sections of the FTC Act give the Commission ample authority to conduct this investigation and to issue CIDs in furtherance of such an investigation. The CIDs at issue were properly authorized and duly issued. *See* 15 U.S.C. § 57b-1(c)(1); *see also* 16 C.F.R. § 2.7(a).⁸ Both CIDs seek documents indisputably “relating to” the subject matter of the investigation, and both were duly signed by a member of the Commission (Chairwoman Edith Ramirez). Pet. Exhs. 3, 4. Based on this, and in light of the ongoing discussions with staff, Western Union and the Monitor have received ample notice of the scope and purpose of the investigation. 15 U.S.C. § 57b-1(c)(2); 16 C.F.R. § 2.6.

As the Commission has ruled, Western Union’s various objections to compliance are utterly lacking in merit and the company has not presented any other argument that would bar immediate production of the requested documents and information. Even if they were outside of the territorial limits of the United States, they would fall within the FTC’s enhanced Section 5 jurisdiction as provided by the U.S. SAFE WEB Act of 2006, and Western Union has not identified any authority prohibiting disclosure to the FTC. 15 U.S.C. § 45(a)(4).

Furthermore, contrary to the claim that Western Union pressed before the Commission, the settlement documents do not impose restrictions on Western Union that would preclude it from providing these material to the Commission. The only limit on Western Union appears in

⁸ Section 2.7(a) of the Commission’s Rules of Practice provides, in relevant part: “The Commission or any Commissioner may, pursuant to a Commission resolution, issue a subpoena, or a civil investigative demand, directing the recipient named therein to appear before a designated representative at a specified time and place to testify or to produce documentary material, or both, and in the case of a civil investigative demand, to provide a written report or answers to questions, relating to any matter under investigation by the Commission.” Section 2.7(a) was amended effective November 9, 2012, but the earlier version that applies to the CID issued to the Monitor is substantially similar.

paragraph 37 of the Monitor Engagement Letter that underpins the Arizona state court settlement; this paragraph only requires Western Union to “maintain the confidentiality” of materials it receives from the Monitor.⁹ See Pet. Exh. 5, at Exh. B, ¶ 37. Production to the FTC would not violate this condition, especially as the FTC provides robust confidentiality protections consistent with the FTC Act and the FTC’s own Rules of Practice. See, e.g., 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10. Moreover, the fact that compulsory process seeks confidential information “poses no obstacle to enforcement.” *Rockefeller*, 441 F. Supp. at 242 (citing *FTC v. Tuttle*, 244 F.2d 605, 616 (2d Cir. 1957); *FTC v. Green*, 252 F. Supp. 153, 156 (S.D.N.Y. 1966)); see also *United States v. GAF Corp.*, 596 F.2d 10, 16 (2d Cir. 1979); Pet. Exh. 6, at 13-17 & nn.52-56.

B. The CIDs seek documents and information that are relevant to the Commission’s investigation.

It is well-established that the appropriate standard for assessing relevance is to “compar[e] the specifications of the subpoenas with the resolutions of the Commission, which announced the purpose and scope of the inquiry. If the comparison establishes that the specified requests ‘may be relevant’ to the legitimate inquiry of the FTC, compliance must be ordered” *Rockefeller*, 441 F. Supp. at 240-41 (internal citations omitted); accord *Texaco*, 555 F.2d at 874. The information requested need only be “reasonably relevant” to the Commission’s inquiry. *Morton Salt*, 338 U.S. at 652; *Texaco*, 555 F.2d at 873 n.23, 876; *Rockefeller*, 441 F. Supp. at 240.

⁹ Although the Monitor’s reports concern Western Union’s own conduct and business practices, Western Union claimed before the Commission that it needs to seek approval from the Arizona court before it can produce copies of the Monitor’s reports and related documents in its possession. The Commission disagrees because paragraph 37 imposes no such requirement.

This standard is deferential to the administrative agency, and is more relaxed than the standard that applies in civil discovery. *See NLRB v. Am. Medical Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992). “[I]n the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case,” and a “court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue.” *Texaco*, 555 F.2d at 874. An agency can inquire “merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *McVane*, 44 F.3d at 1135 (quoting *Morton Salt*, 338 U.S. at 642-43). Thus, “an investigative subpoena of a federal agency will be enforced if the ‘evidence sought . . . [is] not plainly incompetent or irrelevant to any lawful purpose’ of the agency.” *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145 (D.C. Cir. 1987) (alteration original) (quoting *Endicott Johnson*, 317 U.S. at 509); *see also Invention Submission Corp.*, 965 F.2d at 1089.

The Second Circuit has adopted this approach. As the Second Circuit has stated, a district court should “defer to the agency’s appraisal of relevancy, which must be accepted so long as it is not obviously wrong.” *RNR Enters.*, 122 F.3d at 97; *see also McVane*, 44 F.3d at 1136 (“We have interpreted relevance broadly.”). In light of this deference, the Second Circuit has stated that the relevance requirement is to be “generously construed” and is “not especially constraining.” *EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136, 142-43 (2d Cir. 2009) (Newman, J., concurring); *accord Am. Medical Response, Inc.*, 438 F.3d at 192-93.

The Commission has considered the relevancy of the materials demanded by the CID in the context of ruling on Western Union’s administrative petition to quash. It concluded that the

Monitor's reports and related documents were relevant to the purposes of the Commission investigation. Pet. Exh. 6, at 13. Though this conclusion is entitled to deference, *see, e.g., McVane*, 44 F.3d at 1135, it is reinforced by the facts of the investigation. As described above, the resolution here authorizes the use of compulsory process to determine whether "telemarketers, sellers, or others assisting them" have engaged in unlawful acts "including but not limited to the provision of *substantial assistance or support* – such as mailing lists, scripts, merchant accounts and *other information, products, or services* – to telemarketers engaged in unlawful practices." Pet. Exh. 2 (emphasis added). Among other things, the purpose of the inquiry is to determine whether Western Union has adopted an adequate program to reduce fraud-based money transfers connected with fraudulent schemes; Western Union's failure to address these illegal transactions could be considered "substantial assistance or support" to those engaging in telemarketing fraud. It also seeks to identify complainants who have been victimized by money transfers resulting from fraud and the wrongdoers who have received such transfers. *See* note 10 *infra*.

All of the information requested in the CIDs issued to Western Union and the Monitor is relevant to these purposes. For instance, the Monitor's reports and related documents show how Western Union has implemented an anti-money laundering program. Because, as the Commission explained in its ruling, the company's anti-money laundering program is complementary to, and indeed overlaps with, its anti-fraud program, Western Union's steps in addressing money laundering are certainly relevant to its steps in addressing fraud, and the Commission's determination that this information is relevant to, and necessary for, its investigation is entitled to deference. Pet. Exh. 1, ¶ 11; Pet. Exh. 6, at 8-13; *RNR Enters.*, 122

F.3d at 97; *see also McVane*, 44 F.3d at 1135-36. Similarly, complaints from consumers worldwide are also relevant because they illustrate how successful Western Union has been in implementing an anti-fraud program and policing its operations and agents to identify corrupt employees and vulnerabilities involving its system.¹⁰ Indeed, numbers and patterns of complaints can be solid evidence of the effectiveness of such a program. Pet. Exh. 1, ¶ 15.

The Commission's approach here is fully consistent with the Second Circuit's in applying this broad and "not especially constraining" standard afforded administrative compulsory process. Indeed, the Second Circuit has upheld administrative compulsory process seeking the production of broadly relevant materials. *See EEOC v. United Parcel Service*, 587 F.3d at 139-40; *NLRB v. Am. Medical Response*, 438 F.3d at 194-95. The information requested by the CIDs at issue here is relevant to the FTC's investigational purposes, and the CIDs should be enforced.

C. The CIDs are neither indefinite nor impose an undue burden.

The CIDs are not indefinite. The CID to the Monitor contains only one specification, while the CID to Western Union contains two, and there has been no dispute over the meaning of these specifications, or what is required to comply. For similar reasons, the CIDs impose no undue burden. To prove that compliance with a CID would be unduly burdensome, a party must show that compliance would threaten "to unduly disrupt or seriously hinder normal operations of a business." *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979) (quoting *Texaco*, 555 F.2d at 882). Where the materials sought are relevant to the agency's inquiry, "that burden is not easily

¹⁰ Because Western Union did not in its petition to quash dispute the relevance of worldwide consumer complaints, the Commission did not rule on that particular issue. *See* Pet. Exhs. 5, 6. Nonetheless, it is obvious that the complaints are relevant to the investigational resolution generally because they may help the FTC identify senders and receivers of money transfers resulting from fraud, *i.e.*, those directly engaging in, or victimized by, telemarketing

met.” *Rockefeller*, 591 F.2d at 190 (quoting *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973)). Given the limited and narrowly-tailored nature of the CIDs, neither Western Union nor the Monitor can satisfy this standard. Indeed, Western Union did not claim burden in its administrative petition to quash. The Monitor has raised no claim of burden at all. Thus, neither respondent has sufficiently alleged burden to prevent this Court from enforcing the CIDs.

VI. CONCLUSION

For the foregoing reasons, this Court should order Western Union and the Monitor to comply fully with the Commission CIDs within ten (10) days of the Court's Order.

Respectfully submitted,

C. STEVEN BAKER
Regional Director

DAVID C. SHONKA
Acting General Counsel

TODD M. KOSSOW
Assistant Regional Director

JOHN F. DALY
Deputy General Counsel for Litigation

KAREN D. DODGE
Attorney

LESLIE RICE MELMAN
Assistant General Counsel for Litigation

FEDERAL TRADE COMMISSION
Midwest Region
55 West Monroe Street
Suite 1825
Chicago, IL 60603-5001
312-960-5634



BURKE W. KAPPLER
Attorney

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FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2043
(202) 326-2477 (fax)
bkappler@ftc.gov