

13-3100, 13-3272  
FTC v. Western Union

# MANDATE

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1           At a stated term of the United States Court of Appeals  
2           for the Second Circuit, held at the Thurgood Marshall United  
3           States Courthouse, 40 Foley Square, in the City of New York,  
4           on the 7<sup>th</sup> day of October, two thousand fourteen.

5  
6           PRESENT: DENNIS JACOBS,  
7                           CHRISTOPHER F. DRONEY,  
8                                           Circuit Judges,  
9                           LEWIS A. KAPLAN,  
10                                           District Judge.\*

11  
12           - - - - -X  
13           FEDERAL TRADE COMMISSION,  
14                           Appellant and Cross-  
15                           Appellee,

16  
17                           -v.-                                           13-3100, 13-3272

18  
19           THE WESTERN UNION COMPANY,  
20                           Appellee and Cross-  
21                           Appellant.  
22           - - - - -X

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\* Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

1 **FOR APPELLANT FEDERAL**  
2 **TRADE COMMISSION:**

3 BURKE W. KAPPLER (with Jonathan  
4 E. Nuechterlein, David C.  
5 Shonka, John Daly, Leslie Rice  
6 Melman, Josephine Liu, Office of  
7 the General Counsel, Federal  
8 Trade Commission, and C. Steven  
9 Baker, Todd M. Kossow, Karen D.  
10 Dodge, Midwest Region, and Hugh  
11 Stevenson, Stacy Feuer, Lauren  
12 Kapin, Office of International  
13 Affairs, on the brief), Office  
14 of the General Counsel, Federal  
15 Trade Commission, Washington,  
16 D.C.

17 **FOR APPELLEE WESTERN**  
18 **UNION:**

19 CHARLES G. COLE (with Edward B.  
20 Schwartz, Kate M. Riggs, Steptoe  
21 & Johnson LLP, and David Fallek,  
22 Engelwood, Colorado, on the  
23 brief), Steptoe & Johnson LLP,  
24 Washington, D.C.

25 Appeal from a judgment of the United States District  
26 Court for the Southern District of New York (Hellerstein,  
27 J.).

28  
29 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
30 **AND DECREED** that the judgment of the district court be  
31 **REVERSED in part and VACATED and REMANDED in part.**

32  
33 The Federal Trade Commission ("FTC") appeals, and  
34 Western Union cross-appeals, from the judgment of the United  
35 States District Court for the Southern District of New York  
36 (Hellerstein, J.), granting, in part, and denying, in part,  
37 enforcement of a Civil Investigatory Demand ("CID") issued  
38 by the FTC to Western Union. We assume the parties'  
39 familiarity with the underlying facts, the procedural  
40 history, and the issues presented for review.

41  
42 The FTC is authorized by Congress to regulate "unfair  
43 or deceptive acts or practices in or affecting commerce."  
44 15 U.S.C. § 45(a)(1). Its mission is protecting and

1 assisting U.S. consumers. In carrying out its mission, the  
2 FTC has authority to regulate "acts or practices involving  
3 foreign commerce that - (i) cause or are likely to cause  
4 conduct reasonably foreseeable injury within the United  
5 States; or (ii) involve material conduct occurring within  
6 the United States." 15 U.S.C. § 45(a)(4)(A).

7  
8 The FTC has authority to issue a CID in connection with  
9 "any inquiry conducted by a Commission investigator for the  
10 purpose of ascertaining whether any person has been engaged  
11 in any unfair or deceptive acts or practices in or affecting  
12 commerce." Id. § 57b-1(a)(1)-(2). If the subject of a CID  
13 does not voluntarily turn over the requested material, the  
14 FTC may file a petition for enforcement with a district  
15 court. Id. § 57b-1(e).

16  
17 In compliance with the FTC's investigation into fraud-  
18 induced money transfers, Western Union has produced to the  
19 agency more than two dozen categories of documents. Western  
20 Union objected, however, to the production of two document  
21 categories, which became the subject of the CID and this  
22 appeal and cross-appeal: complaints of consumer fraud made  
23 outside the U.S.; and documents related to the work of a  
24 monitor appointed in connection with a settlement of an  
25 Arizona state investigation of cross-border third-party  
26 money laundering. Specifically, the CID called for:  
27 (1) "all documents referring or relating to complaints by  
28 consumers worldwide relating to fraud-induced money  
29 transfers" and (2) "all documents referring or relating to  
30 communications with the Monitor, including, but not limited  
31 to, all information Western Union provided to the Monitor  
32 and, any reports, reviews or other documents prepared by the  
33 Monitor."

34  
35 The FTC sought enforcement of the CID in the district  
36 court, which denied enforcement as to the foreign documents  
37 and granted enforcement as to the Monitor-related documents.

38  
39 As to the foreign documents, a request for "documents  
40 referring or relating to complaints by consumers worldwide  
41 relating to fraud-induced money transfers" falls within the  
42 FTC's statutory authority because foreign complaints of  
43 fraud-induced money transfers are subject to Western Union's  
44 anti-fraud program, which is administered in the United

1 States.<sup>1</sup> 15 U.S.C. § 45(a)(4)(A)(ii). And, if Western  
 2 Union fails to respond to foreign complaints of fraud-  
 3 induced transfers, it is "reasonably foreseeable" that  
 4 unaddressed fraud will harm U.S. consumers. Id.  
 5 § 45(a)(4)(A)(i).<sup>2</sup>

6  
 7 As to the Monitor-related documents, the district court  
 8 acknowledged that fraud and money laundering "may be  
 9 different." In particular, the transferor and the  
 10 transferee in a money-laundering transaction are willing and  
 11 informed. The district court stated that the Monitor-

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<sup>1</sup> This Court is not deciding whether the FTC has jurisdiction to commence an enforcement proceeding concerning wholly foreign transactions. At the subpoena stage courts need not decide questions of the agency's jurisdiction; "rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party." United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 470 (2d Cir. 1996). Currently, the FTC is acting pursuant to its investigative power, and we look only to determine whether the FTC has statutory authority for its investigation.

<sup>2</sup> Since the FTC relies on these provisions of the SAFE WEB Act as authority for the issuance of the CIDs, the Court does not address the question of whether the Commission has authority to issue the CIDs under other provisions of the FTC Act. See, e.g., 15 U.S.C. § 57b-1(c)(1) (authorizing the issuance of CIDs "[w]henver the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce . . . or to antitrust violations); id. § 46(a) (granting the FTC the power to "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce"); id. § 44 (defining "commerce" to mean "commerce among the several States or with foreign nations . . . or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.").

1 related documents were relevant to the FTC's investigation  
2 nevertheless because both fraud and money laundering "have  
3 to do with money transferred from one place to another place  
4 due to the agency of a company like Western Union."  
5

6 The district court's explanation of its decision with  
7 respect to the Monitor-related documents is "too spare to  
8 serve as a basis for our review." Beckford v. Portuondo,  
9 234 F.3d 128, 130 (2d Cir. 2000). "[I]t is normally useful  
10 to have [the district court's] conclusions articulated"  
11 because "if the District Court does not enter an opinion  
12 analyzing the relevant precedents in light of the record, or  
13 merely enters skeletal conclusions of law, the reviewing  
14 court is deprived of . . . helpful guidance." Miranda v.  
15 Bennett, 322 F.3d 171, 175 (2d Cir. 2003) (internal  
16 quotation marks and alterations omitted). Accordingly, we  
17 remand "for further consideration and a complete and  
18 comprehensive decision." Beckford, 234 F.3d at 130.  
19

20 On remand, the district court should make findings  
21 regarding how documents generated in connection with a  
22 monitorship imposed in settlement of a cross-border money-  
23 laundering investigation relates to Congress' grant of  
24 regulatory powers to the FTC.<sup>3</sup> Separate findings are needed  
25 as to what justifies the production of (i) the Monitor's  
26 reports, (ii) Western Union's exchanges with the Monitor,  
27 and (iii) Western Union's internal documents that "refer or  
28 relate" to the Monitor.  
29



30 We remand in accordance with the procedures set forth  
31 in United States v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994).  
32 Either party may notify the Clerk of Court of a renewed  
33 appeal within fourteen days of the district court's decision  
34 and this panel will retain jurisdiction over any subsequent  
35 appeal.  
36

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<sup>3</sup> The district court should also determine whether Western Union's anti-money laundering initiatives have sufficient bearing upon consumer fraud detection to justify the burden of compliance.

1 For the foregoing reasons, we hereby **REVERSE** the  
2 judgment of the district court as to the foreign documents,  
3 and **VACATE** and **REMAND** as to the Monitor-related documents.  
4

5 FOR THE COURT:  
6 CATHERINE O'HAGAN WOLFE, CLERK  
7  
8  
9

10    
11

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit