

REDACTED VERSION, PER LOCAL RULE 25.1(j)(2)

# 13-3100

## & 13-3272 (XAP)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION,  
Appellant/Cross-Appellee,  
v.

THE WESTERN UNION COMPANY,  
Appellee/Cross-Appellant.

On Appeal from the United States District Court  
for the Southern District of New York

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**RESPONSE AND REPLY BRIEF FOR  
FEDERAL TRADE COMMISSION  
(FILED UNDER SEAL PER LEAVE OF COURT)**

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## PRELIMINARY STATEMENT

The Federal Trade Commission (“FTC” or “Commission”) is investigating Western Union to determine whether the company has failed to protect consumers from sending money transfers induced by fraud. As part of the investigation, the Commission issued a civil investigative demand (“CID”) to Western Union directing it to produce two categories of materials – (1) consumer complaints relating to fraud-induced money transfers; and (2) documents related to the work of a state court-appointed monitor who is charged with evaluating and reporting on Western Union’s anti-money laundering (“AML”) program, as required by an agreement between Western Union and the State of Arizona to settle allegations relating to money laundering.

Western Union refused to produce the requested documents. It objected to producing complaints about fraud-induced transfers conducted over Western Union’s network in which both the sender and the immediate recipient are outside the United States. It also contended that documents related to the monitor were not relevant to the Commission’s investigation, and that the FTC had not provided Western Union with sufficient notice about the scope of the

investigation. After the Commission denied an administrative petition to quash the CID and Western Union still refused to comply, the Commission instituted the present enforcement proceeding.

As the Commission showed in its opening brief, the district court erroneously declined to enforce the CID with respect to complaints involving transactions outside the United States. The court improperly determined that the FTC could not compel production of the documents because it has no jurisdiction over foreign transactions. As the Commission showed, the district court erred when it framed the issue as whether the FTC has authority over “wholly foreign” transactions – and thus failed to consider the relevance of foreign complaints to the purpose of the investigation. Western Union’s arguments obfuscate the simple fact that its handling of foreign complaints reflects on the overall quality of its anti-fraud program everywhere, including the United States. Because foreign complaints are a legitimate subject for Commission inquiry, the district court’s contrary ruling should be reversed.

Western Union’s cross-appeal arguments lack merit. The court below correctly concluded that documents related to the monitor

reviewing Western Union’s AML efforts are directly relevant to the present investigation, given the overlaps between the company’s efforts to detect and prevent illegal money laundering in its system and its efforts to detect and prevent fraud-induced money transfers. The court also correctly found that the FTC had provided Western Union with adequate notice of the scope of its inquiry. The ruling of the court below compelling production of those documents was well within its discretion and should be affirmed.

### **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

The FTC relies on the Statement of Subject Matter Jurisdiction and Appellate Jurisdiction in its opening brief. FTC Br. 3.<sup>1</sup>

### **STATEMENT OF THE ISSUES ON CROSS-APPEAL**

1. Whether the district court properly determined that documents relating to a state court-appointed monitor’s evaluation of Western Union’s practices are relevant to the FTC’s investigation into

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<sup>1</sup> “FTC Br.” refers to the FTC’s principal brief, and “WU Br.” refers to Western Union’s cross-appeal brief. “Dkt.” refers to filings in the district court by district court docket number. Page numbers for items in the record below refer to the ECF headers or to Bates numbers in the Joint (“JA”) and Special Appendices (“SA”).

potential violations of the Federal Trade Commission Act and therefore must be produced to the FTC.

2. Whether the district court properly determined that the FTC resolution authorizing the investigation of Western Union provided the company with sufficient notice of the purpose of the investigation.

### **STATEMENT OF THE CASE**

The FTC relies primarily on the Statement of the Case in its opening brief, FTC Br. 4-14, but provides additional facts relevant to Western Union's cross-appeal.

#### **A. The Commission's Investigation and CID**

The FTC is investigating whether Western Union has failed to adequately police its money transfer network, thereby facilitating fraudulent and deceptive practices that harm consumers. If Western Union's oversight of its network is not adequate to prevent telemarketers and other scam artists from harming consumers, that failure may constitute an "unfair" practice in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a) [SA-20].<sup>2</sup>

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<sup>2</sup> The Commission conducted a similar investigation of Western Union's primary competitor, MoneyGram International, Inc. Ultimately, MoneyGram stipulated to a permanent injunction that, among other

As part of its investigation, the FTC issued a CID requiring Western Union to produce two groups of documents. Specification 1 of the CID seeks documents relating to complaints made by consumers anywhere in the world regarding fraud-induced money transfers. Western Union reviews, analyzes, and maintains consumer complaints and related documents at its Denver-area headquarters regardless of their origin. Dkt. 22-8 at 3 [JA-495]; Dkt. 20 ¶ 4 [JA-333]; Dkt. 21-1 ¶¶ 3-5 [JA-374 to -375]; Dkt. 28-3 at 5-10 (sealed) [JA-1018 to -1023] [hereinafter “AFP”]. As Western Union itself has explained, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] AFP at 8 (sealed) [JA-1021 to -1023]. For the same reasons, those documents would help the FTC assess whether Western Union responds adequately to allegations of fraud perpetrated on both U.S. and foreign consumers. *See* Dkt. 1-3 at 20-21 [JA-183 to -184].

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things, requires MoneyGram to implement a comprehensive anti-fraud program and to improve oversight of its agents. *See* Stipulated Order for Permanent Injunction and Final Judgment, *FTC v. MoneyGram Int’l, Inc.*, No. 1:09-cv-6576 (N.D. Ill. Oct. 21, 2009); Dkt. 1 ¶ 8 [JA-17].

Specification 2 of the CID seeks documents relating to the work of a monitor who is evaluating, making recommendations, and reporting on Western Union's AML program. Dkt. 1 at 8, 34-35 [JA-18, JA-44 to -45]; *see also* Dkt. 1-1 at 45-63 [JA-91 to -109]. Western Union agreed to appointment of the monitor to settle allegations by the State of Arizona that the company had failed to respond to suspicious transactions involving its money transfer network and thus was complicit in criminal money laundering in the Southwest Border Area. Dkt. 1-2 at 1-24 [JA-110 to -133]. The monitor's reports, related documents, and communications with Western Union are "relevant to assessing Western Union's anti-fraud program and efforts to reduce fraud-based money transfers because of substantial overlaps between the AML program and the anti-fraud program." Dkt. 1-4 at 5 [JA-217].

#### **B. Western Union's Administrative Petition to Quash**

Western Union asked the FTC to quash the CID. Dkt. 1-1 to 1-2 [JA-47 to -163]. As here, Western Union challenged the Commission's authority to obtain complaints regarding money transfers between Western Union's users outside of the United States (hereinafter "foreign complaints") and argued that documents relating to the work of the

monitor were not relevant to the investigation. Western Union also alleged that the Commission's resolution authorizing the investigation and the issuance of the CID was not sufficiently specific to have provided Western Union with notice. *Id.* The Commission unanimously denied the petition to quash in a detailed, 23-page ruling. Dkt. 1-3 at 2-24 [JA-165 to -187].

The Commission first ruled that the resolution adequately notified Western Union of the purpose of the inquiry. *Id.* at 7-8 [JA-170 to -171]. The resolution authorized investigation of fraudulent telemarketers "or others assisting them," such as companies like Western Union that provide the means to obtain the fraud-induced funds. *Id.* at 7 [JA-170]. The Commission had relied on the same resolution to investigate MoneyGram, Western Union's primary competitor. *Id.* at 7-8 [JA-170 to -171]; *see note 2, supra.*

The Commission then determined that documents relating to the monitor's review of Western Union's AML program were relevant to the investigation. Relevance is "defined broadly," the Commission explained, Dkt. 1-3 at 9 [JA-172], and the AML documents were relevant for three reasons. *First*, regulatory provisions that require

Western Union to guard against money laundering also require it to report “*any* type of suspicious transaction, including consumer fraud.” Thus, the Commission explained, “from a regulatory perspective, there is substantial overlap between an AML program and a program to detect consumer fraud and other illegal activities.” *Id.* at 9-10 [JA-172 to -173]. *Second*, the Commission noted that Western Union’s AML and anti-fraud programs share several operational and administrative elements, which “further demonstrat[e]” the overlap between the programs. Dkt. 1-3 at 11 [JA-174]; *id.* (sealed) [JA-987]. *Third*, the Commission pointed out that Western Union uses many of the same tools in its AML and anti-fraud programs. Dkt. 1-3 at 11-13 [JA-174 to -176]; *id.* (sealed) [JA-987 to -989]. Thus, “the steps Western Union must take to eliminate \* \* \* any suspected illegal transactions from its system are essentially the same.” Dkt. 1-3 at 13 [JA-176].

Finally, the Commission rejected Western Union’s contention that the agency lacked authority to require production of foreign complaints . The Commission also rejected Western Union’s unsupported assertions that requiring production of such documents would compel Western Union to violate foreign data privacy laws. *See* FTC Br. 10.



### C. District Court Enforcement Proceedings

Despite the Commission's order, Western Union refused to comply with the CID. Dkt. 1-3 at 28 [JA-191]. On April 15, 2013, the Commission filed an enforcement proceeding in the United States District Court for the Southern District of New York. After argument, the district court (Hon. Alvin K. Hellerstein) entered an order requiring compliance with the CID in full, except as to the Commission's request for foreign complaints.

The court rejected Western Union's objections to producing documents relating to the monitor. The court acknowledged that "[a]n investigation is a very broad set of activities on the part of an administrative agency to ascertain if a law has been violated or not." Dkt. 41 at 14 [JA-842]. Thus, the court explained, documents created about one issue may nonetheless be relevant to others. Because "a money transfer can be an object or subject of laundering and it can be an aspect of fraud," the court concluded that the FTC had "prima facie" demonstrated the documents' relevance. It thus ordered Western Union to produce them. *Id.* at 11-12 [JA-839 to -840].

The court denied the FTC's request for an order requiring Western Union to produce foreign complaints. The court stated, "They're outside [the FTC's] jurisdiction. \* \* \* The fraud is outside the United States." *Id.* at 20-21 [JA-848 to -849]. The court also rejected Western Union's further assertion that the FTC's investigatory resolution was vague, finding it "no more general or more specific than the usual general resolution that you find with all administrative agencies." *Id.* at 27 [JA-855].

### **STANDARD OF REVIEW**

The FTC relies on its statement of the applicable Standard of Review in its opening brief. FTC Br. 14.

### **SUMMARY OF ARGUMENT**

The FTC Act grants the FTC broad authority to investigate whether Western Union has engaged in "unfair or deceptive acts or practices." The Act further entitles the Commission to compel the production of evidence that is "relevant" to an authorized investigation. The documents at issue here satisfy that standard.

I. For the reasons shown in the Commission's opening brief, the district court erred in refusing to compel production of complaints

about foreign fraud-induced money transfers over Western Union's network.

The FTC is investigating whether Western Union has implemented adequate policies and procedures for policing fraud involving its global network and responding to consumer complaints of fraud-induced money transfers. Contrary to Western Union's assertions, the investigation is not focused on the perpetrators of wholly foreign transactions, as Western Union suggests, but on whether Western Union's own conduct adequately protects all consumers who use its network. Complaints from foreign consumers are relevant to that investigation because those complaints, just like domestic ones, can shed significant light on the adequacy of Western Union's anti-fraud practices. Because many consumer frauds are global, it is important for the FTC to view the patterns that emerge from the entirety of the complaints in order to assess Western Union's efforts. The district court did not acknowledge that fact.

At issue here is the FTC's authority to compel production of documents relevant to a pending investigation. The question presented is not (as the district court erroneously supposed) whether the FTC may

lawfully address fraudulent conduct occurring wholly outside the United States. Even if the extraterritorial reach of the FTC's enforcement authority were before this Court, however, the SAFE WEB Act confirms that the agency may address foreign conduct. That statute demonstrates Congress's "affirmative intention" that the FTC's authority extend extraterritorially as long as it meets either of two statutory tests: whether "material conduct" has taken place in the United States or whether foreign acts "cause or are likely to cause foreseeable injury" in the United States.

Both tests are satisfied here. First, the "material conduct" at issue here is Western Union's implementation of policies and practices for policing its network and addressing fraud. That conduct occurs entirely in the United States. Second, foreign complaints reflect acts that "cause or are likely to cause reasonably foreseeable injury," because any failure by Western Union to respond to fraud complaints threatens harm to all consumers – including U.S. consumers – who use Western Union's single worldwide network.

The production of foreign complaints maintained by Western Union in the United States contravenes no principle of comity with

foreign law. The conflict Western Union asserts with European privacy law is illusory and unsupportable. Nor has Western Union demonstrated that compliance with the CID will result in sanctions abroad.

II. Contrary to Western Union's claims in its cross-appeal, the district court properly held that the FTC may obtain documents related to the monitor and his review of Western Union's AML program. The FTC determined that there are substantial overlaps between Western Union's AML and anti-fraud programs, and the district court properly deferred to the agency's determination that this information is relevant to the investigation of the anti-fraud program.

Finally, the FTC resolution that authorized the investigation of Western Union and the use of compulsory process to obtain evidence relevant to the investigation comports with the FTC Act and provided Western Union with adequate notice of the purpose of the investigation. The district court correctly rejected Western Union's claims to the contrary.

## ARGUMENT

### FEDERAL TRADE COMMISSION'S REPLY BRIEF APPEAL No. 13-3100

#### **I. The District Court Erred in Denying the FTC Access to Foreign Complaints That Bear on the Conduct of a U.S. Corporation**

##### **A. The FTC May Compel Production of All Materials Within the Scope of Its Investigation**

The Commission has broad authority to investigate whether any person, partnership, or corporation is engaged in “unfair or deceptive acts or practices” in violation of the FTC Act and to require the production of materials that may be relevant to the inquiry. *See* 15 U.S.C. §§ 45(a), 57b-1(c)(1) [SA-20, SA-29]; FTC Br. 19-25. These provisions contain no exception for materials that were generated abroad. The CID here must be enforced because “the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

Western Union’s contention that it is entitled to withhold foreign complaints rests on the erroneous premise that the FTC is investigating operators of foreign fraud. *See, e.g.*, WU Br. 26, 32-36. In fact, as the

Commission explained, the investigation here is “focused primarily on whether *Western Union* has adopted and implemented policies and procedures that are sufficient to prevent or limit wrongdoers from using its money transfer system to perpetrate fraud.” Dkt. 1-3 at 20 (emphasis added) [JA-183]. Having all consumer complaints, domestic and foreign, will help the Commission assess whether Western Union responded adequately to the problems reported, and, if it did not do so, whether Western Union engaged in “unfair or deceptive” practices in violation of the FTC Act.<sup>3</sup>

The district court erred by accepting Western Union’s erroneous premise, disregarding the Commission’s description of its own inquiry, and instead characterizing it as an examination of foreign transactions. Dkt. 41 at 20-21 [JA-848 to -849]. The court should have accepted the Commission’s characterization of its own investigation, and deferred to the Commission’s judgment that information about foreign transactions is indeed relevant to its inquiry concerning Western Union’s own

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<sup>3</sup> Western Union’s own anti-fraud program [REDACTED]

[REDACTED] See Dkt. 21-1 at 5 (sealed) [JA-1006]; AFP at 8-10 (sealed) [JA-1021 to -1023].

policies and practices, established and directed from its corporate headquarters in Colorado.

Even if the Commission's authority with respect to foreign transactions were at issue, however, the district court departed from longstanding instructions about the limited role of district courts in agency process enforcement.<sup>4</sup> *See* FTC Br. 16-19. As this Court has declared, "it is for the agency rather than the district courts to determine in the first instance the question of coverage in the course of the preliminary investigation into possible violations." *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973). Western Union contends that these limitations do not apply here,

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<sup>4</sup> Western Union is wrong in asserting that the FTC has waived the argument that the district court improperly considered the agency's jurisdiction. *See* WU Br. 19-21. In fact, the Commission raised the limited nature of district court review prominently in its initial enforcement petition and in its opening brief. *See, e.g.*, Dkt. 2 at 11 [JA-232]; FTC Br. 17. Western Union now invokes an exception to the limited nature of district court review, and the Commission is entitled to respond to that argument.



pointing to some inapposite cases in which plenary review was allowed.<sup>5</sup>

See WU Br. 23-24 & n.2. While some courts have denied process enforcement based on limits to the agency's authority, they have done so only where there was a specific, clear, and unambiguous statutory or constitutional right to be free from investigation. Western Union has identified no such right here.

**B. The SAFE WEB Amendments to the FTC Act Confirm the FTC's Authority to Investigate Western Union's Global Money Transfer System**

To the extent there is any residual doubt that the FTC can properly examine behavior that takes place abroad, the SAFE WEB Act dispels it. The SAFE WEB Act amended the FTC Act by providing expressly that the Commission's authority to prohibit "unfair or

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<sup>5</sup> See, e.g., *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1082-83 (9th Cir. 2001) (acknowledging sovereign immunity of Indian tribe); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 494-95 (7th Cir. 1993) (recognizing "special status" of Indian tribes as "quasi-sovereigns"); *United States v. Univ. Hosp., State Univ. of N.Y. at Stony Brook*, 729 F.2d 144, 150 (2d Cir. 1984) (denying HHS access to medical records of handicapped infant, given the absence of parental consent and the presence of arguable constitutional privacy rights). Western Union's reliance on *United States v. Institute for College Access & Success*, 956 F. Supp. 2d 190 (D.D.C. 2013), is especially misplaced because the district court reversed that magistrate judge's ruling. See *United States v. Inst. for Coll. Access & Success*, 2014 U.S. Dist. LEXIS 35739 (D.D.C. Mar. 19, 2014).

deceptive acts or practices” extends to “unfair or deceptive acts or practices \* \* \* involving foreign commerce” so long as either of two tests are met: (1) the acts “involve material conduct occurring within the United States” *or* (2) the acts “cause or are likely to cause reasonably foreseeable injury within the United States.” 15 U.S.C. § 45(a)(4)(A) [SA-20 to -21].<sup>6</sup> *See* FTC Br. 22-24. Both tests are met here.

Contrary to Western Union’s contentions, the SAFE WEB Act does not merely “mirror” or “codif[y]” prior case law on the extraterritorial reach of the securities statutes. WU Br. 38-39 & n.8. Instead, the two tests the FTC proposed and Congress enacted differ from the “conduct” and “effects” tests that courts were employing at the time in the securities law context. Thus, Western Union’s reliance on the FTC’s June 2005 explanation of its legislative proposals (*see* WU Br. 28) is mistaken. The FTC stated only that the proposed criteria were “*similar to* those developed by federal courts defining the SEC’s authority to address securities and investment fraud involving foreign

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<sup>6</sup> The SAFE WEB Act further authorizes the FTC to seek restitution for “domestic *or foreign victims.*” 15 U.S.C. § 45(a)(4)(B) (emphasis added) [SA-21]. Thus, it expressly contemplates that the FTC will obtain information regarding foreign victims of fraud and their losses.

nations and actors,” not that they were identical.<sup>7</sup> Nothing in the statutory language enacted by Congress supports Western Union’s argument that the Commission must show “substantial effects” in the United States to prevail.

Therefore, Western Union’s reliance on pre-2010 and pre-SAFE WEB case law is misplaced. Under current law, courts may no longer look to “conduct” or “effects” to determine whether a statute applies extraterritorially. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869 (2010). Rather, statutes have extraterritorial effect only upon “the affirmative intention of the Congress clearly expressed.” *Id.* at 2877 (internal quotation marks omitted). The SAFE WEB Act amendments “affirmatively” demonstrate a “clearly expressed” intent. See 15 U.S.C. § 45(a)(4) [SA-20 to -21].<sup>8</sup> The amendments are properly construed according to their own “plain and unambiguous” terms, not

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<sup>7</sup> FTC, *An Explanation of the Provisions of the US SAFE WEB Act* 14 (2006), available at <http://www.ftc.gov/sites/default/files/documents/reports/us-safe-web-act-protecting-consumers-spam-spyware-and-fraud-legislative-recommendation-congress/explanation-provisions-us-safe-web-act.pdf> (emphasis added).

<sup>8</sup> Congress reauthorized the SAFE WEB Act in 2012, after the Supreme Court’s decision in *Morrison*, without making any substantive changes. See Pub. L. No. 112-203, 126 Stat. 1484 (Dec. 4, 2012) [SA-57].

by reference to judge-made law regarding the extraterritorial reach of other statutes. *See, e.g., Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

**1. The Foreign Complaints “Involve” Western Union’s Domestic “Material Conduct” of Administering and Policing Its Network**

The Commission showed that the “material conduct” at issue here is Western Union’s establishment and application in the United States of anti-fraud policies that apply across its global network. FTC Br. 22-23. Western Union is wrong in suggesting that its foreign complaints do not involve material conduct within the United States for the simple reason that the company focuses on the wrong conduct. *See* WU Br. 29-33. The Commission has made clear repeatedly (*e.g.*, Dkt. 1-3 at 20 [JA-183]; FTC Br. 22) that the focus of the investigation and the “material conduct” at issue is Western Union’s administration of its worldwide network, how Western Union responds to complaints about fraud-induced money transfers, and whether Western Union has taken adequate steps to detect and prevent such transfers.

Those acts “involve material conduct occurring within the United States” under the SAFE WEB Act. 15 U.S.C. § 45(a)(4)(A)(ii) [SA-20 to -

21]. “Material” means “significant; essential.” *Black’s Law Dictionary* 1066 (9th ed. 2009). FTC case law establishes that “material” means “important.” See Letter from the Fed. Trade Comm’n to Hon. John Dingell (“Deception Statement”), appended to *In re Cliffdale Assocs.*, 103 F.T.C. 110, 174, 182 & n.45 (1984). Western Union’s oversight of its global money transfer system, which is directed from its U.S. headquarters, fits comfortably within those definitions. If the company’s oversight is deficient – a determination which can become more apparent after examining a full set of domestic and foreign complaints – it exposes consumers in the United States, as well as those abroad, to a risk of unreasonable harm. Such conduct is “material.”<sup>9</sup>

Western Union’s “aiding and abetting” argument is likewise premised on the misunderstanding that the FTC’s investigation is directed at operators of foreign frauds. See WU Br. 32-33. As explained above, the FTC’s investigation focuses primarily on *Western Union’s*

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<sup>9</sup> Even if the pre-*Morrison* “material conduct” cases have some continuing vitality after *Morrison*, the Commission satisfies those standards as well. *North-South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1052-53 (2d Cir. 1996), involved “preparatory” or “post-sale” conduct; by contrast, Western Union’s practices may substantially assist the fraud. *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), is similarly inapposite because Western Union’s oversight of its global network occurs primarily in the United States.

policies and procedures for preventing fraud-induced money transfers. If the Commission finds that those policies and procedures are inadequate, the Commission could properly allege both (1) liability under Section 5 of the FTC Act for failing to protect consumers from unreasonable risks of harm, and (2) liability for providing substantial assistance and support for sellers or telemarketers known to be violating the Telemarketing Sales Rule, 16 C.F.R. Part 310 – just as the Commission alleged in its complaint against Western Union’s primary competitor, MoneyGram.<sup>10</sup>

**2. The Foreign Complaints Reflect Acts that “Cause or Are Likely to Cause Reasonably Foreseeable Injury” in the United States**

Contrary to Western Union’s contention (WU Br. 33-37), deficiencies in its network administration practices would also “cause or [be] likely to cause reasonably foreseeable injury” in the United States. 15 U.S.C. § 45(a)(4)(A)(i) [SA-20 to -21]. Western Union operates a single worldwide network. Dkt. 1 at 4 [JA-14]; Dkt. 21-1 at 3 [JA-375]. Thus, if the company consistently fails to respond to “red flags,” it is reasonably foreseeable that unaddressed fraud will harm all consumers,

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<sup>10</sup> See Complaint, *FTC v. MoneyGram Int’l, Inc.*, No. 1:09-cv-6576 (N.D. Ill. Oct. 19, 2009).

including those in the United States.<sup>11</sup> *See, e.g., FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010) (finding liability for “unfair practices” where website, despite consumer complaints and knowledge that website would be used for fraudulent purposes, failed to properly verify account information before delivering online checks). For example, if Western Union fails to respond to hundreds of complaints about fraud-induced money transfers from consumers in the United Kingdom, France, Germany, and elsewhere to Jamaica, all relating to a single global lottery scam, such inaction may well reflect similarly insufficient efforts to detect and prevent money transfers by U.S. victims of that same fraud.

Indeed, Western Union’s own documents acknowledge that fraud

[REDACTED]

[REDACTED] AFP at 2 (sealed) [JA-1015]. Thus, Western Union foresees that its users can be exposed to an unreasonable risk of harm from money transfers on its network. Western Union concedes as much in its

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<sup>11</sup> The fact that the “red flag” may be provided by a foreign consumer is of no moment. There is no reason why a complicit agent would discriminate between U.S. transfers and foreign transfers. FTC Br. 23-24. Thus, *all* complaints are relevant to evaluating the agent’s complicity and Western Union’s response. *Id.*

brief, where it acknowledges that “given the ease with which [the money transfer] system allows money to be transferred, it also attracts fraudsters, who seek to abuse Western Union’s services to victimize the unwary through common fraud schemes.” WU Br. 4-5.

Western Union is therefore wrong when it contends that “there is no logical connection between a complaint from a consumer in Poland regarding a foreign agent in France and domestic U.S. injury.” WU Br. 34. That claim fails for two reasons. First, Western Union’s failure to address such a complaint may well subject consumers in the United States to fraud-induced money transfers received by the same French agent. Second, such a failure to take responsive action with respect to that agent may be evidence of a systemic failure by Western Union to take adequate steps with respect to agents worldwide, including those in the United States. Thus, the complaints are directly relevant to an evaluation of conduct by Western Union that may put American consumers at risk.

**C. Comity Concerns Do Not Shield Foreign Complaints from a U.S. Law Enforcement Investigation**

Western Union claims that producing the foreign complaints will expose it to sanctions imposed by foreign governments. But Western



Union has not cited a single case “brought by EU privacy authorities against U.S. companies for producing data to a U.S. enforcement authority in the context of a specific investigation.” Dkt. 28-7 ¶ 6.15 [JA-783]. There is no apparent basis for Western Union’s claim.

Even if Western Union could cite such a case, however, foreign laws “do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that [foreign law].” *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.29 (1987) (citing *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-06 (1958)).<sup>12</sup> Even in the context of purely private discovery disputes, courts merely require a “particularized analysis of the respective interests of the foreign nation and the requesting nation.” *See Aérospatiale*, 482 U.S. at 543-44 &

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<sup>12</sup> Western Union’s reliance (WU Br. 37) on *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), is misplaced. *Hoffman* addressed a different question – *i.e.*, whether U.S. antitrust law should apply to conduct by *foreign* companies that causes *foreign harm* independent of domestic harm, where “that foreign harm alone gives rise to the plaintiff’s claim.” *Id.* at 165 (emphasis added). The Court acknowledged that, by contrast, “principles of comity provide Congress greater leeway when,” as here, “it seeks to control through legislation the actions of *American* companies.” *Id.*

n.28.<sup>13</sup> Most of the factors that courts consider when conducting that analysis in private disputes counsel in favor of disclosure here. The complaints are important to the Commission's investigation; the requested documents are discrete and easily identifiable; although non-U.S. residents provided the information in the complaints, the complaints themselves are held in the United States; the United States has a strong national interest in regulating a U.S. corporation and in protecting its users from fraud; and, finally, important interests of foreign nations will not be undermined. Here, of course, the governmental interest of the U.S. in effective law enforcement is especially strong. Moreover, European regulators have recognized that non-EU law enforcement agencies may properly obtain EU personal data, as needed for a specific investigation.<sup>14</sup>

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<sup>13</sup> See also Restatement (Third) of Foreign Relations Law § 442(1)(c) (1987).

<sup>14</sup> Letter from Peter Schar, Chairman, Article 29 Data Protection Working Party, to Ethiopis Tafara, SEC (July 3, 2006), [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2006-07-03-reply\\_whistleblowing.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2006-07-03-reply_whistleblowing.pdf) (acknowledging that internal whistleblowing complaints under Sarbanes-Oxley may be disclosed to non-EU regulators); Press Release, European Data Protection Supervisor, EU Passenger Name Record: Proposed System Fails to Meet Necessity Requirement, Says EDPS (Mar. 28, 2011), <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Do>

Western Union overlooks entirely *Aérospatiale*, the Restatement, and the numerous cases in which courts have enforced administrative subpoenas or required production even in the face of conflicting foreign law.<sup>15</sup> Western Union cites a general EU data protection directive, but it has not identified any particular European nation's data protection law that would sanction the company for complying with the CID.<sup>16</sup> Nor does Western Union address the status of privacy law in countries in Asia, Africa, and the Americas that either have no privacy laws or expressly authorize the kind of disclosures requested here.<sup>17</sup>

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cuments/EDPS/PressNews/Press/2011/EDPS-2011-03\_EU\_PNR\_EN.pdf (“[P]assengers’ personal data could certainly be necessary for law enforcement purposes in targeted cases, when there is a serious threat supported by concrete indicators.”).

<sup>15</sup> See, e.g., *Linde v. Arab Bank, PLC*, 706 F.3d 92, 109-15 (2d Cir. 2013); *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22-23 (2d Cir. 1998); *CAB v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 952-53 (D.C. Cir. 1979); *SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215, 218-19 (9th Cir. 1945); *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845(TPG), 2013 WL 491522, at \*9-\*11 (S.D.N.Y. Feb. 8, 2013); *Vanguard Int’l Mfg., Inc. v. United States*, 588 F. Supp. 1229, 1232-34 (S.D.N.Y. 1984); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 114-19 (S.D.N.Y. 1981).

<sup>16</sup> Although the EU has a general data protection directive, the scope of the directive depends on how the directive is implemented locally in each EU country. See Dkt. 28-7 ¶ 4.4 [JA-776].

<sup>17</sup> See Dkt. 28-6 [JA-771]; *Privacy Comm’r of Can. v. SWIFT* ¶ 48 (Apr. 2, 2007), [http://www.priv.gc.ca/cf-dc/2007/swift\\_rep\\_070402\\_e.asp](http://www.priv.gc.ca/cf-dc/2007/swift_rep_070402_e.asp); *NML*

In any event, as the Commission's expert explained below (Dkt. 28-7 [JA-773 to -786]), the claimed conflict between enforcement of the CID and EU privacy law is largely illusory. *See* WU Br. 38-41. In particular, Western Union need not obtain consent from its affected users. It has already obtained that consent by requiring senders to use a Terms and Conditions form that specifically mentions fraud prevention and potential disclosure to law enforcement agencies. *See* Dkt. 28-7 ¶¶ 6.12-7.4 [JA-783 to -784]; Dkt. 22-8 at 46-47 [JA-538 to -539]. Beyond consent, other grounds would justify disclosure of the personal data in the consumer complaints without exposing the company to the risk of violating EU privacy law. *See* Dkt. 28-7 ¶¶ 6.1-6.11, 6.14 [JA-780 to -783].

Additionally, Western Union has not established that it would be subject to sanctions for producing the complaints. *See* WU Br. 40-41 & n.12; *First Nat'l City Bank of N.Y. v. IRS*, 271 F.2d 616, 619-20 (2d Cir. 1959) (reinstating IRS summons seeking foreign bank records after bank failed to establish that disclosure would violate foreign law). Western Union's reliance on an investigation by Belgian regulators of a

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*Capital, Ltd.*, 2013 WL 491522, at \*3-\*9.

Belgian company is unavailing. *See* WU Br. 40. That controversy arose when SWIFT, a Belgian company, provided the U.S. Department of the Treasury with regular or so-called “mass” transfers of personal data, unrelated to any specific investigation. *See* Dkt. 28-7 ¶ 11.2 [JA-785]. The Belgian regulators themselves noted that the Belgian Privacy Act does not apply to data located outside the European Union.<sup>18</sup>

Western Union’s reliance on a declaration attached to its unfiled surreply is also misplaced. *See* WU Br. 41. Because the district court denied Western Union leave to file the surreply, Dkt. 38 [JA-826 to -827], the attached declaration is not part of the record on appeal. *See Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1127 n.5 (9th Cir. 2009). But even were this Court to consider it, the declaration merely speculates that Western Union “may” face sanctions in the EU. Dkt. 35-1 ¶ 13 [JA-798].

Finally, Western Union’s representation (WU Br. 39) that it acts “consistent[ly]” with the U.S.-EU Safe Harbor Framework when it

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<sup>18</sup> *See* Commission for the Protection of Privacy, Control and Recommendation Procedure Initiated with Respect to the Company SWIFT Scrl ¶ 223 (Dec. 9, 2008), [http://www.privacycommission.be/sites/privacycommission/files/documents/swift\\_decision\\_en\\_09\\_12\\_2008.pdf](http://www.privacycommission.be/sites/privacycommission/files/documents/swift_decision_en_09_12_2008.pdf).

obtains users' consent has no bearing on this appeal. The Safe Harbor Framework does not apply to Western Union, which is not a participant. *See* Dkt. 1-3 at 24 n.76 [JA-187]. Even if Western Union were in the Safe Harbor, the Safe Harbor Framework itself provides that "where U.S. law imposes a conflicting obligation, U.S. organizations whether in the safe harbor or not must comply with the law."<sup>19</sup>

**FEDERAL TRADE COMMISSION'S RESPONSE TO  
WESTERN UNION'S CROSS-APPEAL, No. 13-3272**

**II. The District Court Did Not Abuse Its Discretion in  
Ordering Production of Documents Relating to the Work of  
the Monitor**

This Court applies a deferential standard of review to a district court decision enforcing administrative process. It reviews that decision for "abuse of discretion," which will be found only if the district court "(1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a

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<sup>19</sup> Export.gov, Damages for Breaches of Privacy, Legal Authorizations and Mergers and Takeovers in U.S. Law, § B, [http://export.gov/safeharbor/eu/eg\\_main\\_018482.asp](http://export.gov/safeharbor/eu/eg_main_018482.asp) (last updated Jan. 30, 2009).

legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions.” *NLRB ex rel. Int’l Union of Elec., Radio & Mach. Workers v. Consol. Vacuum Corp.*, 395 F.2d 416, 419-20 (2d Cir. 1968); *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 99-100 (2d Cir. 2012) (internal quotation marks omitted). If the district court finds that the information sought by the agency is irrelevant, this Court will affirm unless that determination is “clearly erroneous.” *See RNR Enters., Inc. v. SEC*, 122 F.3d 93, 97 (2d Cir. 1997).

**A. Documents Pertaining to the Work of the Monitor Are Relevant to the FTC’s Investigation of Western Union’s Anti-Fraud Practices**

The district court correctly deferred to the Commission’s determination that documents pertaining to the monitor’s evaluation of Western Union’s AML program are relevant to the Commission’s investigation. The Commission had determined that its inquiry into whether Western Union’s oversight of its network is sufficient to protect consumers from fraud-induced money transfers would be assisted by information about the monitor’s review of the similar AML program. Dkt. 1-3 at 9-14 [JA-172 to -177].

Western Union asks the Court to second-guess both the Commission and the court below. It points largely to supposed substantive differences between money laundering and fraud. WU Br. 45-46. Whatever the claimed differences in the underlying acts, however, Western Union has a single network for processing global money transfers. Dkt. 1 at 4 [JA-14]; Dkt. 21-1 at 3 [JA-375]. Its AML and anti-fraud programs also have a common purpose – “to prevent illegal transactions occurring through the company’s money transfer system.” Dkt. 1-3 at 13 [JA-176]. Both programs scrutinize the same consumers, the same money transfers, the same agents, and the same geographic regions not only for signs of money laundering, but also for fraud and other illegal activities. Dkt. 1-1 at 50 [JA-96]; AFP at 7 (sealed) [JA-1020]; *see also* Dkt. 28-5 at 25 [JA-764] (“[C]ustomer and transactional information used for AML purposes is often the same customer and transactional information needed for fraud investigations.”).

It does not matter that Western Union currently maintains its AML and anti-fraud programs in separate departments. *See* WU Br. 48-49. Until recently, the AML and anti-fraud operations were both



“embedded” in the same corporate unit. Dkt. 28-2 at 9 [JA-735]. Thus, for a significant part of the period encompassed by the CID (*i.e.*, January 1, 2010 to the date of compliance), Western Union operated its AML and anti-fraud programs from the same department.

Furthermore, Western Union uses similar tools for detecting and responding to reports of suspected money laundering and fraud. *See* Dkt. 1-3 at 11-12 (sealed) [JA-988 to -989]. [REDACTED]  
[REDACTED] Dkt. 1-1 at 55 [JA-101]; AFP at 14-16 (sealed) [JA-1027 to -1029]. [REDACTED]  
[REDACTED]  
[REDACTED] Dkt. 1-1 at 56 [JA-102]; AFP at 4 (sealed) [JA-1017]. [REDACTED]  
[REDACTED] Dkt. 1-1 at 55 [JA-101]; AFP at 3 (sealed) [JA-1016]. In fact, Western Union touted the interrelated nature of these tools in promoting its own annual “Anti-Money Laundering, Anti-Fraud and Compliance Conference” as a program for simultaneously teaching the “best practices in identifying and preventing fraud and money laundering.” Western Union’s Senior Vice President, who oversees the company’s AML and anti-fraud

programs, described that event as “one of North America’s largest anti-money laundering/anti-fraud conferences that helps professionals from a wide variety of industries better identify how to protect their organizations, and consumers, from fraud.”<sup>20</sup> It is clear that evidence pertaining to the monitor is relevant to the FTC’s investigation.

Finally, regulatory provisions that require Western Union to police its money transfer network for money laundering also require it to police its network for fraud. As this Court has recognized, mail fraud and wire fraud are “predicate crimes” under the money laundering statutes. *See, e.g., United States v. All Funds Distributed to Weiss*, 345 F.3d 49, 53 (2d Cir. 2003). In other words, acts of fraud may be connected to money laundering. As a result, there is a substantial overlap between Western Union’s legal obligations in conducting its AML and anti-fraud programs. Those overlapping requirements are also evident in the work of the monitor. Although the monitor was appointed as part of a settlement of money laundering allegations

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<sup>20</sup> *See* Press Release, Western Union, Western Union Hosts 7th Annual Anti-Money Laundering, Anti-Fraud and Compliance Event in Denver (Sept. 18, 2012), <http://ir.westernunion.com/News/Press-Releases/Press-Release-Details/2012/Western-Union-Hosts-7th-Annual-Anti-Money-Laundering-Anti-Fraud-and-Compliance-Event-in-Denver1131072/default.aspx>; *see also* [REDACTED]

relating to drug trafficking and human smuggling, his work encompasses a broader review of Western Union's AML program required by the Bank Secrecy Act. Dkt. 1-3 at 9-10 [JA-172 to -173]. That Act draws no distinction between anti-money laundering and anti-fraud programs. As a covered "money services business," Western Union must file Suspicious Activity Reports for "possible violation[s] of law or regulation." This includes a specific requirement that Western Union report instances of suspected consumer fraud.<sup>21</sup> Indeed, the Financial Crimes Enforcement Network of the Department of the Treasury ("FinCEN") – the agency primarily responsible for combatting money laundering – expressly recognizes that money laundering and fraud are "quite often interconnected." As described by FinCEN's then director, programs to fight one or the other are mutually reinforcing because "the resources being spent on fraud detection and prevention within financial institutions may well support the AML program, and vice versa." Dkt. 28-5 at 9-10, 19, 25 [JA-748 to -749, JA-758, JA-764].

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<sup>21</sup> 31 U.S.C. §§ 5312(a)(2)(R), 5318(g), (h); 31 C.F.R. §§ 1022.210(d), 1022.320(a); Fin. Crimes Enforcement Network & Internal Revenue Serv., Bank Secrecy Act/Anti-Money Laundering Examination Manual for Money Services Businesses 86 (2008), *available at* [http://www.fincen.gov/news\\_room/rp/files/MSB\\_Exam\\_Manual.pdf](http://www.fincen.gov/news_room/rp/files/MSB_Exam_Manual.pdf).

As the district court acknowledged, “a money transfer can be an object or subject of laundering and it can be an aspect of fraud. It can do both, and [the FTC is] interested in the fraud.” Dkt. 41 at 11-12 [JA-839 to -840]. The court correctly required Western Union to comply with Specification 1 of the CID in its entirety.

**B. The Commission’s Investigatory Resolution Provided Sufficient Notice of the Nature and Scope of the Investigation**

Western Union claims that the investigatory resolution under which the CID was issued was not sufficient to provide notice of the purpose of the investigation or to allow the court to assess the relevance of the requested documents. The FTC Act requires a CID to “state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.” 15 U.S.C. § 57b-1(c)(2) [SA-29]. The Commission’s regulations state that “[a] copy of a Commission resolution \* \* \* shall be sufficient to give \* \* \* notice of the purpose of the investigation.” 16 C.F.R. § 2.6. The resolution at issue here authorized an investigation and the use of compulsory process:

To determine whether unnamed telemarketers, sellers, *or others assisting them* have engaged or are engaging in: (1)

unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the [FTC Act]; and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. pt 310 (as amended), 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.

Dkt. 1-1 at 25 [JA-71] (emphasis added). This resolution provided all the information required by statute – the nature of the conduct constituting the alleged violation (whether telemarketers, sellers, or *others assisting them* engaged in *unfair*, deceptive, or abusive practices, *including providing substantial assistance and support to such practices*) – and it identified the applicable provisions of law (*Section 5 and the Telemarketing Sales Rule*). No law requires the Commission to draft its resolutions more specifically – *e.g.*, to alert the subject of an investigation to any particular wrongful conduct before it investigates. *See, e.g., FTC v. Nat'l Claims Serv., Inc.*, 1999 U.S. Dist. LEXIS 3312 (E.D. Cal. Feb. 9, 1999). Such a requirement would impede agency investigations by forcing the Commission to issue a new resolution each time investigators encounter a variation of the practice that originally triggered the investigation.

Contrary to Western Union's contention (WU Br. 52-56), the notice requirement in the 1980 FTC Improvements Act was not intended to force the Commission, in advance of an investigation, to delineate the exact parameters of its inquiry. Courts have approved resolutions comparable to the one at issue here without articulating any concern about their ability to assess the relevance of the requested documents, both before and after the FTC Improvements Act. In *FTC v. Carter*, for example, the district court rejected a challenge to a resolution that, citing Section 5 of the FTC Act and Section 8(b) of the Cigarette Labeling and Advertising Act, stated that the investigation concerned "the advertising, promotion, offering for sale, sale, or distribution of cigarettes." 636 F.2d 781, 788 (D.C. Cir. 1980). This resolution left the court "comfortably apprised of the purposes of the investigation and subpoenas issued in its pursuit." *Id.*; see also *Nat'l Claims Serv., Inc.*, 1999 U.S. Dist. LEXIS 3312 at \*4 ("unnamed business opportunity firms" who sell "business opportunities \* \* \* to consumers [and] have been or are engaged in unfair or deceptive acts or practices"); *FTC v. O'Connell Assocs., Inc.*, 828 F. Supp. 165, 167 n.1 (E.D.N.Y. 1993) ("[t]o determine whether unnamed consumer reporting

agencies or others are or may be engaged in acts or practices in violation of Section 5 [of the FTC Act] and of the [Fair Credit Reporting Act]”). Indeed, as the district court recognized, the resolution is “no more general or more specific than the usual general resolution that you find with all administrative agencies.” Dkt. 41 at 27 [JA-855].

Western Union has not shown that the resolution did not comply with statutory standards or that the company was prejudiced in any way by the form of notice.

## CONCLUSION

The district court's order should be affirmed in part and reversed in part and the matter remanded with instructions to enter an order directing Western Union to comply with the CID in its entirety.

Respectfully submitted,

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Dated: April 28, 2014

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28.1(a), I certify that the Response and Reply Brief for Appellant/Cross-Appellee Federal Trade Commission complies with the type-volume limitation set forth in Fed. R. App. P. 28.1(e)(2)(A)(i) and contains 7,591 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the *Microsoft Word 2010* word processing program used to prepare this brief.

I further certify that the Response and Reply Brief for Appellant Federal Trade Commission complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and has been prepared in a proportionally spaced typeface using *Microsoft Word 2010* in 14-point Century Schoolbook font.

Date: April 28, 2014

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**CERTIFICATE OF SERVICE OF BRIEF FILED UNDER SEAL**

I hereby certify that on April 28, 2014, I served a courtesy copy of the Response and Reply Brief for Appellant Federal Trade Commission filed under seal this day upon counsel for respondents The Western Union Company and Lonnie Keene, Keene Consulting Arizona, LLC, through FedEx overnight delivery service and by e-mail to the addresses below:

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