UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of	)	
CIVIL INVESTIGATIVE DEMAND ISSUED TO THE ROBERT LARSON AUTOMOTIVE GROUP, INC., ALSO D/B/A LARSON VOLKSWAGEN AND AUDI TACOMA DATED DECEMBER 8, 2015	)	**File No. 1623006** **February 25, 2016**

ORDER DENYING PETITION TO STRIKE
OR LIMIT CIVIL INVESTIGATIVE DEMAND

By McSWEENY, Commissioner:

The Robert Larson Automotive Group, Inc. ("RLAG" or "Petitioner"), has filed a petition to strike or limit a civil investigative demand ("CID") issued by the Commission on December 8, 2015. For the reasons stated below, the petition to strike or limit ("Petition") is denied. Nonetheless, in order to expedite compliance in aid of the Commission's investigation, the Commission incorporates certain modifications to the CID agreed to by staff and directs Petitioner to comply with the amended CID.

I. BACKGROUND

Volkswagen AG and Audi AG (hereinafter referred to collectively as "VW") marketed certain 2009-2016 model year vehicles as low emission "Clean Diesel" vehicles that complied with federal emission standards. In 2014, state and federal agencies started to question the manufacturers' claims for these vehicles. Most recently, the Justice Department, on behalf of the Environmental Protection Agency, sued VW alleging that more than 500,000 of these "Clean Diesel" vehicles contained "defeat devices" designed to mislead federal emissions tests.[1] The complaint in that case alleges that these "defeat devices" can detect whether a vehicle is

[1] *United States v. Volkswagen AG, et al.*, No. 2:16-CV-10006 (E.D. Mich. Jan. 4, 2016). The EPA's complaint was transferred to the Northern District of California to be considered as part of the related Multidistrict Litigation. *See in re: Volkswagen "Clean Diesel" Marketing, Sales Practices & Products Liability Litig.*, No. 3:15-md-02672 (N.D. Cal.).

undergoing an emissions test and cause the vehicles to produce compliant emissions results, thus concealing the actual level of nitrogen oxide emissions they emit during normal operations.[2]

The Commission opened its own investigation of VW's environmental claims after reviewing the marketing materials for these vehicles. As part of the investigation, the Commission issued CIDs to Volkswagen USA ("VW USA") and to various third parties, including a number of car dealerships.[3] On December 8, 2015, the Commission issued a CID to RLAG seeking, among other things, documents and information regarding the environmental claims for "Clean Diesel" vehicles, complaints about those claims, and certain information about sales and leased vehicles. Of particular relevance here, the CID requested information and materials regarding, with respect to the Clean Diesel vehicles, the results of any investigations or testing of the "defeat devices," emissions, and the use of Diesel Exhaust Fluid to reduce nitrogen oxide emissions.

Petitioner made a limited production by the due date, but nonetheless filed the instant petition on January 14, 2016, asking the Commission to strike or limit the CID, principally on grounds of undue burden. For the reasons discussed below, Petitioner has not shown undue burden or any other ground that would warrant striking or modifying the CID.

II. ANALYSIS

FTC compulsory process is proper "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant" to the investigation.[4] Further, production must not be "unduly burdensome."[5] Petitioner argues that the CID is unduly burdensome, overbroad, vague, lacks sufficient confidentiality protections, and was directed to the wrong entity. None of these arguments has merit.

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[2] *See id.*, Complaint, ¶¶ 56-84.

[3] The Commission's Resolution Directing Use of Compulsory Process in a Non-Public Investigation of Unnamed Marketers Making Environmental Claims, describes the nature and scope of the investigation as follows:

> To determine whether unnamed persons, partnerships, corporations, or others have been or are engaged in 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, by: (1) making express or implied claims that are inconsistent with the Commission's Guides for the Use of Environmental Claims, 16 C.F.R. Part 260; or (2) otherwise making express or implied environmental claims. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or to others would be in the public interest.

Resolution File No. 0823151 (dated April 8, 2011).

[4] *United States v. Morton Salt Co*., 338 U.S. 632, 652 (1950).

[5] *FTC v. Invention Submission Corp*., 965 F.2d 1086, 1089 (D.C. Cir. 1992) (citing, *inter alia*, *FTC v. Texaco, Inc*., 555 F.2d 862, 881(D.C. Cir. 1977)).

A. The Commission May Seek Relevant Information from Third Parties.

Petitioner contends first that it should be excused from complying with the CID because VW assertedly "has almost all the material information the FTC seeks."[6] Petitioner claims that it neither designs nor tests the cars it sells, that all technical information it possesses responsive to the CID it receives from manufacturers, and that it should only respond to a narrowed CID after VW makes its production.[7]

The Commission, however, is not required to exhaust its efforts to gather responsive materials from the target of an investigation before it may issue process to third parties.[8] The Commission may issue a CID to "any person" it "has reason to believe" possesses information or documents "relevant" to a law enforcement investigation regarding unfair or deceptive trade practices.[9] Indeed, an important and effective tool in investigations involves comparing information and materials obtained from targets with that obtained from third parties. Thus, even if Petitioner were correct that VW has "almost all the material information the FTC seeks,"[10] that would not justify placing any limitation on the CID to Petitioner. In any event, a number of the CID specifications ask for information that is plainly available only from Petitioner.[11] In short, Petitioner is not relieved of its obligation to produce responsive materials.[12]

B. The CID Does Not Impose Undue Burden

Petitioner also argues that compliance with the CID would be unduly burdensome and expensive, and would result in the production of information with little probative value.[13] The standard for assessing the burden imposed by agency investigative process is well established. Agency process is not unduly burdensome unless compliance threatens to seriously impair or

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[6] Pet. at 3.

[7] Pet. at 1, 3; Pet. Ex. A. (Larson Decl.) ¶ 4.

[8] *See, e.g., Gasoline Pricing Investig*., 141 F.T.C. 498, 505, 2006 WL 6679070, at *4 (2006).

[9] 15 U.S.C. §§ 57b-1(a)(6), (c)(1).

[10] *See* Pet. at 3.

[11] *See*, *e.g.*, Exh. 1 to Pet. Exh. A (CID, Doc. Req. 9) ("All Documents Relating To any compensation, incentives, bonuses, repayment, or offsets You or any Volkswagen Affiliate has given (or promised to give) to owners or lessees of Covered Vehicles You sold or leased, since September 14, 2015.").

[12] Petitioner's specific objections to Document Requests 2-9 and 11 and Interrogatories 1-9 are unfounded for the same reasons. *See* Pet. at 7-9. Petitioner must produce responsive materials and information in its possession, custody, or control regardless of its origin. If Petitioner does not have such material, *see*, *e.g.*, Pet. at 9 (specific objections to Interrogatories 6, 8), it should certify as much and produce what it has.

[13] Pet. at 4-5.

unduly disrupt the normal operations of the recipient's business.[14] This same standard applies to nonparties.[15] The recipient bears the responsibility of showing that the burden of compliance is undue.[16] The recipient of agency process must show the "measure of [its] grievance rather than [asking the court] to assume it,"[17] with the recognition that "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest."[18]

Petitioner asserts that compliance with the CID would involve reviewing "every record in [its] archive," consisting of "many thousands of documents," of which "only a small percentage" would be responsive.[19] Petitioner also asserts its "best estimate" is that compliance would require someone "three months working full time" to compile the requested information.[20] Mr. Larson's affidavit, however, does not provide any basis for these projections, and fails to show that such a search would substantially disrupt its operations.[21] Some cost of complying with an investigation – even substantial outlays – is to be expected; the burden of that cost must be evaluated in relation to the size and complexity of a recipient's business operations.[22] Courts have found that agency process that requested far more documents than the CID at issue, and that

[14] *See, e.g., Invention Submission*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 882); *Maryland Cup*, 785 F.2d at 479; *In re FTC Line of Business Report Litig.*, 595 F.2d 685, 703 (D.C. Cir. 1978).

[15] *See, e.g., Commission Order Affirming June 18, 2012 Ruling Denying Petition of Samsung Telecommunications America, LLC to Limit Subpoena Duces Tecum*, File No. 111-0163 (September 7, 2012), https://www.ftc.gov/enforcement/cases-proceedings/petitions-quash/google-inc (investigative subpoena issued on nonparty) (citing *FTC v. Rockefeller*, 441 F. Supp. 234, 240-42 (S.D.N.Y. 1977)); *see also In the Matter of Evanston Northwestern Healthcare Corp.*, No. 9315, 2004 FTC LEXIS 179, at *5-6 (Sept. 28, 2004) (citation omitted) (process issued on nonparties in administrative adjudicative proceeding); *FTC v. Ernstthal*, Misc. No. 78-0064, 1978 WL 1375 (D.D.C. May 30, 1978, *aff'd*, 607 F.2d 488, 489 n.1 (D.C. Cir. 1979) (rejecting burden, definiteness, and relevance challenges to administrative subpoena issued on nonparty in adjudicative hearing particularly where identically-situated nonparties complied without difficulty).

[16] *In the Matter of January 16, 2014 Civil Investigative Demand Issued to the College Network, Inc.*, File No. 1323236, 2014 FTC LEXIS 90, at *5 (April 21, 2014) (citing, *inter alia*, *Texaco*, 555 F.2d at 882).

[17] *Morton Salt*, 338 U.S. at 654.

[18] *Texaco*, 555 F.2d at 882.

[19] *See* Pet. at 4-5; Pet. Exh. A. (Larson Decl.) ¶¶ 7, 8.

[20] Pet. Exh. A (Larson Decl.) ¶ 10.

[21] For similar reasons, we deny as unfounded Petitioner's related objection that the deadline for compliance was "unreasonably short" because it would take "at least three months" to complete a review of responsive documents. Pet. at 4. In addition to extending Petitioner's compliance date until January 14, 2016, *see* Pet. Ex. 3 to Ex. A, FTC staff offered to further extend the compliance date and proposed other modifications to reduce the claimed burden.

[22] *The College Network*, 2014 FTC LEXIS 90, at *18.

imposed significant expenses, was not unduly burdensome.[23] Moreover, several CID requests have particular limitations on the scope of the response that lessen burden.[24]

Petitioner argues further that the burden of compliance is far outweighed by the "negligible value" of some of the information requested.[25] In particular, Petitioner contends that information about the amount of diesel exhaust fluid ("DEF") put in cars during servicing "adds nothing" to "admissions already made by Volkswagen."[26] In fact, the amount of DEF that vehicles consumed could reflect important information about the functioning of the defeat device and who would have known about its existence. Regardless, "[t]he Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation."[27] The material "need only be relevant to the *investigation* [into a possible law violation] – the boundary of which may be defined quite generally."[28] Indeed, the FTC's "own appraisal of relevancy must be accepted so long as it is not 'obviously wrong,'"[29] a showing Petitioner does not make here.[30]

[23] *See, e.g., FDIC v. Garner*, 126 F.3d 1138, 1145-46 (9th Cir. 1997) (affirming enforcement of agency subpoena that recipient alleged demanded "over one million" documents from hospital); *see also FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. Unit A July 1981) (citing *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974) ($392,000 cost for a bank with net income of $178 million)); *Texaco*, 555 F.2d at 922 ($4,000,000).

[24] For example, Document Request 1 requires only "[r]epresentative samples of" (not every document reflecting) certain advertisement claims, while Document Requests 5, 7, 8, 9, and Interrogatories 7 and 8 significantly limit the time period for responsive documents (from September 14, 2015 until compliance with the CID). *See* Exh. 1 to Pet. Exh. A.

[25] Pet. at 5.

[26] *Id.*

[27] *Invention Submission*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 877).

[28] *Id.* (emphasis in original) (citations omitted); *see also FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, 9 (D.D.C. 2010) (rejecting claim that the "FTC [must show] like any litigant, that the document demanded will lead to reasonably relevant and ultimately admissible evidence" as mischaracterizing the nature of the FTC's investigative authority) (citing *Morton Salt*, 338 U.S. at 642 and *Texaco*, 555 F.2d at 874), *aff'd*, 665 F.3d 1312 (D.C. Cir. 2011).

[29] *Invention Submission*, 965 F.2d at 1089 (citations omitted).

[30] Petitioner's specific objections to Document Request 11 and Interrogatory 9 regarding DEF, *see* Pet. at 8, 9, are unfounded for the same reasons. Those requests are not unduly burdensome and they are directly related to the April 8, 2011 Resolution regarding environmental claims. Also unfounded is Petitioner's challenge on relevancy grounds to Document Request 10 (regarding franchise agreements between Petitioner and VW USA since 2008), *see* Pet. at 8, as those agreements could describe the role of the dealership in marketing vehicle environmental claims and are therefore central to the investigation.

C. The CID is Not Overbroad

Petitioner argues that the definition of "Merchantability Claims" is overbroad because it would include any imported car beyond those at issue here.[31] This claim is without merit. A CID request is overbroad only where it is "out of proportion to the ends sought," and "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."[32] In fact, the term is used only in two document requests seeking marketing materials referring specifically to "Covered Vehicles" (certain 2009-2016 models of VWs and Audis at issue),[33] not any imported vehicle, and thus is sufficiently targeted to the investigation. Petitioner's overbreadth challenges to other specific CID requests are likewise unfounded because they are all sufficiently narrow and focused on the subject matter of the investigation.[34]

D. The CID Requests are Specific and Definite

Petitioner claims that the term "defeat device" is undefined and vague.[35] A CID request is impermissibly vague where it lacks reasonable specificity or is too indefinite to allow a responding party to comply.[36] The term "defeat device," is in fact explained in the CID itself (under the definition of "Covered Vehicle") as one "that causes, or may cause, the vehicle to produce materially different emissions during emissions testing than during normal road operation."[37] The provided definition is sufficiently specific and focused on the agency's investigation to enable Petitioner to identify responsive materials.[38]

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[31] Pet. at 6.

[32] *U.S. v. Wyatt*, 637 F.2d 293, 302 (5th Cir. 1981) (quoting, *inter alia*, *Morton Salt*, 338 U.S. at 652).

[33] *See* Document Requests 1, 4; Exh. 1 to Pet. Exh. A (CID) at 2-5 (§ I. "Definitions" ¶¶ H and O).

[34] For example, Petitioner challenges Document Request 1 claiming that it "would cover every advertisement which included a diesel vehicle," Pet. at 7, whereas in fact the CID as written is limited to just "[r]epresentative samples of . . . Environmentally Friendly" or "Merchantability" claims for the 2009-2016 model vehicles at issue. Likewise, Document Request 2 (regarding substantiation that the relevant "Covered Vehicles" are "Environmentally Friendly") and Request 4 (sales methods for "Covered Vehicles" relating to "Environmentally Friendly Claims") are not impermissibly broad because they are narrowly tailored to the agency's inquiry.

[35] *See* Pet. at 6, 7 (objection to Document Request 5); Pet. Exh. A (Larson Decl.) ¶ 13.

[36] *See, e.g.*, *College Network*, 2014 FTC LEXIS 90, at *4 (citing, *inter alia*, *United States v. Fitch Oil Co.*, 676 F.2d 673, 679 (Temp. Emer. Ct. App. 1982)).

[37] Exh. 1 to Pet. Exh. A (CID) at 2 (§ I. "Definitions" ¶ H).

[38] For the same reasons, we conclude that Petitioner's vagueness challenge to Document Request 2 (regarding substantiation that the relevant "Covered Vehicles" are "Environmentally Friendly"), *see* Pet. at 7, is unfounded as that request is adequately defined.

E. The FTC Act and the Commission's Rules of Practice Protect Confidential Business and Customer Information

Petitioner objects that the CID improperly asks for confidential business and personal customer information without sufficient protections, and in particular complains about information that may be shared with "other unnamed agencies without restriction."[39] This claim too has no merit. The Commission's Rules of Practice and relevant statutory provisions provide ample protection for documents and information obtained by the Commission through compulsory process.[40] Courts have consistently held that these provisions provide adequate protection and that the Commission has a full right to access even the most highly sensitive information, including trade secrets.[41] These protections apply to proprietary business and sensitive customer information like that called for by the FTC's requests. Additionally, under the relevant legal provisions, the Commission is permitted to share information obtained through process with other government agencies, provided those agencies describe the nature of their law enforcement activity, state the relevance of the requested information, and ensure that such information will be maintained in confidence and will be used only for official law enforcement purposes.[42]

F. Petitioner Had Adequate Notice of the CID Requests

Finally, Petitioner contends that the CID should be quashed because it was directed to an affiliated entity that does not directly sell Volkswagens. We disagree.

The Commission issued the CID to "The Robert Larson Automotive Group, Inc., also d/b/a Larson Volkswagen and Audi Tacoma," and directed it to the attention of "Robert Larson, President."[43] Petitioner contends that "The Robert Larson Automotive Group. Inc." does not sell VWs and that the CID should have been directed instead to Larson Motors, Inc., which does.[44] There is no dispute, however, that Robert Larson is the President, CEO, and owner of both RLAG and Larson Motors.[45] Petitioner does not allege that it was misled or prejudiced in any

[39] Pet. at 6-7; Pet. Exh. A. (Larson Decl.) ¶ 14.

[40] *See* 15 U.S.C. §§ 46(f), 57b-2; 16 C.F.R. § 4.10(a).

[41] *See, e.g.*, *FTC* v. *Invention Submission Corp.*, No. 89-272, 1991 WL 47104, at *4 (D.D.C. 1991), *aff'd*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *In re Subpoena Duces Tecum*, 228 F.3d 341, 351 (4th Cir. 2000) (enforcing subpoena requesting sensitive health care information in light of statutory protections).

[42] *See* 15 U.S.C. § 46(f); 16 C.F.R. § 4.11(c) and (j).

[43] Exh. 1 (CID) to Pet. Exh. A.

[44] Pet. at 3; Pet. Exh. A (Larson Aff.) ¶¶ 2, 3.

[45] *See, e.g.*, Pet. Exh. A (Larson Aff.) ¶ 1.

way by what is at most a technical flaw.[46] Indeed, the registered agent responsible under Washington state law for receiving service of process for Larson Motors is located at the same address in Tacoma, Washington as RLAG's business address. Further, Petitioner's counsel contacted FTC staff on December 15, 2015 – the day after the CID was delivered by FedEx at that Tacoma address – to discuss Petitioner's compliance.

In sum, we conclude that Petitioner's challenges to the CID are unfounded and deny its Petition.

III. MODIFICATION OF THE CID

While we deny the Petition as lacking merit, we note that Commission staff offered certain modifications to the CID in the interests of expedition. The CID is hereby modified in accordance with the offer that staff made to Petitioner by email dated January 13, 2016.

IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of The Robert Larson Automotive Group, Inc., also d/b/a Larson Volkswagen and Audi Tacoma, to Strike or Limit the Civil Investigative Demand be, and it hereby is, **DENIED,** and

IT IS FURTHER ORDERED THAT Petitioner The Robert Larson Automotive Group, Inc., also d/b/a Larson Volkswagen and Audi Tacoma, shall comply with the Commission's CID **as modified herein** on or before March 15, 2016.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: February 25, 2016

[46] *See, e.g., Morrel v. Nationwide Mut. Fire Ins. Co.*, 188 F.3d 218, 223-24 (4th Cir. 1999) (excusing notice that named improper party "in such terms that every intelligent person understands who is meant ... the misnomer of a corporation in a notice, summons ... or other step in a judicial proceeding is immaterial if it appears that [the corporation] could not have been, or was not, misled," where President of the intended recipient received service, and document itself made clear the intended recipient) (citation omitted); *Nader v. Fed. Election Comm'n*, 823 F. Supp. 2d 53, 67-68 (D.D.C. 2011) (failure to notice respondents of administrative complaint filed against them constituted harmless error), *appeal dismissed*, 725 F.3d 226 (D.C. Cir. 2013); *FEC v. Club for Growth, Inc*., 432 F.Supp. 2d 87, 90 (D.D.C. 2006) (defect in notice of complaint constituted harmless error where notice was sent to similar sounding entity and officer of both entities "surely had coterminous notice") (citation omitted); *SEC v. Lines Overseas Mgmt., Ltd.*, No. Civ. A. 04-302, 2005 WL 3627141, at *10 (D.D.C. Jan.7, 2005) (subpoena issued to "LOM Group of Companies," rather than target company "LOM, Ltd.," was enforced because the intended recipient was "plainly obvious.").