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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

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT THE WESTERN UNION COMPANY (FILED UNDER SEAL PER LEAVE OF COURT)

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INTRODUCTION

The FTC contends that Western Union is obligated to produce some 250,000 documents relating to a court-appointed Monitor's oversight of Western Union's *anti-money laundering* program in the Southwest Border Area. It argues that these documents are relevant to its investigation of Western Union's efforts to prevent *consumer fraud* because, in the words of the district court, "'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***.'" FTC Response Br. at 36 (quoting Dkt. 41 at 11–12 [JA-839 to -40]) (alteration in original) (emphasis added).

However interested in consumer fraud the FTC might be, it did not target consumer fraud in its Civil Investigative Demand ("CID"). Instead, it demanded all documents bearing any mention of the Monitor and his oversight of Western Union's *anti-money laundering* efforts along the Southwest border. But the FTC admits that it has no jurisdiction over money laundering. Moreover, it has not demonstrated that these Monitor-related documents addressing money laundering shed any light on Western Union's efforts to combat consumer fraud.

Morton Salt requires the district court to determine, at this juncture, whether the CID exceeds the statutory authority of the FTC and whether the documents demanded are "reasonably relevant" to the FTC's consumer fraud investigation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). The FTC cannot

satisfy even this liberal relevance standard with respect to the Monitor-related documents.

The FTC does not contend that the Monitor oversees Western Union's consumer fraud prevention program. It argues only that Western Union's measures to prevent money laundering may help the FTC assess whether Western Union might have done something different to prevent consumer fraud. But the Commission ignores the key differences between Western Union's anti-money laundering program and its consumer fraud prevention program—differences that are driven by the differences in the underlying crimes. In all events, whatever similarities the programs may have do not give the Commission *carte blanche* to take a deep dive into Western Union's measures to prevent crimes outside the FTC's reach.

Even if the FTC's doubtful relevance theory were deemed to have merit—a determination this Court should not uphold—it would support, at best, the FTC's demand for the Monitor's reports. However, those reports were only a small fraction of the documents that the FTC demanded. It also required Western Union to search for any documents that simply mentioned or related broadly to "communications with the Monitor." Dkt. 1 at 7–8 [JA-44 to -45]. In its administrative order, the FTC relied on a wholly separate justification for seeking those documents, concluding that they were relevant to determining "the strength

of the company's culture of compliance and whether there is a widespread commitment to eliminating illegal transactions from Western Union's system." Dkt. 1-3 at 13 [JA-177].

On this rationale, the FTC forced Western Union to review more than one million documents held by over 70 employees. Now, however, the FTC abandons this "culture of compliance" rationale. It makes no mention of this rationale in its response brief. Despite abandoning the *only* justification contemporaneously advanced by the Commission for seeking all documents related to communications with the Monitor, the FTC demands deference to its administrative determination of relevance. Accepting the FTC's position effectively would grant the agency nearly limitless investigative authority—authority not contemplated by *Morton Salt* and authority previously curtailed by Congress in the 1980 FTC Improvements Act. The district court's order should be reversed and the responsive documents should be ordered returned to Western Union.

ARGUMENT

I. This Court Must Assess Whether the FTC Investigation Is "Within the Authority of the Agency" and the Information Demanded Is "Reasonably Relevant" to That Investigation

A. This Court Must Examine Whether the FTC's Inquiry Falls "Within the Authority of the Agency"

In its initial brief (at 18–21), Western Union pointed out that the FTC had not raised in the district court its present contention that the district court *cannot*

review the agency's statutory authority for its inquiry "unless and until Western Union faces an actual complaint." FTC Opening Br. at 19. The FTC now claims that it "raised the limited nature of district court review" in the district court (FTC Response Br. at 16 n.4). However, the identified pages do not support this view. To the contrary, the FTC explicitly asked the district court to determine whether the "investigative subpoena" is "'within the authority of the agency.'" Dkt. 61-4 at 11 [JA-232] (citation omitted). Thus, the FTC waived its argument that the district court could not conduct the statutory authority inquiry at the subpoena enforcement stage. *See* Western Union Br. at 19–21.

In any event, Western Union pointed to well-established precedent denying the enforcement of administrative subpoenas where the investigation ranged outside the statutory authority of the agency. *See* Western Union Br. at 22–23 & 24 n.2. The Supreme Court plainly required this statutory authority inquiry in *Morton Salt*, 338 U.S. at 653, and this Court has said that, before enforcing an agency subpoena, the trial court must "assur[e] itself that the subject matter of the investigation is within the agency's statutory [authority]." *United States v. Univ. Hosp.*, 729 F.2d 144, 150 (2d Cir. 1984).

The FTC now acknowledges this case law, but contends that the cases fall within an exception for subpoenas infringing a "specific, clear, and unambiguous statutory or constitutional right to be free from investigation." FTC Response Br.

at 17. The FTC cites no case articulating such an "exception." In fact, the cases denying subpoena enforcement for lack of agency statutory authority do not depend on a "specific, clear, and unambiguous" statutory or constitutional bar, but rather require a careful review of the agency's authority in all instances.

In *University Hospital*, for instance, this Court found that the agency had exceeded its statutory authority, even though the relevant statute "does not make crystal clear its intended scope." 729 F.2d at 161 (citation and internal quotation marks omitted). It relied not on any specific, clear, or unambiguous right to be free from investigation, but on its lengthy parsing of the statute's text and legislative history. *See id*. at 152–60.

Similarly, in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001), and *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490 (7th Cir. 1993), the courts construed statutes otherwise silent on the issue of the agency's investigatory reach in denying subpoena enforcement. *See Karuk*, 260 F.3d at 1080; *Reich*, 4 F.3d at 495.[1] The FTC does not even address a number

[1] Western Union previously cited *United States v. Institute for College Access & Success*, 956 F. Supp. 2d 190 (D.D.C. 2013), a magistrate's decision that was overruled by the district court after Western Union filed its opening brief. *See United States v. Inst. for Coll. Access & Success*, Misc. Action No. 13-0081 (ABJ), 2014 U.S. Dist. LEXIS 35739 (D.D.C. Mar. 19, 2014). But the district court largely based its decision on the fact that the government significantly narrowed its original subpoena. *Id.* at *19–20. Absent that narrowing, the court would have been "inclined to agree" with the magistrate that the government's request failed to satisfy *Morton Salt*. *Id*. at 19.

of other cases Western Union cited that find a lack of authority for a subpoena without relying on an explicit statutory bar. *E.g.*, *United States v. Newport News Shipbuilding & Dry Dock Co.*, 837 F.2d 162 (4th Cir. 1988) (rejecting agency subpoena in excess of agency's statutory authority).

These decisions require a district court to determine the agency's statutory authority at the subpoena enforcement stage. There is "no point in permitting the Government to institute an investigation . . . if there is and can be no authority for undertaking it." *United States v. Cabrini Med. Ctr.*, 639 F.2d 908, 910 (2d Cir. 1981). This Court should reject the FTC's late effort to foreclose a *Morton Salt* inquiry into agency authority.

B. The District Court Must Also Be Satisfied that the Information at Issue Is "Reasonably Relevant" to the Agency's Inquiry

Morton Salt also requires the district court to determine whether the information demanded by the agency is "reasonably relevant" to the agency's inquiry. 338 U.S. at 652. Relevance "is predominantly a matter of law." *EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136, 142 (2d Cir. 2009) (Newman, J., concurring). By demanding "reasonable" relevance, the Supreme Court put a limit on the nature of the connection. Not every tenuous connection will satisfy this standard—only those that meet an objective standard of reasonableness.

Nothing in the case law requires, as the FTC contends, that the district court simply defer to the agency's relevance determination. *See* FTC Response Br. at

14, 31. *Morton Salt* itself entrusts the determination of reasonable relevance to the district court, 338 U.S. at 652, and courts have frequently applied this standard to deny subpoena enforcement notwithstanding an agency's support for the inquiry. *See* Western Union Br. at 48 n. 19 (citing, *inter alia*, *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1159 (10th Cir. 2012) (affirming denial of administrative subpoena because nationwide data sought was 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'") (citation omitted)).

Significantly, Congress has affirmed the need for district court oversight of the FTC's administrative subpoenas. In enacting the 1980 FTC Improvements Act, Congress sought to curtail the FTC's propensity to serve "impossibly broad" subpoenas, 126 Cong. Rec. 2339, at 2394 (1980), and to engage in "fishing expeditions . . . merely to satisfy its official curiosity," S. Rep. No. 96-500, at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1105 (citation omitted). Congress established "appropriate safeguards to protect the legitimate rights and interests of every person subject to investigation . . . [including] a right to judicial review by the courts in case of a dispute." S. Rep. No. 96-500, at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1125–26. Thus, the district court here had a

responsibility to review the subpoena specifications to determine whether the information requested was "reasonably relevant."

II. Western Union's Monitor-Related Documents Are Irrelevant to the FTC's Investigation into the Efficacy of Western Union's Efforts to Prevent Consumer Fraud

A. The Monitor's Purpose and Function Is to Oversee Western Union's Anti-Money Laundering Program in the Southwest Border Area, Not Western Union's Consumer Fraud Prevention Program.

The FTC does not assert that it has jurisdiction over money laundering. In fact, it concedes, as it must, that the Department of the Treasury is "primarily responsible" for combating money laundering. FTC Response Br. at 35. Nonetheless, the FTC makes a sweeping demand for every document relating to the Arizona court-appointed Monitor.

The Monitor's chartering documents, however, make clear that the Monitor's role is to oversee Western Union's anti-money laundering measures along the Southwest border. As the FTC acknowledges, the "monitor was appointed as part of a settlement of money laundering allegations relating to drug trafficking and human smuggling." FTC Response Br. at 34–35. That settlement targeted (1) the ability of criminals to use Western Union's services "to launder the money proceeds of the criminals' international and inter-state illegal drug sales," (Dkt. 1-2 at 2 [JA-154]); and (2) the "use of Western Union services by human smugglers ('coyotes') to obtain payment from sponsors of persons being smuggled

illegally into the United States," (Dkt. 1-1 at 11 [JA-101] (Monitor Engagement Letter)). In appointing the initial Monitor, the court noted that the Settlement Agreement "calls for . . . an independent Monitor with substantial duties relating to evaluating and improving Western Union's anti-money laundering efforts." Dkt. 1-2 at 1 [JA-125]; *see also* Dkt. 1-2 at 9 [JA-119] *and* Dkt. 1-1 at 16 [JA-106] (tasking Monitor with "review[ing]" and "evaluat[ing]" the effectiveness of "Western Union's risk-based [anti-money laundering] compliance program for the Southwest Border Area," including determining whether "Western Union's [anti-money laundering] Program is reasonably designed and effectively implemented to detect, deter, and prevent money laundering").

There is not a single mention of consumer fraud anywhere in the documents settling the Arizona matter or establishing the Monitorship.[2] Nevertheless, on the basis of little more than an asserted similarity between money laundering and consumer fraud and the measures necessary to combat both, the Commission demands all of the "reports, reviews, or other documents prepared by the Monitor" relating to Western Union's compliance with its anti-money laundering program. Dkt. 1 at 8 [JA-45]. But the FTC does not stop there. It also demands "all

[2] *See* Dkt. 1-2 at 1–13 [JA-111 to -123] (Settlement Agreement); Dkt. 1-1 at 1–19 [JA-91 to -109] (Monitor Engagement Letter); Dkt. 1-2 at 1–9 [JA-125 to -133] (court order approving settlement and appointing Monitor); Dkt. 17-3 at 1–9 [JA-292 to -300] (court order replacing Monitor); Dkt. 28-4 [JA-739] (Statement of Admitted Facts).

information Western Union provided to the Monitor" and "***[a]ll documents referring or relating to communications with the Monitor***." *Id*. at 7–8 [JA-44 to -45] (emphasis added).

As a result of this remarkably broad request, Western Union was obligated to produce more than 250,000 documents and a privilege log containing more than 230,000 others. The overwhelming majority of these documents reflect wholly internal correspondence and deliberations of Western Union employees and attorneys about Western Union's dealings with the Monitor and its anti-money laundering program. *See* Dkt. 64 ¶¶ 9–10. Even a deferential examination of the FTC's justification for its expansive demand shows the agency's overreach.

1. Western Union's Anti-Money Laundering Program and its Consumer Fraud Prevention Program Are Distinct Programs Serving Distinct Purposes

The FTC contends that the Monitor-related documents are relevant to its consumer fraud investigation because of "'substantial overlaps between the [anti-money laundering] program and the anti-fraud program.'" FTC Response Br. at 6 (citation omitted). The FTC first dismisses the "substantive differences" between money laundering and consumer fraud as "supposed." *Id*. at 32. It thereby seeks to equate Western Union's consumer fraud prevention program with its anti-money laundering program. From those asserted similarities, it then argues that it is

entitled to review all aspects of Western Union's money laundering prevention program.

The differences between the two criminal activities—and thus the measures to prevent them—are not "supposed" but real. "Typically, the underlying money transfer activity that the AML program seeks to prevent involves two complicit parties, the sender and receiver, who have conspired to launder proceeds from unlawful activities." Dkt. 21-1 at ¶ 20 [JA-378]. Not so with consumer fraud, where the sender is the victim, and "has in some way been deceived into sending the funds." Dkt. 21-1 at ¶ 21 [JA-379]. *See also* Western Union Br. at 45–46.[3]

The differences between the two underlying crimes lead to substantial differences in the programs that Western Union employs to prevent each. Western Union's consumer fraud prevention program seeks to protect innocent victims by educating potential senders as to the risks of fraud. *See* Dkt. 21-1 ¶ 15 [JA-377]; Dkt. 28-3 at 3, 20–24 (sealed) [JA-1016, 1033-37]. In numerous geographic regions, Western Union maintains a "Courtesy Callback Program," through which

[3] The FTC cites statements made by the Financial Crimes Enforcement Network ("FinCEN")'s then-director, at a Mortgage Bankers Association conference discussing mortgage fraud, that money laundering and fraud are "'quite often interconnected.'" FTC Response Br. at 35. The FTC ignores the next sentence where the former director goes on to explain that a fraudulent act may lead to an act of money laundering. Dkt. 28-5 at 8 [JA-748]. Here, no one contends that acts of consumer fraud led to money laundering along the Southwest border. Rather, the focus has been on drug trafficking and human smuggling.

[redacted] Dkt. 21-1 at ¶ 15 (sealed) [JA-1005]. In order to protect duped senders, Western Union prohibits some transactions altogether. *See* Dkt. 28-3 at 15 (sealed) [JA-1028] ([redacted]).

Obviously, these practices make no sense in the context of an anti-money laundering program. Western Union thus does not seek to educate potential senders who plan on laundering money as to the programs in place to detect them, since those senders are themselves culpable. Nor does Western [redacted]. Instead, Western Union's anti-money laundering program focuses on [redacted] The program is grounded in statutory requirements specifically geared to combat money laundering, which assume that both sender and receiver are complicit. *See* 31 C.F.R. § 1022.210 (2013).

For these reasons, the two programs do not, as the FTC contends, encompass "the same consumers [and] the same money transfers." FTC Response Br. at 32.

As Western Union's Senior Vice President testified, the two programs "have different goals, and are designed to prevent different illegal conduct." Dkt. 21-1 at ¶ 19 [JA-378]. They therefore have very "different operations and procedures." *Id*. The FTC's attempt to bridge those differences ignores reality.

2. Western Union's "Single Network" and "Similar" Tools Do Not Establish the Relevance of the Monitor-Related Documents to the FTC's Consumer Fraud Investigation

Looking for any possible strand of commonality, the FTC argues that the programs are similar because "Western Union has a single network for processing global money transfers" and the two programs use "similar" prevention tools. FTC Response Br. at 32, 33.

The FTC cites no authority to support its argument that it is entitled to investigate any criminal activity outside of its jurisdiction, provided only that it was conducted over the same "network" as conduct within its jurisdiction. Furthermore, the FTC's position has disturbing implications. On this theory, *any* agency, state or federal, could demand the Monitor-related documents, whether or not preventing money laundering was within the agency's jurisdiction. All it would have to do is show that Western Union's network was used for some other conduct that fell within its jurisdiction. Relevance is not so pliable as to allow such limitless bootstrapping. *See, e.g.*, *Newport News*, 837 F.2d at 166 (refusing

to enforce subpoena, noting that agency's argument in support of enforcement "contains no apparent limit on the records to which [it] would have access").

Moreover, the same dynamic would apply to many other modern corporate enterprises, ranging from airlines to brokerage houses, which frequently employ a "single network for processing" their customer transactions. The use of a single network does not entitle an agency with jurisdiction over one type of transaction to inquire into all others on the same network. "The reasonableness of a subpoena is not only a function of the type of information sought but also the scope of the information requested." *State ex rel. Goddard v. W. Union Fin. Servs.*, 166 P.3d 916, 923 (Ariz. Ct. App. 2007) (refusing to enforce, on grounds of unreasonableness, certain parts of state attorney general subpoena served on Western Union because subpoena called for money transfers not related to racketeering, the subject under investigation).

Nor does the assertion that Western Union uses similar tools to implement two very different prevention programs give the FTC unfettered access to anti-money laundering documents. The [redacted] does not, in itself, make one program relevant to another. *See* FTC Response Br. at 33. [redacted]. *Compare* Dkt. 28-3 at 15 (sealed) [JA-1028] ([redacted]),

with Dkt. 17-2 at 11 [JA-282] ([redacted]). The uses of the information are also different. In its anti-fraud program, Western Union uses [redacted] Dkt. 28-3 at 4 (sealed) [JA-1017]. In its anti-money laundering program, Western Union [redacted] Dkt. 1-1 at 12 [JA-102]. By itself, the use of [redacted] in the anti-money laundering context does nothing to demonstrate the efficacy (or lack thereof) of the consumer fraud prevention program.[4]

3. The Bank Secrecy Act Does Not Render the Monitor-Related Documents Relevant to the FTC's Consumer Fraud Investigation

Grasping at its final straw, the FTC also posits that it has authority to demand the more than 250,000 Monitor-related documents on the ground that the Monitor's role encompasses a "broader review" of Western Union's compliance with the Bank Secrecy Act ("BSA"). FTC Response Br. at 35. Because the BSA

[4] For much the same reasons, the FTC cannot rely on its assertions that consumer fraud and money laundering were discussed in the same conference. *See* FTC Response Br. at 33–34. The FTC does not cite a single case upholding jurisdiction for a subpoena simply on the fortuity that compliance issues regarding different statutes were discussed in the same professional conference.

requires that Western Union file Suspicious Activity Reports ("SARs"), the FTC argues that the Monitor may have some oversight over reports of suspected consumer fraud. *Id*.

The FTC's argument ignores the record. As noted above (*see supra* section II.A), nothing about the Monitor's mandate had anything to do with consumer fraud. The parties to the Settlement Agreement did not focus on consumer fraud. Instead, the Monitor was tasked with reviewing Western Union's efforts to prevent money laundering in a specific geographic region of the country. The targeted money laundering was thought to arise from drug trafficking and human smuggling. The Monitor did not oversee Western Union's consumer fraud prevention efforts.

That the Monitor has the power to review Western Union's compliance with the Bank Secrecy Act's SAR filing requirement does not in any way change the focus of his work. The Bank Secrecy Act's SAR regulations do not even mention consumer fraud. Instead, the regulations require money services businesses like Western Union, in certain circumstances, to file reports of suspicious activity relevant to *any* "possible violation of law or regulation." 31 C.F.R. § 1022.320(a)(1) (2013). To the extent that consumer fraud falls within the SAR reporting requirement, it is only because consumer fraud may be one of many potential illegal acts that can trigger a SAR filing. Others include illegal

transaction structuring, terrorist financing, bribery, counterfeiting, identity theft, forgery, embezzlement, public corruption, and a range of other suspicious activity. *See* Suspicious Activity Report Form, Version Number 1.1, *available at* http://sdtmut.fincen.treas.gov/news/SuspiciousActivityReport.pdf (last visited May 20, 2014). That the Monitor, as part of his overall mission to review Western Union's anti-money laundering program, has authority to review Western Union's SAR filing program does not give the FTC a free pass to investigate any of these wide variety of criminal activities. To reach this conclusion would transform the FTC into another FBI.

The FTC's contention—attempting to use the possibility of consumer fraud-related SARs as its tool to pry into Western Union's anti-money laundering program—is particularly questionable since the FTC is without authority to review any SARs that Western Union may have submitted. As pertinent here, Western Union may not "disclose a SAR or any information that would reveal the existence of a SAR" except to (1) a federal law enforcement agency or (2) a "[f]ederal regulatory authority that examines the money services business for compliance with the [BSA]." 31 C.F.R. § 1022.320(d) (2013).

Guidance from FinCEN, the agency primarily responsible for enforcing the BSA, does not cite the FTC among the examples of federal law enforcement agencies to which a SAR could be provided; rather, it identifies entities such as the

FBI, the DEA, Immigrations & Customs Enforcement, and U.S. Attorneys' Offices.[5] Nor does the FTC have authority to examine companies, such as Western Union, for compliance with the BSA. The federal agencies to which that authority has been delegated are the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Reserve, the National Credit Union Administration, and several agencies within the Treasury Department.[6] Thus, if there were SARs dealing with consumer fraud, the FTC could not see them.

In any event, the fact that the Monitor might have some theoretical authority over hypothetical acts of consumer fraud—when these were not the focus of his work—cannot provide a basis for rendering *all* documents relating to the Monitor's work relevant to the FTC's consumer fraud investigation. *See, e.g.*, *In re Horowitz*, 482 F.2d 72 (2d Cir. 1973) (recognizing that grand jury subpoena may not be used to obtain documents not relevant to the grand jury's investigation). If

[5] *See* FinCEN, SAR Activity Review, Issue 9, at 44 (Oct. 2005), *available at* www.fincen.gov/sarreviewissue9.pdf (citing examples of federal law enforcement agencies to which a SAR could be provided, without any mention of the FTC).

[6] *See* GAO, Report to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate: Bank Secrecy Act – Federal Agencies Should Take Action to Further Improve Coordination and Information-Sharing Efforts, at 11 (Feb. 2009), *available at* http://www.gao.gov/products/GAO-09-227 (listing the federal agencies involved in examining compliance with the BSA, without any mention of the FTC).

the FTC believes that the Monitor might have documents relevant to suspected instances of consumer fraud, it could have asked for those documents directly. Instead, under the guise of this merely hypothetical regulatory overlap, it seeks documents far afield from the consumer fraud that it has authority to investigate. The Bank Secrecy Act, like the rest of the FTC's justifications, simply does not provide the relevance hook on which the agency seeks to hang its overreaching demand.

B. The FTC Has Abandoned its Original Rationale for Why the Bulk of the Monitor Documents Are Relevant

Notably, the Commission offered its arguments regarding the similarities between anti-money laundering and anti-fraud measures *only* in support of the FTC's demand for the Monitor's reports. *See* Dkt. 1-3 at 12 [JA-176] ("To the extent the Monitor's reports include an assessment of, and recommendations for, each of these facets of Western Union's AML program, they are highly relevant to the current inquiry into the adequacy of the company's antifraud program."). However, the Monitor reports were only a small portion of the documents sought by the CID's second specification. *See id.* (noting the CID "was not limited to the Monitor's reports"). The CID also sought "Western Union's internal communications and reactions to the findings and recommendations of the Monitor." *Id.* at 13 [JA-177].

As to those wholly internal communications (which accounted for the vast bulk of the 250,000 documents produced, *see* Dkt. 64 ¶¶ 9–10), the FTC relied on an entirely separate relevance rationale. Those Western Union documents, the FTC concluded, "are relevant to determining the ***strength of the company's culture of compliance*** and whether there is ***widespread commitment to eliminating illegal transactions*** from Western Union's system." Dkt. 1-3 at 13 [JA-177] (emphasis added). Based on this "culture of compliance" rationale, the FTC demanded that Western Union conduct broad searches of the documents and emails of 74 Western Union employees, review more than 1,300,000 documents, and produce all non-privileged documents. *See* Western Union Br. at 13–14.

Remarkably, now that Western Union has challenged the FTC's specious relevance arguments, the FTC has wholly abandoned this "culture of compliance" rationale. Despite Western Union's direct challenge to this purported justification in its cross-appeal (*see* Western Union Br. at 50), the FTC's response brief is silent about the "culture of compliance" argument. Instead, it seeks to sneak a quarter of a million documents through this Court's review without offering *any* explanation for how they might be relevant to the investigation. It asks the Court to defer to its administrative findings of relevance, *even though it now abandons the only justification for seeking the vast bulk of the documents.* This Court owes no deference to the FTC's puzzling position. *See FTC v. Rockefeller*, 591 F.2d 182,

187 (2d Cir. 1979) ("[W]e are reluctant to justify [FTC] subpoenas . . . on . . . a basis not used by the Commission.") (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

The FTC offers no response to Western Union's position that the desire to examine the company's "culture of compliance" is not an acceptable justification for such a far-reaching document demand. Western Union's compliance with *other* laws would tell the FTC nothing about how it complies with its anti-fraud obligations. Indeed, under the FTC's now-abandoned justification, there is no corporate legal compliance program that the FTC could not reach in the guise of investigating fraud compliance. *See* Western Union Br. at 50. "Reasonable" relevance requires something more than this attenuated connection.

III. The FTC's CID Does Not Sufficiently Explain the Subject of the Agency's Investigation

In an effort to defend the adequacy of the CID, the FTC relies on a resolution so vague that it is plainly deficient under the FTC Improvements Act. The FTC emphasizes that it is investigating "*others* assisting" telemarketers or sellers with unlawful practices concerning "*other* information, products, or services" in violation of Section 5 of the FTC Act "and/or" the Telemarketing Sales Rule. FTC Response at 36–37.[7] This language is empty; it effectively

[7] Though the FTC now describes the CID's applicable statutory and regulatory provisions as Section 5 "and" the Telemarketing Sales Rule, this

reaches all conduct covered by Section 5. In addition, it cannot give meaningful notice to Western Union, much less provide a meaningful basis for a court to assess the relevancy of the requested documents as mandated by *Morton Salt*.[8] *See, e.g.*, *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980) ("Section 5's prohibition of unfair and deceptive practices . . . standing broadly alone would not serve very specific notice of [a resolution's] purpose.").

Although a CID need not "delineate the exact parameters of its inquiry," FTC Response Br. at 37–38, it must contain more than "a vague description of the general subject matter" of its inquiry. S. Rep. No. 96-500, at 23 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1125. Congress directed the FTC 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) (2012).

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misstates the CID, which is in the disjunctive. *See* Dkt. 1-1 [JA-71] (investigation of violations of Section 5 "and/or" violations of the Telemarketing Sales Rule).

[8] The FTC effectively contends that this Court should find the resolution adequate because the "Commission had relied on the same resolution to investigate MoneyGram, Western Union's primary competitor" without problem. FTC Response Br. at 7. In *MoneyGram*, neither the district court nor the Seventh Circuit had any occasion to determine whether the resolution was sufficient (nor whether the CID was properly within the authority of the agency). *See* docket for *FTC v. MoneyGram Int'l, Inc.*, No. 1:09-cv-06576 (N.D. Ill. Oct. 21, 2009). That the resolution faced no challenge in *MoneyGram* does not render it adequate in this case.

Congress could not have believed that this mandate was achieved through language that simply mirrors Section 5 of the FTC Act.

The FTC incorrectly asserts that courts have previously approved similar broadly worded investigative demands. To the contrary, as Western Union demonstrated in its opening brief (at 53–54), in all of the cases cited by the Commission (and cited again in the FTC's response brief, at 38), the resolution was found to be adequate because the statutory provision at issue was paired with something more, such as a defined product, practice, company, or specific statutory violation, to specify the conduct under investigation. These cases also show the district court's error in concluding that the CID is no less specific than "the usual general resolution that you find with all administrative agencies." Dkt. 41 at 27 [JA-855].

Nor would a more specific CID "impede agency investigations," as the FTC claims. FTC Response Br. at 37. In fact, Congress viewed the Improvements Act's specificity requirement as *benefitting* the FTC:

> If the FTC has to define what it is after *before* it starts, rather than asking for everything, then fighting in court to get it, and later sorting out what it really wants, it is likely to make more actual progress in its investigations.

126 Cong. Rec. 2339, at 2394–95 (1980) (emphasis added). In a statement to Congress, then-FTC Commissioner Pitofsky called the Act a "net benefit" because it requires the Commission "to think through more clearly and thoroughly what

information it seeks, and the recipients of investigative demands will be in a better position to resist unnecessary investigations or comply in a reasonable way." *Id*. at 2395 (citation and internal quotation marks omitted).

In any event, other federal agencies manage *both* to produce subpoenas with more specific statements about the scope and purpose of the investigation *and* to proceed with their investigation. *See, e.g*., *Gold Bond Stamp Co. v. United States*, 325 F.2d 1018, 1018 (8th Cir. 1964) (affirming enforcement of DOJ CID issued to determine "whether there is or has been a violation of the provisions of Title 15 United States Code Secs. 1, 2, 3, 13, 14 and 18 by . . . Restrictive practices and acquisitions involving the dispensing, supplying, sale or furnishing of trading stamps and the purchase and sale of goods and services in connection therewith") (citation and internal quotation marks omitted)[9]; *Maccaferri Gabions, Inc. v. United States*, 938 F. Supp. 311, 314 (D. Md. 1995) (DOJ CID issued "to determine whether there is, has been or may be a violation of §§ 1, 2 of the Sherman Act; § 3 of the Clayton Act by . . . [a]greements and conduct restraining trade in the gabion and gabion fastening industries") (citation and internal

[9] Much like the FTC Act, 15 U.S.C. § 1312 (2012) requires that an Antitrust Division, Department of Justice CID "state the nature of the conduct constituting the alleged antitrust violation . . . which [is] under investigation and the provision of law applicable thereto."

quotation marks omitted). This Court should require the same specificity from the FTC and deny enforcement of this vague CID.

CONCLUSION

The district court's order enforcing Specification 2 of the CID should be reversed, and the Court should order responsive documents returned to Western Union.

Dated: May 22, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 28.1(e)(2)(C) 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 5,782 words, according to the word processing system used to produce the text.

Dated: May 22, 2014

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CERTIFICATE OF SERVICE

I, Charles G. Cole, hereby certify that on May 22, 2014, I caused to be served a courtesy copy of the foregoing Reply Brief of Appellee/Cross-Appellant The Western Union Company filed under seal this day upon counsel for the Federal Trade Commission and for Lonnie Keene, Keene Consulting Arizona, LLC, by Federal Express overnight delivery service and by e-mail to the addresses below:

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