13-3100(L)

& 13-3272 (XAP)

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

BRIEF OF APPELLEE AND CROSS-APPELLANT THE WESTERN UNION COMPANY

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CORPORATE DISCLOSURE STATEMENT
OF WESTERN UNION COMPANY
UNDER FED. R. APP. P. 26.1

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee/Cross-Appellant The Western Union Company ("Western Union"), through its counsel, files this Corporate Disclosure Statement. Western Union (a private non-governmental party) states that it has no parent company, that it is a publicly traded entity, and that no entity owns more than ten percent of its stock.

/s Charles G. Cole_____

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JURISDICTIONAL STATEMENT

Appellee The Western Union Company ("Western Union" or "Company") does not contest the jurisdictional statement filed by the Federal Trade Commission ("FTC"). Western Union filed a timely notice of cross-appeal on August 27, 2013.

STATEMENT OF THE ISSUES

1. Whether the district court properly refused to enforce an FTC Civil Investigative Demand ("CID") seeking consumer complaints related to wholly foreign wire transfers, where neither the senders nor receivers were located in the United States, and the transfers themselves caused no injury in the United States.
2. Whether the district court erred in enforcing an FTC CID seeking documents relating to a court-appointed monitor's oversight of Western Union's anti-money laundering program in the Southwest border area of the United States, when the Commission has no jurisdiction over money laundering, the information sought by the FTC is not reasonably relevant to an investigation of consumer fraud, and the CID is deficient under the FTC Improvements Act.

STATEMENT OF THE CASE

The FTC's investigatory authority is defined and limited by federal law. Congress authorized the FTC to regulate "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1), (2) [SA-20]. Where the FTC seeks to reach conduct overseas, its jurisdiction is restricted to such practices that "involve material conduct occurring within the United States" or that are "likely to cause reasonably foreseeable injury within the United States." *Id.* § 45(a)(4) [SA-20-21]. Federal law also vests district courts with a critical role in enforcing FTC civil investigative demands ("CIDs"), a role which requires judicial review of their purpose, relevance, and scope. *Id.* § 57b-1(e) & (h) [SA-33-34].

The FTC seeks enforcement here of a CID that exceeds these legislative limitations. The FTC has been investigating how third parties have used Western Union's money transfer services to engage in consumer fraud. Since 2009, Western Union has voluntarily produced more than two dozen categories of documents and data. For instance, Western Union has provided all complaints it has received about consumer fraud involving a U.S. sender or recipient. But the parties disagree on the FTC's authority to demand two additional categories of documents: Western Union's consumer complaints relating to wholly foreign transactions, and internal communications relating to Western Union's efforts to prevent money laundering (as opposed to consumer fraud) along the U.S.

Southwest border. In December 2012, the FTC issued a CID with two specifications corresponding to these two disputed categories.

After a hearing, the district court issued an order enforcing in part and denying in part the FTC's request for an order enforcing the CID. Dkt. 47 [JA-868-74]. The court denied the FTC's demand that Western Union produce documents relating to consumer fraud complaints received by Western Union from foreign victims, where neither the sender nor the receiver of the funds was located in the United States. The district court agreed with Western Union that, under the U.S. SAFE WEB Act, 15 U.S.C. § 45(a)(4) [SA-20-21], the FTC lacked authority to investigate, and thus to demand production of, documents related to such wholly foreign fraud.

The CID also sought documents relating to a monitor appointed as part of a settlement of an Arizona state investigation of cross-border (third-party) money laundering. Money laundering is very different from consumer fraud. In a money-laundering transaction, the sender is knowledgeable and complicit in the illegal purpose of the transfer, which is to carry out illegal activity or conceal the proceeds of illegal activity. *See, e.g.*, the Money Laundering Control Act of 1986, 18 U.S.C. § 1956. In consumer fraud, by contrast, the sender is an unknowing victim of a fraud scheme. The FTC has no authority over money-laundering transactions. Yet, the FTC sought such documents not because they relate to consumer fraud,

but to assess Western Union's "culture of compliance." The district court nevertheless rejected Western Union's challenge and enforced the CID with respect to these anti-money laundering documents.

The FTC appealed the district court's ruling on wholly foreign documents, and Western Union cross-appealed on the demand for anti-money laundering related documents.

A. Western Union's Business and Its Consumer Fraud Prevention Efforts

Western Union is a global financial services company, with over 45,000 agent locations throughout the United States alone. Dkt. 21-1 ¶ 6 [JA-375]. Western Union's primary business involves transmitting money sent by one person to another via interstate and international wires. Western Union facilitated more than 226 million consumer transactions, involving over $81 billion in global consumer money transfers, in 2011 alone. Dkt. 28-3 at 2 [JA-1015].

These money transfers are a vital part of the international economy. Consumer money transfers allow individuals to instantly wire funds to family members worldwide in order to help them pay bills, purchase and sell goods and services, or provide crucial assistance in emergencies. Indeed, these money transfers are the only practical way many people have of moving money around the world. But given the ease with which that 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. These schemes follow familiar scripts, such as requesting money from consumers to cover taxes associated with foreign lottery winnings, or targeting grandparents for emergency funds purportedly needed by their grandchildren in an emergency abroad.

Western Union is committed to protecting consumers from fraud. The Company has a comprehensive and multi-faceted consumer protection program that is designed to prevent its services from being used for fraud. Since at least 2007, Western Union has employed a robust Consumer Protection Group dedicated to fraud prevention. Dkt. 28-3 at 2, 5 [JA-1015, 1018]. In 2012, Western Union established the Fraud Risk Management Group, a separate unit dedicated exclusively to fighting consumer fraud, and committed millions of dollars to systems enhancements as part of its fraud prevention efforts. *Id.*

The Company's fraud prevention program has four main elements, each specifically geared to *consumer fraud* prevention. *See* Dkt. 21-1 ¶ 14 [JA-377].

- Consumer and Agent Education and Awareness. Western Union provides consumers with prominent fraud warnings on all money transfer forms and at all points of sale, conducts outreach efforts through the Company's website, media, and consumer advocacy groups, and provides mandatory training to agents specific to the issue of consumer fraud. Dkt. 21-1 ¶ 15 [JA-377]; Dkt. 28-3 at 3, 20-24 [JA-1016, 1033-37];
- Fraud Controls. Western Union maintains a dedicated fraud hotline, a Courtesy Callback program (which proactively contacts consumers suspected of being defrauded), a Real-Time Risk Assessment program (which analyzes existing consumer fraud complaints to create rules that automatically halt high-risk transactions), and an Interdiction program

(which prevents both suspected fraudsters and chronic victims from using Western Union's money transfer service). Dkt. 21-1 ¶ 16 [JA-377]; Dkt. 28-3 at 14, 16-18 [JA-1027, 1029-31];

- Agent Monitoring. Western Union conducts separate agent monitoring specific to consumer fraud based on the frequency of consumer fraud complaints. Dkt. 21-1 ¶ 18 [JA-378]; Dkt. 28-3 at 8-9 [JA-1021-22]; and
- Law Enforcement Collaboration. Western Union works with law enforcement officials specifically to combat consumer and telemarketing fraud. Dkt. 21-1 ¶ 18 [JA-378]; Dkt. 28-3 at 24-26 [JA-1038-40]. Through this cooperation, Western Union has helped frustrate numerous individual schemes and developed further safeguards to prevent fraud victimization.

As a result of these measures, Western Union has dramatically decreased the ability of fraudsters to employ Western Union's services to defraud U.S. consumers.

B. The Commission's Investigation

In 2009, at the FTC's request, Western Union met with FTC staff to discuss its consumer fraud prevention efforts. Dkt. 21-1 ¶ 25 [JA-380]. Since that first meeting, Western Union has met with the FTC on at least ten occasions and voluntarily provided substantial documentation and information to assist the FTC in understanding Western Union's consumer fraud prevention program. Specifically, Western Union has voluntarily provided at least 25 categories of documents and information, including, for example, all domestic fraud complaints, the Company's policies and practices to minimize consumer fraud within its money transfer system, the Company's consumer fraud reporting policies, and

detailed information about its agent hiring, training, monitoring, and termination processes. Dkt. 21-1 ¶ 27 [JA 1008-09].

In April 2011, the FTC issued Resolution 0123145, entitled "Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others." Dkt. 21-3 [JA-393]. That resolution did not target Western Union, or even refer to money transfers, but instead broadly authorized the FTC to use compulsory process to determine whether any unnamed telemarketers, sellers or others assisting them have engaged in acts that violate either of the two major statutes within the FTC's enforcement authority. The resolution purports to authorize the FTC:

> To determine whether unnamed telemarketers, sellers, or others assisting them have engaged in or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); 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. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

Dkt. 21-3 [JA-393].

On the basis of that omnibus resolution, the FTC in December 2012 issued a CID that sought additional documents from Western Union. The CID sought a range of documents, including: (1) "[a]ll documents referring to or relating to complaints made to Western Union by consumers anywhere in the world, referring or relating to fraud-induced money transfers"—this request thus sought, *inter alia*, fraud complaints in wholly foreign (non-U.S.) transactions; and (2) "all documents referring or relating to communications with [a] [m]onitor" who was engaged as part of a settlement of an investigation by the Arizona Attorney General, which related to money laundering tied to human smuggling and drug trafficking along the U.S. Southwest border. Dkt. 22-10 at 7-8 [JA-574-75].

Western Union has produced a substantial number of documents in response to the two specifications in the CID. For example, it has provided (and this appeal does not concern) documents related to consumer fraud complaints in which one part of the transaction (either the sender or recipient) is located within the United States. Western Union objected, however, to providing documents relating to wholly foreign transactions, in which the sender and recipient were both located outside the United States. *See* Dkt. 1-1 at 10-12 [JA-57-59]; Dkt. 21 at 17-19 [JA-365-67]. Western Union expressed concern that the fraudulent conduct that is the subject of these documents was beyond the FTC's authority and the production

could implicate a range of foreign privacy laws. *See* Dkt. 1-1 at 10-13 [JA-57-60]; Dkt. 21 at 17-23 [JA-365-71].

With respect to the second specification, Western Union objected because the documents related to a monitor's oversight of use by third parties of Western Union's services in money laundering activities—a subject matter well outside of the FTC's statutory authority. The monitor was appointed under a settlement between Western Union and the Arizona Attorney General to assess the Company's efforts to prevent money laundering related to "human smuggling or narcotics trafficking" along the U.S. Southwest border. Dkt. 22-9 at 3 [JA-543]. The monitor is responsible for "review[ing] and evaluat[ing] the effectiveness of Western Union's risk-based Anti-Money Laundering ("AML") compliance program for the Southwest Border Area"—a program "to prevent, detect, and report potential money laundering activities" in "Arizona and the area within 200 miles north and south of the United States/Mexico border." Dkt. 22-3 ¶¶ 21, 3 [JA-462, -454]. The Settlement Agreement recognizes that "the Southwest Border Area poses special money laundering risks associated with criminal activity by drug, human, and weapons smuggling organizations" that are "regional in nature." *Id.* ¶ 10 [JA-456].

Western Union's AML program is separate and distinct from its consumer fraud prevention efforts. Dkt. 21-1 ¶ 19 [JA-378]. The AML program is aimed at

preventing the violation of specific anti-money laundering statutes enforced by agencies other than the FTC, and involves situations in which the sender is not a victim of fraud, but rather a person complicit in the underlying transaction. Dkt. 21-1 ¶ 20 [JA-378]; Dkt. 28-4 ¶ 2 [JA-739]. As a result, the AML program has different goals, elements, and operations and procedures from Western Union's consumer fraud prevention program. Dkt. 21-1 ¶¶ 9-13, 19, 23 [JA-376, 378-79]. Each program has its own separate team and management—some of whom are located in different cities—and since before the CID's issuance, the two programs have been located in separate departments. *Id.* ¶¶ 22, 24 [JA-379, 380].

The second CID specification seeks documents created pursuant to terms in Western Union's settlement agreement with Arizona, the court's approval of the settlement, and the monitorship engagement letter protecting their confidentiality. *See, e.g.*, Dkt. 22-3 ¶ 37 [JA-452] (prohibiting disclosure of monitor reports and other monitor material); Dkt. 22-1 ¶ 9 [JA-436] (limiting the monitor's ability to disclose confidential information provided by Western Union); Dkt. 22-4 at 8 [JA-475] (restricting any disclosure of Western Union's information to "another law enforcement or prosecutive agency" unless kept "confidential to the maximum extent permissible under law"). The Arizona court in which the settlement was filed twice denied the disclosure of the monitor's anti-money laundering related documents absent federal judicial enforcement. The state court found that

"Western Union had a reasonable expectation that their information and the [m]onitor's reports would be accessible only to the State of Arizona and this [Arizona] Court" and that the Company's "proprietary information and practices would [not] be otherwise provided to a third party who has no enforceable limitation on its use or disclosure." *See* Dkt. 22-6 at 2-3 [JA-485-86].

C. The Commission's Order Denying Western Union's Petition to Quash the CID

After the Arizona court's second denial of the requested materials, Western Union filed an administrative petition to quash both specifications of the CID—to the extent they sought documents relating to wholly foreign transactions or to the monitor's scrutiny of Western Union's anti-money laundering efforts. The FTC denied Western Union's petition. *See* Dkt. 1-1 [JA-48-64]. The Commission rejected Western Union's challenges that the authorizing resolution provides insufficient notice of the FTC's investigation, concluding that it provides "more information than the bare text of Section 5." Dkt. 22-9 at 8 [JA-548].

The Commission concluded that wholly foreign consumer fraud documents were within the agency's authority because: (1) "the complaints sought by the CID are maintained in the United States," Dkt. 22-9 at 20 n.63 [JA-560]; (2) "the 'material conduct' at issue [] is Western Union's actions in developing and administering its antifraud program," rather than the underlying fraud, *id.* at 20 [JA-560]; and (3) even though there is no U.S. component to the transaction,

"[a]ny future victims may include both U.S. and foreign consumers." *Id.* at 21 [JA-561].

The Commission reasoned that the monitor's reports and related documents were relevant because "there is substantial overlap between an [anti-money laundering] program and a program to detect consumer fraud." Dkt. 22-9 at 9 [JA-549]. To support that assertion, the Commission reasoned that "personnel were housed within the same corporate group" and that Western Union's anti-money laundering prevention at the U.S. Southwest border would shed light on Western Union's "culture of compliance." Dkt. 22-9 at 9, 13 [JA-549, -553].

D. The District Court's Ruling on Enforcement of the CID

After efforts to resolve the document dispute failed, the FTC filed an enforcement petition in the district court. The court denied enforcement of the CID with respect to wholly foreign fraud complaints, as outside the FTC's authority under the SAFE WEB Act. Dkt. 47 ¶ 5 [JA-869-70]. The court reasoned that such fraud "is outside the United States," and stated that it "doesn't follow" that such acts would victimize a U.S. consumer. Dkt. 41 at 21-22 [JA-849-50].

With respect to the CID specification seeking monitor reports and related anti-money laundering documents, the court acknowledged that money laundering "may be different" than fraud, but upheld the relevance of the CID because both situations "*have to do with money transfers[s]*." Dkt. 41 at 16-17 [JA-844-45]

(emphasis added). The court concluded that the documents were reasonably relevant and did not impose an undue burden, although the exact language of the order is incomplete. Dkt. 47 ¶ 6 [JA-870]. The court enforced the specification on monitor-related documents, subject to development of a proposed protocol and search terms to identify responsive documents. Dkt. 47 ¶ 13 [JA-871-72].

E. Post-Order Proceedings

The district court requested that the parties submit a proposed order based on the court's oral rulings, with competing proposals if they were unable to agree on form. Dkt. 41 at 28-29 [JA-856-57]. The court then signed an order without clear reference to which of the competing proposals it was endorsing. Dkt. 43 [JA-860-66]. The court subsequently issued a corrected order, which did not fully clarify the first order. *See, e.g.*, Dkt. 47 ¶ 6 [JA-870]. Western Union filed a Motion for Clarification, and the FTC filed an opposition that acknowledged that the court may wish to correct the order's language in the event of an appeal—but the district court denied the motion entirely. Dkts. 44-46, 50 [JA-875-954 & 966-67].

A further dispute arose regarding the scope of the search protocol under the court's order. The FTC sought a search protocol that required 1,692 searches to be run across 74 potential custodians. Western Union, believing that the FTC's proposal exceeded the scope of the court's order, indicated its intent to seek guidance from the court. *See* Dkt. 64.10 (November 6, 2013 letter to Judge

Hellerstein). The FTC preemptively filed a motion to show cause for contempt, and Western Union filed a motion for protective order. Dkts. 55 & 60-61. The parties subsequently resolved the dispute, and Western Union agreed to produce documents under the FTC's demanded protocol, subject to the Company's right to appeal the underlying order. Dkt. 67. Western Union has since reviewed 1.3 million documents, produced approximately 250,000 documents in response to the second specification, and created a privilege log containing more than 230,000 others, at a cost of more than $4.8 million.

SUMMARY OF ARGUMENT

The two CID demands at issue in this appeal plainly exceed the agency's statutory investigative authority and are not reasonably relevant to its investigation of consumer fraud. The CID is thus improper under the Supreme Court's decision in *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), and should be quashed.

As an initial matter, the FTC seeks judicial approval for its information demands on the ground that any challenge to its investigative authority is premature. However, the FTC waived that argument, failing to raise it either in administrative proceedings on the CID or in enforcement proceedings in the district court. The Commission affirmatively invited the district court to decide whether "[t]he CIDs are within the lawful authority of the agency," Dkt. 2 at 13

[JA-234], and acknowledged that this inquiry is appropriate at the subpoena-enforcement stage. *Id.* at 11 [JA-232] (citing *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 97 (2d Cir. 1997)). The FTC cannot take a different position on appeal. In any event, the FTC's cases—and many others—recognize an inquiry into statutory authority is required at the enforcement stage. The questions presented by Western Union's challenge to the FTC's authority are essentially legal and ready for review.

The district court correctly held that the FTC does not have authority to demand documents involving wholly foreign transactions. The judicial presumption against extraterritoriality requires that the SAFE WEB Act be construed narrowly. Neither the statute's language nor its legislative history authorizes the FTC to investigate the wholly foreign transactions at issue here. The SAFE WEB Act limits the FTC's authority to unfair or deceptive acts or practices that "involve material conduct occurring within the United States" or "are likely to cause reasonably foreseeable injury within the United States." 15 U.S.C. § 45(a)(4)(A)(ii) [SA-21]. That statute was adopted to reach foreign actors who defraud U.S. citizens and conduct in the United States that victimizes foreign citizens.

The FTC cannot satisfy either standard under the statute. The FTC argues that Western Union's failure to prevent others from committing fraud overseas constitutes "material conduct" within the reach of the statute. However, "material

conduct" has been defined as conduct that directly causes the loss, and this Court has expressly recognized that "the failure to prevent fraudulent acts" fails to meet the "material conduct" standard. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975).

Similarly, conduct "likely to cause reasonably foreseeable injury within the United States" has been defined to require substantial domestic effects, and to exclude transactions with only remote or indirect effects. *North-South Fin. Co. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996) ("*Al-Turki*"). The district court did not abuse its discretion in concluding that it "doesn't follow" that a foreign actor who defrauds someone in his own country will victimize someone in the United States. Any effects here are totally speculative, remote and indirect. Further, the FTC's demand for the foreign complaints would implicate foreign data privacy laws, and should therefore be narrowly construed. In short, the FTC's demand for complaints relating to wholly foreign acts of fraud is beyond the scope of its investigative powers.

The FTC's second CID demand, seeking documents related to certain aspects of Western Union's anti-money laundering program, is also plainly outside the FTC's authority. The anti-money laundering documents relate to activities distinct from consumer and telemarketing fraud. Money laundering, by definition, involves a sender complicit in the illegal transaction, and therefore represents an

entirely different act than that of consumer fraud, where a sender is tricked into the transaction by the recipient. Further, the two programs are separate. The FTC cannot investigate compliance with an entirely different set of laws not under its jurisdiction based on a rationale that it is concerned with Western Union's "culture of compliance." On that theory, the FTC—or any other agency—could investigate *any* compliance program outside its authority. This violates the recognized standard that a subpoena must only seek information that is "reasonably relevant" to the agency's investigation. *Morton Salt*, 338 U.S. at 652; *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996).

Finally, the CID violates statutory requirements by failing to state the nature of the conduct under investigation. The resolution incorporated into the CID provides little more than a recitation of the FTC's statutory authority, and therefore provides no basis from which a court can conduct a relevance inquiry. Although Western Union has already produced the documents in response to this demand, this Court has the power to remedy the harm to Western Union by ordering the FTC to return the documents.

ARGUMENT

I. Standard of Review

Findings of fact in an administrative subpoena enforcement action are reviewed for abuse of discretion; conclusions of law are reviewed *de novo*.

Mollison v. United States, 481 F.3d 119, 122 (2d Cir. 2007) ("We review the District Court's factual findings for clear error and its interpretation of the [law] *de novo*"). This Court reviews carefully a district court's determination of relevance in enforcing agency information demands and will set aside a district court's relevancy determination where it fails to consider proper factors. *See EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136, 139 (2d Cir. 2009). "The determination of whether the information sought bears a sufficient relationship to the investigative purposes to permit enforcement of the subpoena is predominantly a matter of law." *Id*. at 142 (Newman, J., concurring); *Peters v. United States*, 853 F.2d 692, 695 (9th Cir. 1988) (scope of subpoena power is question of law reviewed *de novo*).

II. The FTC's Ripeness Arguments Were Waived and Are Without Merit

For the first time in more than a year of administrative and judicial proceedings relating to the CID—and only after the district court rejected its demand for wholly foreign documents—the FTC now asserts that this Court cannot decide the issue of whether the CID's demands fall within the agency's statutory authority. Appellant's Br. at 16-19. The FTC has plainly waived this argument by not raising it before the district court, and, in fact, inviting a ruling on its authority. But even if it is not waived, it is simply incorrect. A long line of cases authorizes courts to decide whether a demand falls within the statutory authority of the agency at the subpoena enforcement stage, and Congress made clear in enacting the FTC

Improvements Act of 1980 (Pub. Law No. 96-252, 94 Stat. 374) that the courts play an essential role in keeping the FTC within the bounds of its investigative authority.

A. The FTC Waived Its Objection to a Judicial Determination of the Scope of the FTC's Authority

The FTC asserts for the first time here that the determination of its statutory authority to investigate wholly foreign fraud is premature and should be deferred pending any enforcement action. Appellant's Br. at 2, 16-19. But the FTC failed to raise this argument either in the Commission's order denying Western Union's motion to quash the CID or in enforcement proceedings before the district court. Instead, the FTC has consistently asked for a ruling that it has the authority to seek these documents under the SAFE WEB Act, 15 U.S.C. § 45(a)(4) [SA-20-21]. *See* Dkt. 22-9 at 17-23 [JA-557-63]; Dkt. 2 at 14 [JA-235]; Dkt. 28 at 5-7 [JA-707-09]. The FTC has waived its argument that the challenge to its statutory authority is premature.

It is a well-established principle of law that a party generally cannot raise an issue for the first time on appeal. *See, e.g., Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 104 (2d Cir. 2001) (refusing to address whether securities statute preempts negligent misrepresentation claim where not raised in proceedings below); *Mahant v. Lehman Bros.*, 32 F. App'x 598, 599 (2d Cir. 2002) (refusing to consider new theories as to why arbitration clause was unenforceable,

given plaintiff's "full and fair opportunity to raise any argument" before the district court). *See also Skipper v. French*, 130 F.3d 603, 610 (4th Cir. 1997) ("Ordinarily, for very good reasons, we do not decide issues on the basis of theories first raised on appeal.") (citation omitted); *United States v. Waechter*, 195 F.2d 963, 964 (9th Cir. 1952) ("[T]he government . . . cannot fairly urge as a ground for reversal a theory which it did not present while the case was before the trial court.").

The FTC contends that the challenge to its authority to investigate foreign fraud is not "ripe" unless and until it decides to bring an enforcement action. *See* Appellant's Br. at 19. The FTC thus suggests a prudential (non-constitutional) "ripeness" limitation on the court's authority.[1] But prudential ripeness is subject to waiver when not raised before the district court. *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("To the extent the dissent believes that the question is prudentially unripe, we reject that argument as waived"); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560

[1] There can be little doubt that the dispute here arises in a context concrete enough to satisfy constitutional ripeness standards. The question of the FTC's extraterritorial authority underlies a concrete demand for information by the FTC, and compliance with that demand causes real injury to Western Union in the form of disclosure of otherwise confidential business information. *See, e.g., In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 109-10 (2d Cir. 2013) ("The doctrine of constitutional ripeness 'prevents a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur.'") (citation omitted).

U.S. 702, 729 (2010) (holding prudential ripeness objection to takings claim waived).

Here, the FTC had every opportunity to argue before the district court (and even in administrative enforcement proceedings before the agency) that a challenge to its authority to investigate complaints of wholly foreign fraud and to examine Western Union's anti-money laundering measures was premature. It did not do so. Instead it argued—even in the heading of its initial argument—that "[t]he CIDs are within the lawful authority of the agency." Dkt. 2 at 13 [JA-234]. *See also id.* at 10 [JA-231] (asserting Commission's view that foreign complaints "plainly fall within [] enhanced [Section 5] jurisdiction" under the SAFE WEB Act); Dkt. 28 at 5-7 [JA-707-09] (arguing "the Court can simply enforce the CID on those [jurisdictional] grounds alone"). Whether its approach was intentional—in order to obtain judicial confirmation of its view of its statutory authority—or simply the result of an oversight, the result should be the same: The FTC, having failed to properly raise the issue below, and in fact having argued the scope of its authority on the merits, should be deemed to have waived any objection that consideration of its authority is premature.

B. The Court Properly Reviewed Whether "the Inquiry Is within the Authority of the Agency"

Even if the FTC had properly preserved its new ripeness argument, that argument did not preclude the district court from reaching the issue of whether the

FTC acted within its authority in issuing the CID specifications seeking documents related to extraterritorial fraud and anti-money laundering practices. The FTC Improvements Act makes clear that the FTC's determination of its purported need for documents as part of an investigation is not self-enforcing, instead requiring the FTC to petition a court to enforce a CID. *See* 15 U.S.C. § 57b-1(e) [SA-33]. Indeed, the Act's legislative history confirms that Congress intended the district courts to serve as a check on the FTC's propensity to serve "impossibly broad" subpoenas, 126 Cong. Rec. 2339, at 2394 (1980), and to engage in "fishing expeditions undertaken merely to satisfy the FTC's '"official curiosity,"' S. Rep. No. 96-500, at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1105.

Thus, as the FTC itself acknowledges (Appellant's Br. at 17), a court should not enforce a CID if (a) the inquiry is not "within the authority of the agency"; (b) the demand is "too indefinite"; or (c) the information sought is not "reasonably relevant to the inquiry." *Morton Salt*, 338 U.S. at 652. The Supreme Court noted, "[a] governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *Id.*

As part of its review, then, a court must "'assure itself that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency.'" *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586-87 (D.C. Cir. 2001) (*quoting*

FEC v. Machinists Non Partisan Political League, 655 F.2d 380, 386 (D.C. Cir. 1981)). Even the cases cited by the FTC recognize that courts "will not interpret the scope of [a] Resolution so broadly as to enable the agency to investigate a matter beyond the reach of the law it enforces." *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1316 (D.C. Cir. 2011) (citation omitted); *Ken Roberts*, 276 F.3d at 586 ("there is no doubt that a court asked to enforce a subpoena will refuse to do so if the subpoena exceeds an express statutory limitation on the agency's investigative powers") (citation omitted).

Applying this standard, courts have refused to enforce agency demands for information on the grounds that the underlying investigation was outside the scope of an agency's authority. *See, e.g., United States v. Univ. Hosp., State Univ. of N.Y. at Stoney Brook*, 729 F.2d 144, 150 (2d Cir. 1984) ("an agency is not entitled to information sought in connection with an investigation that 'overreaches the authority Congress has given'") (citation omitted); *see also Truckers United for Safety v. Mead*, 251 F.3d 183, 189-90 (D.C. Cir. 2001) (denying enforcement of subpoena because Department of Transportation Office of the Inspector General lacked authority to investigate motor carriers' compliance with safety regulations); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1082-83 (9th Cir. 2001) (quashing EEOC subpoena because Indian tribe was not subject to the ADEA); *Burlington N. R.R. Co. v. Office of the Inspector Gen.*, 983 F.2d 631 (5th Cir.

1993) (denying enforcement of subpoena because Inspector General of the Railroad Retirement Board lacked authority to conduct ongoing regulatory compliance investigations); *United States v. Inst. for College Access & Success*, No. 13-mc-81, 2013 WL 3853239, *4-6 (D.D.C. July 26, 2013) (IOG did not have the authority to enforce the subpoena against a private entity that did not receive funds or contract with the federal government).

The FTC argues (Appellant's Br. at 16) that a court need not determine whether a *subpoenaed party* is within the agency's jurisdiction at the subpoena enforcement stage. However, that factual question is not the one posed here. The issue of whether the demand for documents is within the agency's authority is one that can and should be decided now as a matter of law.[2] For the reasons that follow, the agency's demands challenged in this appeal are beyond its authority.

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[2] *See, e.g., Karuk Tribe Hous. Auth.*, 260 F.3d at 1073 (where "[r]esolution of this issue is a pure question of law . . . [it] is best resolved at the subpoena-enforcement stage, rather than in potential downstream litigation"); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 491-92 (7th Cir. 1993) (reaching a "question purely of law" regarding DOL's jurisdiction under the FLSA); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 837 F.2d 162 (4th Cir. 1988) (declining to enforce subpoena that exceeded the agency's statutory authority to seek cost data concerning government contracts); *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 369 (7th Cir. 1983) (finding "no doubt" that courts should refuse to enforce an administrative subpoena where it exceeds a statute's defined parameters); *United States v. Cabrini Med. Ctr.*, 639 F.2d 908, 910 (2d Cir. 1981) (addressing "the purely legal question of statutory jurisdiction," and holding there is "no point in permitting the Government to institute an investigation . . . if there is and can be no authority for undertaking it").

III. The District Court Properly Denied the CID Request for Complaints Relating to Wholly Foreign Transactions

The district court correctly held that the FTC's demand for wholly foreign fraud complaints was beyond the Commission's authority. "When, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975).

The question of the FTC's authority to reach transactions overseas thus must be decided against a "legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small v. United States*, 544 U.S. 385, 388-89 (2005); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*"). That is, "absent clear evidence of congressional intent to apply a statute beyond our borders, the statute will apply only to the territorial United States." *United States v. Gatlin*, 216 F.3d 207, 211-12 (2d Cir. 2000) (internal quotation marks omitted).

The FTC contends here that the question of extraterritoriality is answered by the SAFE WEB Act, a statute that extends the FTC's authority to certain overseas transactions. *See* 15 U.S.C. § 45(a)(4) [SA-20-21]. But even where Congress intends to address overseas transactions, the precise reach of such a statute is

narrowly construed. "[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) ("*Morrison*"); *see also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455-56 (2007) ("the presumption is not defeated . . . just because [a statute] specifically addresses [an] issue of extraterritorial application . . . it remains instructive in determining the extent of the statutory exception") (quotations omitted).

A. The SAFE WEB Act Expressly Limits the FTC's Extraterritorial Reach to Exclude Wholly Foreign Transactions

Against this backdrop, the district court rightly declined to enforce the FTC's CID to the extent that it sought foreign complaints received by Western Union outside of the United States and that related to allegations of foreign misconduct. Dkt. 41 at 20-21 [JA-848-49]. Those foreign transactions are presumptively beyond the reach of the FTC. The FTC can find no refuge in the SAFE WEB Act, because it limits the FTC's extraterritorial reach to "unfair or deceptive acts or practices" that either: "(i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States." 15 U.S.C. § 45(a)(4)(A) [SA-20-21].

This provision was designed to permit the FTC to reach fraudulent acts overseas *only* where they can be connected in some significant way to the United States, either by injuring a person in the United States, or where the act of fraud

itself involves material conduct in this country. It is not, as the FTC suggests, a broad expansion of the FTC's extraterritorial reach, but must be narrowly construed in light of the presumption against extraterritoriality.

The limited reach of the statute is confirmed by its legislative history.[3] Contrary to the FTC's litigation position, it did not seek the SAFE WEB Act to investigate wholly foreign transactions. During congressional hearings before the SAFE WEB Act was enacted, FTC Commissioner Timothy J. Muris divided its 30,000 cross-border fraud complaints into two categories: "either domestic consumers complaining about foreign businesses, or foreign consumers complaining about domestic businesses."[4] In addition, the FTC did not claim a need to remedy complaints by foreign consumers about foreign businesses. Instead, the FTC sought legislation that "[e]xpressly confirms . . . the FTC's authority to redress harm in the United States caused by foreign wrongdoers and

[3] *See FTC, The US SAFE WEB Act: Protecting Consumers From Spam, Spyware, and Fraud, A Legislative Recommendation to Congress*, pg. iii (June 2005) (hereinafter "FTC Recommendation"), *available at* www.ftc.gov/reports/ussafeweb/USSAFEWEB.pdf ("By confirming the availability of remedies, Congress can protect Americans from foreign wrongdoers and prevent the United States from becoming a haven for wrongdoers targeting victims abroad.").

[4] Statement of Hon. Timothy J. Muris, Fed. Trade Comm'n, The International Consumer Protection Act of 2003: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 108th Cong. 5 (2003).

harm abroad caused by U.S. wrongdoers."[5] Thus, the FTC proposed legislation that targeted "schemes originating abroad that have harmed U.S. consumers" and "schemes originating in the United States that have targeted foreign consumers."[6]

The Commission explained that its language—which was enacted by Congress[7]—used "criteria . . . similar to those developed by federal courts defining the SEC's authority to address securities and investment fraud involving foreign nations and actors." *See* FTC's SAFE WEB Act Explanation at 14. The statute's two limited avenues for extraterritorial application of Section 5 were designed to mirror the then-prevailing judicial standards applied to determine the extraterritorial reach of U.S. securities laws. Indeed, the FTC cited this Court's decision in *Al-Turki* as defining that authority. *See* 100 F.3d at 1051-52 (summarizing, in a RICO case, the "effects" and "conduct" tests used by the

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[5] *See* "Summary of the US SAFE WEB Act," *FTC, The US SAFE WEB Act: Protecting Consumers From Spam, Spyware, and Fraud, A Legislative Recommendation to Congress* at Tab 2, pg. 2 (June 2005), *available at* www.ftc.gov/reports/ussafeweb/USSAFEWEB.pdf.

[6] "An Explanation of the Provisions of the US SAFE WEB Act," *FTC, The US SAFE WEB Act: Protecting Consumers From Spam, Spyware, and Fraud, A Legislative Recommendation to Congress* at Tab 3, pg. 15 (June 2005) (hereinafter "FTC's SAFE WEB Act Explanation"), *available at* www.ftc.gov/reports/ussafeweb/USSAFEWEB.pdf.

[7] *Compare* 15 U.S.C. § 45(a)(4)(A) *with* "Draft US SAFE WEB Act," FTC, *The US SAFE WEB Act: Protecting Consumers From Spam, Spyware, and Fraud, A Legislative Recommendation to Congress* at Tab 1, pg. 4 (June 2005), *available at* www.ftc.gov/reports/ussafeweb/USSAFEWEB.pdf (using identical language).

Second Circuit in considering the applicability of U.S. securities laws to transnational securities frauds).[8]

Taken in conjunction with the strict limits set by the presumption against extraterritorial application, the SAFE WEB Act's "material conduct" and "injury in the United States" tests affirm that the FTC has no authority over the wholly foreign transactions at issue here.

1. Wholly Foreign Complaints Do Not Involve Material Conduct Within the United States

The SAFE WEB Act extends the FTC's authority to "unfair or deceptive acts or practices . . . involving foreign commerce" if *such acts or practices* "involve material conduct occurring within the United States." 15 U.S.C. § 45(a)(4)(A)(ii) [SA-21]. Thus, the "material conduct" must form a part of the "unfair or deceptive acts or practices." It is not enough that some related conduct occur in the United States; that conduct is relevant only when it constitutes a portion of the unfair or deceptive acts.

The Commission asserts, in conclusory fashion, that because Western Union "manages and administers its global money transfer network"—including setting

[8] While the Supreme Court in *Morrison* rejected the then-prevailing Second Circuit standards for extraterritorial application of Section 10(b) of the Securities Exchange Act of 1934, 130 S. Ct. 2869, 2879-81 (2010), those standards were effectively codified with respect to the FTC in the SAFE WEB Act. Accordingly, this Court's pre-*Morrison* extraterritoriality decisions under Section 10(b) inform the interpretation of the SAFE WEB Act here.

its anti-fraud policies—and "maintains the consumer complaints at issue" in Colorado, it has engaged in "material conduct within the United States." On this basis, the FTC would bring all complaints regarding wholly foreign transactions within the FTC's reach. *See* Appellant's Br. at 22; *see also* Dkt. 22-9 at 20 [JA-560].

The FTC misconstrues the "material conduct" standard. It seeks to extend its statutory authority to foreign acts of fraud on the unfounded assumption that Western Union may have failed to prevent others from using its money transfer network to commit fraud overseas. Western Union disagrees with the premise that a "failure to prevent" is alone enough to satisfy the FTC's jurisdictional grant over "using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2) [SA-20]. But even indulging that assumption, Western Union's purported *response* to the acts of foreign fraud alleged in consumer complaints at issue is, as a matter of law, immaterial to those fraudulent acts and insufficient to confer jurisdiction.

This Court's SEC jurisprudence, on which Congress based the SAFE WEB Act, informs the "material conduct" inquiry. Under this Court's "material conduct" test, the Court will find a sufficient U.S. connection "only where *conduct material to the completion of the fraud* occurred in the United States." *Al-Turki*, 100 F.3d at 1052 (emphasis added). Thus, "[m]ere preparatory activities, and

conduct far removed from the consummation of the fraud, will not suffice to establish jurisdiction." *Id.* "Only where conduct 'within the United States *directly caused' the loss* will a district court have jurisdiction over suits" with defrauded foreign victims. *Id.* (citation omitted; emphasis added).[9]

Applying *Al-Turki*, this Court has specifically refused to extend the "material conduct" standard to "the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries." *IIT*, 519 F.2d at 1018 (explaining "the line has to be drawn somewhere if the securities laws are not to apply in every instance where something has happened in the United States, however large the gap between the something and a consummated fraud and however negligible the effect in the United States or on its citizens"). The FTC's argument, that Western Union's failure to prevent fraud through its policies and complaint collection constitutes relevant "material conduct" with respect to those acts of foreign fraud, cannot be squared with these decisions. At the end of the day, as the district court properly concluded, the fraud here—that is, all of the relevant acts to complete it—"is outside the United States." Dkt 41 at 21 [JA-849].

[9] This test implements the idea that "Congress did not want 'to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.'" *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir.1983) (citation omitted). The material conduct provision of the SAFE WEB Act has the same goal: "to prevent the United States from becoming a haven for cross-border fraud operators targeting victims abroad." *See* FTC Recommendation June 2005 at 8, 25.

Like the SEC, the FTC lacks authority to reach foreign fraud on the basis of Western Union's allegedly inadequate response to complaints of that fraud. Post-transaction response to fraud is not material to the fraudulent act and, therefore, is insufficient to justify extraterritorial authority under the conduct test. *Al-Turki*, 100 F.3d at 1053 (concluding that "post-sale conduct . . . was not material to the completion of the fraud").[10]

Finally, the FTC cannot prevail with the argument that it is investigating only whether Western Union aided and abetted (or, in the FTC's words, provided "substantial assistance or support") acts of foreign fraud. An agency lacks the authority to bring secondary charges, such as "aiding and abetting" liability, based on primary extraterritorial acts over which it has no authority in the first place. In light of the presumption against extraterritoriality, "the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of" the underlying statute. *See United States v. Ali*, 718 F.3d 929, 934-35 (D.C. Cir. 2013); *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) ("[A]iding and abetting[ ] and conspiracy ... have been deemed to confer extraterritorial

[10] The FTC's suggestion that it has jurisdiction because Western Union stores its foreign complaint documents in the United States misses the mark. The question is not the physical situs of the documents, but the authority of the agency to investigate the foreign transactions that they reference. *See United States v. Univ. Hosp.*, 729 F.2d at 150 (before enforcing subpoena, court must "assur[e] itself that the subject matter of the investigation is within the agency's statutory jurisdiction").

jurisdiction to the same extent as the offenses that underlie them."). Thus, for instance, the federal aiding and abetting criminal statute does not expand the extraterritorial reach of underlying criminal laws to which it applies. *United States v. Yakou*, 428 F.3d 241, 252 (D.C. Cir. 2005).

So, too, here. The FTC cannot expand the scope of its authority over wholly foreign acts of fraud simply by claiming authority to seek relief against those domestic actors that purportedly provide assistance to the foreign fraudster. *See Ali*, 718 F.3d at 938 (citing *Yakou*, 428 F.3d at 252). Where, as here, no U.S. statute reaches the foreign fraud, there is no conduct for which secondary liability can attach. *See id.* The FTC cannot satisfy the "material conduct" test.

2. Foreign Acts with No Connection to the United States Do Not Cause Injury Within the United States

For similar reasons, the FTC cannot justify its demand for documents addressing wholly foreign fraud under the alternative prong of Section 45(a)(4). The SAFE WEB Act provides that "'unfair or deceptive acts or practices' includes such acts or practices involving foreign commerce that . . . cause or are likely to cause reasonably foreseeable injury within the United States." 15 U.S.C. § 45(a)(4)(A)(i) [SA-21]. Thus—at its outer limit—the Act covers fraudulent acts in foreign commerce if those acts are likely to cause a reasonably foreseeable domestic injury. *Id.*

The Commission claims authority over wholly foreign consumer fraud complaints on the premise that "any failure by Western Union to take effective remedial action against a problematic foreign agent would necessarily cause or be likely to cause reasonably foreseeable injury to consumers within the U.S." *See* Dkt. 22-9 at 21 [JA-561]. It argues foreseeable U.S. injury on the grounds that "a problem agent in a foreign jurisdiction that is receiving fraud-induced transactions from foreign victims may also likely be receiving fraud-induced transactions from U.S. victims." *Id.*; *see also* Appellant's Br. at 23-24.

The district court properly rejected this reasoning, concluding that it "doesn't follow" that "[i]f a perpetrator is victimizing a foreign consumer, it's reasonably foreseeable that they would also be victimizing U.S. consumers as well." Dkt. 41 at 20 [JA-848]. The Commission's rationale is entirely speculative, since there is no logical connection between a complaint from a consumer in Poland regarding a foreign agent in France and domestic U.S. injury. Nor is there any reason to stretch the Commission's authority to reach those wholly foreign complaints, where it already has the authority to investigate any complaints actually involving U.S. consumers (and has, in fact, received all such complaints).

Congress has already set the standard that foreign transactions must satisfy in order to fall within the FTC's jurisdiction: The foreign acts must "cause or [be] likely to cause" injury within the United States and that injury must be "reasonably

foreseeable." 15 U.S.C. § 45(a)(4)(A)(i) [SA-21]. In light of the *Morrison* presumption, that standard must be narrowly construed, not circumvented by pure speculation. The FTC's hypotheticals do not meet that standard.

Not surprisingly, the Commission's speculative chain of injury finds no support in the case law. The SAFE WEB Act's "domestic injury" standard was modeled on this Court's "domestic effects" test, under which U.S. securities laws were given extraterritorial reach "whenever a predominantly foreign transaction has substantial effects within the United States." *Al-Turki*, 100 F.3d at 1052. Under that standard, "[t]ransactions with only remote and indirect effects in the United States" do not satisfy the domestic effects standard. *Id.* at 1051-52.

Thus, this Court has found an "indiscernible" U.S. interest in a foreign transaction where the plaintiff was a Panamanian corporation; the individual who placed the purchase orders and ultimately suffered losses was a Canadian; the securities are not traded on a U.S. exchange; and "no effect on a U.S. affiliated company was alleged . . . ." *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128 (2d Cir. 1998) ("*Banque Paribas*").

This case is indistinguishable. The money transfers at issue never touch the United States; they are sent from an agent location in a foreign country to an agent location in another foreign country. "There is, thus, no U.S. entity that Congress could have wished to protect from the machinations of swindlers." *Id.* But under

the Commission's logic, it could reach virtually any act of foreign fraud, simply on the basis of speculation that the foreign fraudster could separately seek to harm U.S. consumers. The FTC—or any other agency—could assert jurisdiction over a wholly foreign transaction through the simple construct of imagining a parallel transaction with the same foreign perpetrator and U.S. victims.

Such an approach is inconsistent with the language of the SAFE WEB Act. The statute plainly requires that, in order to obtain U.S. jurisdiction, the unfair foreign act of fraud itself must cause or be likely to cause reasonably foreseeable harm in the United States. 15 U.S.C. § 45(a)(4)(A)(i) [SA-21]. Under the FTC's argument, it is not the wholly foreign transfers (with senders and receivers abroad) that cause injury in the United States; under its theory, the harm is caused by unidentified, postulated transactions involving hypothetical U.S. victims. But Western Union has already provided all complaints concerning any actual foreign transactions that are alleged to have harmed U.S. senders. The Commission cannot obtain jurisdiction over wholly foreign transactions by speculating as to additional fictional transactions that might involve U.S. victims and assuming a link between those and the wholly foreign transactions. In its jurisdictional provision, Congress has explicitly required that the foreign transactions themselves have U.S. effects. *Id.* The extraterritorial context requires close adherence to that language. *See F. Hoffman-LaRoche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

Because the Act's plain language and legislative history demonstrate Congress's intent to exclude wholly foreign transactions, the FTC's expansive new interpretation to the contrary is not entitled to deference. *See, e.g., Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (rejecting agency interpretation that ran contrary to statutory text and its legislative history); *Osorio v. INS*, 18 F.3d 1017, 1022 (2d Cir. 1994) (same). The district court thus did not abuse its discretion in denying the FTC's demand for wholly foreign fraud complaints.

B. FTC Attempts to Reach Material Protected by Foreign Privacy Laws Violates the Strong Policy Supporting the Presumption Against Extraterritorial Application

In the district court, Western Union presented a further reason for rejecting the FTC's expansive interpretation of its authority to gather documents. The FTC's demand for wholly foreign fraud complaints raises issues of conflict with foreign privacy laws protecting personal data. In the interest of comity, courts must construe statutes "to avoid unreasonable interference with the sovereign authority of other nations." *Hoffmann-La Roche*, 542 U.S. at 164. The presumption against extraterritoriality serves this interest, protecting "against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 244 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)).

This case illustrates how agency overreach can give rise to an international conflict of laws. Many countries have stricter legal protections than the United States for personal data. For example, in Europe, protected personal data includes "any information relating to an identified or identifiable natural person." Dkt. 22-8 [JA-497]. This broad definition includes names, contact information and email addresses—all of which is routinely collected on the foreign complaint forms at issue. *Id.* The FTC has demanded that Western Union produce wholly foreign complaint documents with the personal data unredacted, despite the fact that doing so would implicate foreign privacy laws and subject Western Union to potential regulatory and criminal sanctions abroad.

In a white paper submitted to the FTC, Western Union demonstrated that privacy laws in 55 countries would be implicated if it complied with the CID. *See* Dkt. 22-8 [JA-495-540]. In particular, the European Union ("EU")—with 27 Member States—has a broad data protection directive implicated by compliance with the CID. European privacy laws, and this directive in particular, have already been the subject of international conflict.

Under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, if a country lacks adequate data protection, EU Member States must affirmatively prevent the transfer of personal data to that country. Dkt. 22-8 [JA-498]. The EU determined that the United States lacks adequate data

protection. *Id.* To resolve this conflict, the U.S. Department of Commerce and the EU negotiated a safe harbor mechanism by which U.S. companies could voluntarily increase their level of data protection and become eligible for data transfers from the EU. *See* Carla L. Reyes, *The U.S. Discovery-EU Privacy Directive Conflict: Constructing a Three-Tiered Compliance Strategy*, 19 Duke J. Comp. & Int'l L. 359 (2009).

The Directive places significant requirements on the "processing" of personal data (broadly defined to include use and disclosure). Consistent with the Directive and safe harbor mechanism, Western Union has obtained the consent of its customers to send personal data outside of the EU. But such generic processing consents are typically not sufficient for the production of data to a third party, even where that party is a U.S. administrative agency. Dkt. 22-8 [JA-501]. To produce documents to the FTC, Western Union would likely need to provide specific notice and obtain specific consent from both senders and recipients prior to disclosing foreign complaints. *See id.* Art. 2(f); Article 29 Working Document 1/2009, *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp158 en.pdf ("Article 29 Working Document"). It is neither practical nor in many cases possible for Western Union to obtain the requisite specific consents for the 80,000

customers affected by the FTC's demand. Without that specific notice and consent, Western Union could be vulnerable to challenge by EU regulators.[11]

The fact that production would be commanded by a court upon motion of a federal agency is of no moment. Companies have been subjected to investigations by EU regulators for failures of this kind. For example, SWIFT—a company that provides financial messaging services—was subject to a two-year investigation by the Belgian Privacy Commission for turning over financial data from EU customers to the U.S. Department of Treasury for use in the Terrorist Finance Tracking Program. Dkt 63-2 at 10 [JA-500]. Even though SWIFT's databases were in the United States and the disclosure was at the behest of a federal agency, the regulators required that SWIFT provide specific notice informing individuals about the potential disclosures. *Id.*

Western Union faces similar regulation. If unable to comply with the consent and notice requirements, Western Union could be subject to administrative fines, civil lawsuits and, in some countries, even criminal liability for violating the EU Directive. Dkt. 22-8 [JA-507-08].[12] In the district court, Western Union

[11] Foreign countries would be particularly concerned if the U.S. invoked the meticulously negotiated "safe harbor" to bring personal data to the U.S. and then the FTC used the presence of that data in the U.S. to compel disclosure.

[12] The risk that Western Union will face penalties under foreign privacy laws provides an additional reason for the court to consider Western Union's challenge to the agency's jurisdiction at this time. The cases that defer jurisdictional

proffered an expert on foreign privacy laws—Fordham law professor Joel R. Reidenberg—who opined that Western Union "has a legitimate concern over the permissibility under EU data protection law of the disclosure of European sender and receiver data to the Federal Trade Commission and, has a legitimate concern for the consequent risk of an enforcement action by one or more EU member states if it were to provide the requested EU complaint documents to the FTC." Dkt. 35-1 ¶ 3 [JA-794]. The wholesale, indiscriminate nature of the FTC's demand exacerbates this risk. Dkt. 22-8 [JA-504-05] (describing European concerns with proportionality and data minimization).

After looking at the law for specific countries in which Western Union processes personal data, Reidenberg further concluded that "[b]ecause of the uncertainties concerning the existence of a legal basis for turning over data of European origin about consumer complaints to the FTC, Western Union may face prosecution and sanctions in the EU . . . if it were to produce the requested EU complaint documents to the FTC." *Id.* ¶ 13 [JA-798].[13]

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challenges until an enforcement action is brought presume that nothing is lost by a later determination. Here, however, Western Union faces the risk of serious penalties in the interim.

[13] Professor Reidenberg has consulted for both the FTC and the EU on EU data privacy issues. At the close of briefing, Western Union moved to file Reidenberg's report for the limited purpose of rebutting an expert report filed by the FTC in its reply memorandum. Dkt. 35 [JA-790]. The FTC objected. Dkt. 36

Because the district court concluded that wholly foreign complaints are outside the FTC's authority, it did not address the impact of foreign privacy laws on Western Union's compliance with the CID. By the same token, this Court need not decide that the foreign privacy rules would be violated in order to conclude that international comity concerns counsel against a broad interpretation of the SAFE WEB Act's extraterritorial provisions. In fact, "judicial deference to an agency's interpretation of its investigative authority is not justified when the agency's action may have extraterritorial impact." *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 495 n.17 (D.C. Cir. 1984)) (citation omitted). In light of the statutory language and history, the case law requiring a narrow interpretation, and the potential conflict with foreign privacy laws, the FTC is not entitled to production of complaints about wholly foreign transactions.

[JA-813-16]. Western Union's motion remained pending at the hearing [JA-893] and was subsequently denied as moot. Dkt. 38 [JA-827].

WESTERN UNION'S CROSS-APPEAL

IV. The District Court Erred in Ordering Production of Documents Concerning Anti-Money Laundering Efforts at the Southwest Border

A. Western Union's Cross-Appeal Presents a Live, Justiciable Controversy

The district court improperly ordered the production of the Arizona monitor's reports and "all documents referring or relating to communications with the [m]onitor." The FTC construed this language broadly.[14] After protracted disagreements over the implementation of the Court's order, Western Union agreed to produce, subject to its rights in this appeal, all non-privileged documents that fell within the FTC's search protocol for the CID's second specification. It has now produced approximately 250,000 responsive documents at a total cost of more than $4.8 million.[15]

Western Union's cross-appeal seeks a return of these produced documents and an order that the FTC should not share them with the public or any other

[14] The FTC's final search protocol imposed search terms that do not refer or relate to a *communication* with the monitor, but rather refer to *topics* related to the Company's anti-money laundering efforts generally. Such general terms include "money order" or "prepaid" or "Business Solutions." Dkt. 62 at 23. Western Union pointed out that these search terms sought documents outside of the scope of the CID and the district court's June 7 order.

[15] As the Arizona court has recognized (*see supra*, at 10-11), many of these documents were prepared based on assurances that information submitted to the monitor would be kept confidential.

entity, or rely upon them in any investigation. The cross-appeal presents a live controversy. In similar circumstances, courts have held that disputes over document productions are not mooted by production under compulsion of court order. *See, e.g.*, *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992); *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 109 (2009); *Constr. Prods.*, 73 F.3d at 469.

As the Supreme Court has noted, a court "can fashion some meaningful relief" despite the production of documents under a disputed court order. *Church of Scientology*, 506 U.S. at 12-13. Western Union has "an obvious possessory interest in [its] records. When the Government has obtained such materials as a result of an unlawful summons, that interest is violated and a court can effectuate relief by ordering the Government to return the records." *Id.* at 13; *see also Mohawk*, 558 U.S. at 109 (recognizing that "[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings"). The power to order the return or destruction of the documents in question is enough to save the dispute from mootness, and this is particularly true where, as here, "[r]espondents have a privacy interest in all of the documents, and will be entitled to their return if the enforcement order should be vacated." *Constr. Prods.*, 73 F.3d at 469; *see also Church of Scientology*, 506 U.S. at 13; *FTC v. Church & Dwight Co.*, 756 F. Supp. 2d 81, 86-87 (D.D.C. 2010)

(subpoena recipient "reserve[s] its right to claim that the FTC's consideration of the unredacted documents was improper and illegal" if compelled disclosure overturned on appeal).

B. The FTC's Demand for Anti-Money Laundering Documents Is Beyond Its Authority and Irrelevant to Its Investigation

Morton Salt and its progeny require that, to enforce a CID, the inquiry must be "within the authority of the agency" and that the information sought must be "reasonably relevant" to the investigation. *Morton Salt*, 338 U.S. at 652. A CID specification from the FTC seeking anti-money laundering documents does not fit either of these criteria—the FTC has no authority to investigate anti-money laundering activity, and the documents are not reasonably relevant to an investigation into consumer and telemarketing fraud.

As with wholly foreign complaints, documents related to anti-money laundering along the U.S. Southwest border concern activities well outside the FTC's authority. Congress has enacted legislation specifically prohibiting various activities that constitute or facilitate "money laundering,"—including the Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956-57, the Bank Secrecy Act of 1970, 31 U.S.C. §§ 5311-30, and other laws—and granted enforcement authority to the Department of Justice, Department of the Treasury, and other agencies.

The FTC's Section 5 authority, by contrast, has never been extended to money laundering, and the Commission does not claim otherwise. In contrast to

the express statutory authority elsewhere granted other agencies, Congress amended the FTC Act in 1994 to provide that "[t]he Commission shall have no authority under this section" to declare an act or practice is unfair if it is "*reasonably avoidable by consumers themselves*." 15 U.S.C. § 45(n) [SA-25] (emphasis added). Money-laundering is the process of making illegally-gained proceeds (*i.e.* "dirty money") appear legal (*i.e.* "clean").[16] This involves complicit behavior by the sender. By contrast, in consumer telemarketing fraud—the broad subject of the FTC's investigation—an unwitting sender is tricked by the recipient into sending money.

Implicitly recognizing this limitation on its authority, the FTC argues that documents regarding the monitor's oversight of Western Union's anti-money laundering efforts along the U.S. Southwest border are nonetheless relevant to its investigation of Western Union's efforts to prevent consumer fraud. "The determination of whether the information sought bears a sufficient relationship to the investigative purposes to permit enforcement of the subpoena is predominantly a matter of law," subject to *de novo* review. *EEOC v. United Parcel Serv., Inc.*, 587 F.3d at 142 (Newman, J., concurring).

[16] *See, e.g.*, 18 U.S.C. § 1856; *see also* Department of the Treasury, Financial Crimes Enforcement Network, *History of Money Laundering Laws*, *available at* http://www.fincen.gov/news_room/aml_history.html.

In its brief, the FTC characterizes the focus of its investigation as "whether [Western Union] uses effective procedures to stop consumers from being deceived into sending funds to perpetrators of fraud." Appellant's Br. at 1.[17] Yet the monitor's role has no relationship to consumer fraud. Under the settlement agreement, the monitor oversees Western Union's efforts to combat money laundering associated with drug trafficking and human smuggling along the Mexico-U.S. border. *See* Dkt. 22-3 at 9, 1 [JA-462, 454]; Dkt. 22-3 at 3 [JA-456].

The FTC's demand for anti-money laundering related documents thus fails to satisfy *Morton Salt*, which provides that agency subpoenas are unenforceable if they demand information that is not "reasonably relevant" to the agency's investigation. 338 U.S. at 652. An agency is not free to conduct "any investigation it may conjure up; the disclosure sought must always be reasonable." *Constr. Prods.*, 73 F.3d at 471.[18] Courts refuse to enforce agency information

[17] This is a *post hoc* characterization. Neither the CID nor the resolution states the nature of the Western Union's conduct under review. This deficiency is discussed in Section IV.C, *infra*.

[18] *See also Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946) ("The gist of the protection is . . . that the disclosure sought shall not be unreasonable."); *SEC v. Arthur Young & Co.*, 584 F.2d 1028, 1030-31 (D.C. Cir. 1978) (a subpoena request must "not [be] so overbroad as to reach into areas that are irrelevant or immaterial") (citation omitted).

demands requests that are plainly overbroad and irrelevant to an agency's investigation.[19]

Here, the Commission's relevance theory is flawed. The Commission reasoned that the monitor documents were relevant because "there is substantial overlap between an [anti-money laundering] program and a program to detect consumer fraud,"—namely, that the programs involved an overlap in personnel, oversight and processes. Dkt. 22-9 at 9 [JA-549]. The Commission asserted, for instance, that both Western Union's AML program and its consumer fraud prevention program were "housed within the same corporate group" and involved a "common set of personnel." *Id.*

As an initial matter, this is simply untrue. The Company's AML operations are separate and distinct in every material respect from its consumer fraud

[19] *See, e.g.*, *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1159 (10th Cir. 2012) (subpoena seeking nationwide data not relevant to charges of individual disability discrimination); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 654 (7th Cir. 2002) (declining to enforce subpoena because "relevance requirements should not be interpreted so broadly as to render the[m] a "nullity'"); *In re McVane v. FDIC*, 44 F.3d 1127, 1135 (2d Cir. 1995) (refusing to enforce part of subpoena based on lack of "reasonableness of the FDIC's subpoena of the personal financial records of the Directors' families"); *Check 'n Go of Fla., Inc. v. State*, 790 So.2d 454, 460 (Fla. Dist. Ct. App. 2001) (in investigation of rollover transactions, refusing to enforce as overbroad a subpoena not limited to consecutive transactions); *United States v. Inst. for College Access & Success*, No. 13-mc-81, 2013 WL 3853239, at *4 (D.D.C. July 26, 2013) (denying request in ethics investigation for all documents containing a company president's name, as "so unmanageably broad as to render its results irrelevant to the investigation's goals").

prevention efforts. The consumer fraud program has been organizationally separate from the AML program for the past two and a half years—before this CID was issued—and their employees do not overlap. *See supra* Statement of the Case Part B; Dkt. 21-1 ¶¶ 9-13, 19, 23 [JA-376, 378-79].

But even if such overlap did exist, the mere sharing of office space or even some personnel would not make Western Union's AML program relevant to a determination of the strength of its consumer fraud prevention program. An agency does not obtain the right to investigate a corporate activity beyond its authority simply because it is conducted by some of the same people or in the same place as a regulated activity. Rather, an agency's right to investigate is defined and limited by its authorizing statute. *See, e.g., Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587, 598 (1934) ("The Commission is an administrative body possessing only such powers as are granted by statute.").

Here, the Commission has received all relevant documents needed to assess on their own merits Western Union's consumer fraud prevention measures. From those documents, the Commission can test those anti-fraud measures that Western Union has employed, assess the need for and recommend additional measures, evaluate oversight personnel, and find whatever information it needs to evaluate the strength of Western Union's compliance with its own consumer fraud prevention program.

The Commission has no basis for seeking, in addition, purely internal correspondence that merely mentions the Southwest border AML monitor, in order to assess the "culture of compliance" at Western Union. Dkt. 22-9 at 13 [JA-990]. The FTC fails to offer any explanation of how compliance with unrelated legal obligations would say *anything* about Western Union's consumer fraud prevention compliance. And it has every tool available to test that compliance directly.

Under the FTC's "culture of compliance" rationale, there is *no legal compliance program* that the FTC could not investigate. For example, the FTC might demand documents related to Western Union's Sarbanes-Oxley compliance program or its Foreign Corrupt Practices Act compliance program—both statutes enforced by other agencies (the SEC and Justice Department, respectively)—on the theory that these documents might help the FTC test how Western Union handles its compliance obligations under U.S. law. Every regulatory scheme creates a need for compliance, and every agency has an interest in ensuring compliance within its regulatory scheme. But every agency does not have the right to investigate compliance with the regulations of other agencies. *Morton Salt* does not support such a spurious relevance inquiry.

Lacking a coherent explanation of relevance from the FTC, the district court relied on a rationale for the anti-money laundering documents that was equally erroneous. It based its determination of relevance on the fact that both money

laundering and consumer fraud "ha[ve] to do with a money transfer." Dkt. 41 at 17 [JA-845]. In response to Western Union's assertion that "money laundering is a completely different act," the court responded, "Than fraud, yes, it may be different, and there are aspects that are the same. They both have to do with money transferred from one place to another place due the agency of a company like Western Union." Dkt. 41 at 16 [JA-844]. Money transfers, however, encompass the substantial majority of Western Union's business. Such a generalization threatens to find relevant any documents related to money transfers—or most of the documents generated by Western Union.

In sum, specification two violates the recognized standard that a subpoena request must "not [be] so overbroad as to reach into areas that are irrelevant or immaterial." *Arthur Young*, 584 F.2d at 1028. The district court's determination to the contrary must be reversed.

C. The FTC's CID Violates the Improvements Act

The CID must also be quashed because it violates the Federal Trade Commission Improvements Act of 1980 (the "Improvements Act") by failing to sufficiently state the subject of the investigation. The Improvements Act requires that a valid CID must "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].

This provision was enacted in response to complaints regarding the FTC's use of its unfettered discretion to serve "impossibly broad" subpoenas, 126 Cong. Rec. 2339, 2394 (1980), and its predilection for engaging in "fishing expeditions undertaken merely to satisfy the FTC's '"official curiosity,"' S. Rep. No. 96-500, at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1105. Congress was concerned that "[t]oo often, the Commission has not seen fit to state clearly what conduct it is investigating—leaving the recipients of its subpoena with no basis on which to question the relevance of anything that might be asked for." 126 Cong. Rec. 2339, 2394 (1980) (statement of Sen. Howell Heflin). Thus, a primary effect of the Improvements Act is "to limit the practice of the Commission of giving a vague description of the general subject matter of the inquiry and provide[] a standard by which relevance may be determined. . . ." S. Rep. No. 96-500, at 23 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1125; *see also FTC v. Foremost-McKesson, Inc.*, No. 79 Civ. 0162, 1981 WL 2029, at *4 (S.D.N.Y. Feb. 24, 1981) (endorsing this statement of the Improvements Act's intended purpose).

The statute requires that every CID "state the nature of the conduct constituting the alleged violation which is under investigation." 15 U.S.C. § 57b-1(c)(2) [SA-29]. The FTC's regulations similarly require sufficient notice of "the purpose and scope of the investigation" and "the nature of the acts or practices under investigation." 16 C.F.R. § 2.6 [SA-59]. Here, the CID at issue simply

referenced and incorporated the Commission's very general and vague omnibus resolution in order to provide the required notice. But that resolution did not provide such notice. Instead, it provides an extraordinarily broad, general description of the scope of the FTC's omnibus investigation into unfair practices *or* telemarketing violations.

For a company the size and scope of Western Union, such notice is as good as no notice of the particular conduct under review. It provides little to no guidance to the Company or to the reviewing court that would enable a real relevance determination. Notably, the Commission Order denying Western Union's petition to quash the CID only evaluates relevance against a very general "investigation into consumer fraud and telemarketing." Dkt. 22-9 at 8 [JA-548]. Such a blanket resolution neither specifies the target of the investigation nor provides more than a bare recitation of the FTC's statutory authority.

Each of the cases cited by the Commission for the sufficiency of the CID involved a more specific description of the conduct under investigation. *See* Dkt. 22-9 at 6-7 n.15 [JA-546-47].[20] Similarly, in *FTC v. Carter*, 636 F.2d 781 (D.C.

[20] *See FTC v. Lab MD, Inc.*, No. 1:12-cv-3005 (N.D. Ga. Nov. 26, 2012) (limited to "consumer privacy and/or data security."); *FTC v. Nat'l Claims Serv., Inc.*, No. S-98-283, 1999 WL 819640, at *2 (E.D. Cal. Feb. 9, 1999) (limited to firms who sell "business opportunities" to consumers); *FTC v. O'Connell Assocs., Inc.*, 828 F. Supp. 165, 171 (E.D.N.Y. 1993) (consumer reporting agencies that violated the Fair Credit Reporting Act (FCRA).

Cir. 1980), the court found the resolution to be sufficient based on three factors not present here.[21]

By contrast, the resolution does not link the investigation to a defined product, practice, company, or specific statutory violation. The investigation therefore could encompass any entity's violation of Section 5 on any ground. Courts have expressly stated that similar bare recitations of "Section 5's prohibition of unfair and deceptive practices … standing broadly alone would not serve very specific notice of [a resolution's] purpose," and are therefore insufficient to evaluate the relevance of a particular CID request. *Carter*, 636 F.2d at 788; *see also FTC v. Green*, 252 F. Supp. 153, 156 (S.D.N.Y. 1966) (noting courts have "refused to enforce a subpoena issued by an administrative agency where the statement of purpose was insufficient to enable the court to determine the relevance of the information sought thereunder.").

The resolution's vague statement of the conduct under investigation precludes an appropriate relevance determination by the court. *Morton Salt's*

[21] The three factors were: (1) the resolution "identif[ied] the specific conduct under investigation[,] cigarette advertising and promotion"; (2) it required the Section 5 violation be tied to a violation of "section 8(b) of the Cigarette Labelling and Advertising Act," and (3) it "additionally defined the application of section 5 in the Resolution by relating it to the subject matter of the investigation[,] 'the advertising, promotion, offering for sale, sale, or distribution of cigarettes. . . .'"). *Carter*, 636 F.2d at 788. This case was decided prior to the FTC Improvements Act, based on *Morton Salt*.

inquiry is impossible to conduct when the CID provides no detail of the particular (or even general) conduct targeted by the investigation. "[R]elevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." *Okla. Press*, 327 U.S. at 209.

The FTC cannot cure this defect by asserting that the investigation was made more specific through verbal communications to Western Union or through post hoc rationalizations in judicial filings. Courts have rejected arguments that a court should look beyond the text of the resolution and CID to cure the defect in an overly broad resolution, recognizing instead that "the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence." *Carter*, 636 F.2d at 789; *see also FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992) (noting that "'[w]hen a conflict exists in the parties' understanding of the purpose of an agency's investigations, the language of the agency's resolution,' rather than subsequent representations of Commission staff, controls"); *Montship Lines, Ltd. v. Fed. Mar. Bd.*, 295 F.2d 147, 155 (D.C. Cir. 1961) (investigatory purpose "must be apparent from the order itself and cannot be supplied by contentions in the briefs").

In sum, the FTC's CID is procedurally deficient in that it fails to permit a court to review the relationship between the documents sought and the particular conduct under investigation. By defending the resolution, the FTC seeks judicial

approval of the very practices that Congress sought to curb in enacting the Improvements Act in 1980. There is no basis for doing so, and the district court erred in compelling production of documents related to Western Union's anti-money laundering practices.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed to the extent it refused to order to the production of documents related to wholly foreign complaints and should be reversed insofar as it ordered the production of documents relating to communications with the monitor regarding anti-money laundering.

Dated: February 26, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 28.1(e)(2)(B) and 32(a)(7)(C), I hereby certify that the textual portion of the foregoing brief complies with the type-volume limitations set forth in Rules 28.1 and 32 of the Federal Rules of Appellate Procedure, uses a proportionally spaced font (Times New Roman), has a typeface of 14 point, and contains 13,269 words, according to the word processing system used to produce the text.

Dated: February 26, 2014

s/ Charles G. Cole
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CERTIFICATE OF SERVICE

I, Charles G. Cole, hereby certify that on February 26, 2014, I served a copy of the foregoing Brief of the Appellee and Cross-Appellant The Western Union Company upon counsel for the Federal Trade Commission by filing these documents through the Electronic Case Filing (ECF) system for the United States Court of Appeals for the Second Circuit.

s/ Charles G. Cole
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