



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

March 28, 2007

VIA FACSIMILE AND EXPRESS MAIL

Commonwealth Marketing Group, Inc.
c/o Ronald L. Hicks, Jr., Esquire
Meyer, Unkovic & Scott LLP
1300 Oliver Building
535 Smithfield St.
Pittsburgh, PA 15222

Re: *Commonwealth Marketing Group, Inc.'s ("CMG") Petition to Quash or Limit Civil Investigative Demand ("CMG's Petition"), File No. 912-3352*

Dear Mr. Hicks:

This letter advises you of the disposition of CMG's Petition to quash or limit various specifications of the Civil Investigative Demand ("CID") issued to it on December 13, 2006. For the reasons stated herein, the Commission denies CMG's Petition. Pursuant to 16 C.F.R. § 2.7(e), CMG is ordered to comply with the CID on or before April 9, 2007 at 5:00 p.m. E.S.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

I. Background and Summary

On December 13, 2006, the Commission issued a CID to CMG as part of an investigation of the sales and marketing activities of CMG. CMG's Petition was timely filed on January 3, 2007. CMG's Petition contends that the CID seeks: (1) information that is outside the scope of the resolution authorizing the investigation, CMG's Petition at 3; (2) documents that are not adequately identified, *id.* at 4; and (3) information regarding CMG's financial status that "is entirely unlawful and an abuse of the FTC's powers." *Id.*

The resolution authorizing the CID defines the scope of this investigation as follows:

To determine whether unnamed accessors of consumers' bank accounts are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act . . . by accessing consumers' bank accounts . . . through unfair or deceptive acts or practices. The investigation is also to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

Resolution Directing Use of Compulsory Process in Nonpublic Investigation, Unnamed Accessors of Consumers' Bank Accounts, File No. 912-3552 (Aug. 6, 1991).

II. The Information Requested Is Relevant to the Commission's Investigation

CMG claims there is no nexus between the information requested in interrogatory specifications III.A.1.,2., and 4.-6. and document production specifications III.B.5.-11. and the law enforcement purpose of the investigation as stated in the Resolution authorizing the use of compulsory process.² We disagree. The information sought by each of the enumerated specifications is sufficiently related to the investigation.

The Commission is entitled to require respondents to provide any information that is "not plainly incompetent or irrelevant to any lawful purpose of the [agency] . . . and not unduly burdensome to produce[.]" *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (internal quotations and citations omitted). Further, "the agency's own appraisal of relevancy must be accepted so long as it is not obviously wrong." *Id.* (internal quotations and citations omitted).

"[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." *Id.* at 1090 (citing *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d 862, 877 (D.C. Cir. 1977)). Determination of relevancy "in an investigatory proceeding is more relaxed than in an adjudicatory one." *Id.* The material requested "need only be relevant to the *investigation* – the boundary of which may be defined quite generally, . . . as it was in the Commission's resolution

² CMG's Petition at 5-7.

here.” *Id.* (emphasis in original). With these principles in mind, we turn now to the determination of whether the information sought by the challenged specifications is relevant to the scope of the investigation authorized by the Commission’s Resolution of August 6, 1991.

Information sought by CID is relevant to an investigation so long as it is likely to be of some assistance to the Commission in deciding whether there is reason to believe that Section 5 has been violated and whether an enforcement action should be commenced. *Invention Submission Corp.*, 965 F.2d at 1090. The information sought by each of the challenged specifications is clearly relevant to this investigation.

Interrogatory specifications 1 and 2 and document specifications 6 and 7 seek the identification of each person who obtained a credit card from CMG or who CMG enrolled in a particular membership class. The Commission seeks to determine whether CMG may have improperly accessed the bank accounts of its customers. Thus, the information requested by these specifications is clearly relevant to identify both witnesses who can provide evidence regarding CMG’s marketing practices over time, and persons who might also be victims in the event evidence of a violation is uncovered.

Interrogatory specification 4 and document specification 8 seek the identification of each CMG customer who requested cancellation of either a credit card or membership. Identification of witnesses and potential victims is directly relevant to the investigation.

Interrogatory specification 5 and document specification 11 seek information relating to products and services associated with a membership classification, and the number and identity of persons using such products and services. Information regarding the identity of witnesses/victims as well as the scope and frequency of particular purchases are relevant to this investigation of CMG’s marketing practices, and to determine whether CMG had authority to access consumers’ bank accounts.

Interrogatory specifications 6 and 7 and document specifications 9 and 10 seek information relating to all merchandise offered for sale by CMG and whether consumers could or could not purchase that merchandise using the credit card issued by CMG. Identification of merchandise that was actually being sold and the conditions of such sales are relevant to whether those sales, terms and conditions were in fact consistent or inconsistent to CMG’s sales and promotional representations to consumers. It will also assist the Commission in assessing whether CMG had authority to access consumers’ bank accounts.

Finally, document specification 5 requests copies of any performance bond or escrow agreement that might have been obtained by CMG’s principal (Frederick Zeigler) in accordance with the terms of a Stipulated Settlement Agreement Containing Order for Permanent Injunction and Monetary Relief with Defendants Commonwealth Marketing Group, Inc., Great Escape Vacations & Tours, Inc. and Frederick F. Zeigler, III entered in *Federal Trade Commission v.*

Commonwealth Marketing Group, Inc., et al, Case No. 98-918 (W.D. PA Mar. 6, 2000).³ That Order requires Mr. Zeigler, *inter alia*, to obtain bonding if he engages in telemarketing. Staff has reason to believe that some portion of CMG's current marketing activity has been conducted by way of telemarketing. The existence of such bonding is relevant to the identification of parties from whom consumer redress might be sought under certain circumstances. Accordingly, it is relevant to the current investigation. The fact that it might also be relevant to issues of compliance with an Order of the United States District Court for the Western District of Pennsylvania does not somehow make it any less relevant to the current investigation.

III. The Word "Unique" Is Not Vague and Undefined

CMG objects to document specifications III.B.1.-3. on the ground that the adjective "unique" is impermissibly "vague and undefined," CMG's Petition at 8-9,⁴ when used to describe, *inter alia*, telemarketing scripts, Internet websites, and commercial email messages. CMG cites no authority supporting a claim that a word of common usage and understanding is vague simply because it is not separately defined by the CID. Further, CMG has offered no explanation of the manner in which it was confused by the usage of the adjective "unique."

³ CMG notes that staff made virtually identical information requests by way of discovery requests permitted by that Order prior to the issuance of the CID. *See* CMG's Petition at 2-3. Staff withdrew those discovery requests after CMG objected on the grounds that much of the information being requested was outside of the scope of that Order. CMG's Petition at 2-3.

⁴ CMG further argues that use of the word "every," to define certain classes of individuals, constitutes a form of vagueness because it fails to differentiate between alleged authorized and unauthorized accesses to bank accounts. *Id.* CMG would have the Commission put the horse in front of the cart. Under the standard advocated by CMG, the Commission would be obliged to divine in advance all transactions that might violate the law before seeking information limited only to those identified transactions. This standard fails for two reasons. First, "[a]t the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint." *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d at 1090 (citations omitted). Second, evaluation of the differences between authorized and unauthorized transactions might well provide evidence of a violation. *See Federal Trade Commission v. Texaco, Inc.*, 555 F.2d at 876 ("We agree with the FTC that comparative information of this sort is 'reasonably relevant' to its investigation."). Thus, the distinction between authorized and unauthorized transactions advocated by CMG does not represent any difference in the potential evidentiary value of any transaction records in the context of this investigation. The application of that standard would likely impede rather than advance the Commission's investigation, and is, therefore, rejected.

The Commission used the adjective “unique” in these specifications to avoid burdening CMG with the redundant production of multiple copies of the same documents.⁵ The Commission finds CMG’s objection to the use of the word “unique” in these specifications to be wholly without merit.

IV. This Investigation Is Not An Unlawful Fishing Expedition⁶

Use of the “fishing expedition” metaphor, even when accompanied by a citation to some court’s usage of the term, *see* CMG’s Petition at 8, frequently fails to provide any illumination regarding the issues being raised. This is particularly true of FTC investigations where the Supreme Court has clearly stated that the Commission may conduct an investigation even if it does so merely to satisfy an “official curiosity.” *United States v. Morton Salt Co.*, 338 U.S. 632, 639 (1950). The *Morton Salt* Court further advised,

We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan “no fishing expeditions.” . . . [However,] [t]he only power that is involved here is the power to get information from those who can best give it and who are most interested in not doing so. . . . [Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Id. at 642-43.

CMG has provided the Commission with no factual or legal basis for its claim that the present CID is beyond the FTC’s power to inquire, or that the Commission has no reason to believe that an investigation is in the public interest. That being the case, invocation of the fishing expedition metaphor, by itself, is inadequate to call the present investigation, and this CID, into question.

⁵ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1288 (10th ed. 2002) defines the adjective “unique” to mean “being the only one: sole . . . being without like or equal.”

⁶ CMG’s Petition at 9.

V. CMG Has Not Established That the CID Seeks Irrelevant Financial Information.

CMG claims the present CID was issued as part of a prohibited inquiry “to assess the financial status of CMG before the FTC undertakes [] an investigation,” CMG’s Petition at 4, and relies on the unexplained *dictum* found in *Federal Trade Commission v. Turner*, 609 F.2d 743, 745 (5th Cir. 1980), to the effect that the amount of a person’s assets are “not relevant to an inquiry into whether a violation of the law exists.” Such reliance is unavailing. Unlike in *Turner*, this is an inquiry to determine whether CMG has violated the law and not an inquiry into whether it would be cost effective to seek enforcement of an existing cease and desist order. *See id.* at 744. In similar investigative circumstances, the D.C. Circuit Court of Appeals declined to follow *Turner* and found that “[f]inancial data, including evidence of relative profitability, could facilitate the Commission’s investigation of [a respondent] in different ways, not all of which may yet be apparent.” *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d at 1090.

In addition, the terms of the CID itself do not appear to support CMG’s claim. Many types of records which would normally be sought in order to assess a company’s financial status simply do not appear in this CID. Journals, ledgers, financial statements, tax returns, inventories of assets and liabilities are all classes of financial records particularly relevant to an inquiry into a company’s financial status; however, the CID seeks none of those records. Indeed, CMG only claims that information responsive to “the CID will directly reflect on the number of sales made by the company, [and, further, that] CMG has valid reason to believe that the FTC is really seeking to ascertain nothing more than the financial status of this company.” CMG’s Petition at 11. Neither the fact that CID responses might show gross sales figures nor the fact that such figures might provide some incomplete insights regarding CMG’s financial condition would make such sales information either irrelevant to the investigation or beyond the ambit of legitimate inquiry by the FTC or evidence of an improper motive for this investigation of CMG.

“The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to the purpose.” *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d at 882; *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d at 1090. CMG has offered neither factual nor legal support for its claim that the “FTC has engaged in an unlawful investigation.” CMG’s Petition at 11. It has, thus, failed to carry its burden of establishing its right to have the CID limited or quashed on that ground.

VI. Conclusion and Order

For all of the foregoing reasons, **IT IS ORDERED THAT** CMG's Petition should be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT CMG shall respond to the CID on or before April 9, 2007 at 5:00 p.m. E.S.T.

By Direction of the Commission.

Donald S. Clark
Secretary