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

Office of the Secretary

March 24, 2005

VIA FACSIMILE AND EXPRESS MAIL

United FreshStart
c/o Edward L. Clabaugh, Esquire
10217 SW Burton Drive
Vashon, Washington 98070

Re: *Petition to Quash Filed by United FreshStart* (hereinafter "Petitioner" or "UFS"), File No. 042 3195

Dear Mr. Clabaugh:

This letter advises you of the disposition of the UFS Petition to Quash the Civil Investigative Demand ("CID") for written interrogatories, documentary materials, and oral testimony issued in conjunction with an investigation of UFS's conduct by the Federal Trade Commission (hereinafter "FTC" or "Commission"). The Petition to Quash is denied for the reasons hereinafter stated. The new dates for Petitioner to comply with the CID are April 8, 2005, with respect to interrogatory answers and the production of documents, and April 15, 2005, with respect to oral testimony.

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]

I. Background and Summary

The CID was issued on December 21, 2004 – production of interrogatory answers and documents was required by January 20, 2005 and the investigational hearing was scheduled for February 11, 2005. On January 19, 2005, counsel for UFS spoke to Staff as technically required by Commission Rule § 2.7(d)(2), 16 C.F.R § 2.7(d)(2), to discuss compliance issues related to the CID. In particular, you, on behalf of UFS, advised Staff that UFS would only comply with the CID if it were "granted immunity from prosecution." Statement of Counsel for UFS at 1.

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[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.

Staff indicated that the FTC had neither the authority to prosecute criminal claims nor the power to grant immunity from prosecution. Later that same day, UFS's Petition to Quash was timely filed.

II. Petitioner Has Failed to Substantiate Any Basis for Relief.

The factual basis for this Petition is provided by unsupported assertions of counsel. The Petition is not accompanied by any affidavits or other materials under oath.[2] In substance, UFS claims that it is entitled to relief from the commandment of the CID on four separate grounds: (1) the resolution authorizing the investigation only covers bankruptcy and financial counseling services, not foreclosure avoidance services and, thus, all the information sought is beyond the scope of the investigation authorized by the Commission; (2) the information sought is overly broad and not sufficiently related to the subject of the investigation to survive scrutiny under the Fourth Amendment; (3) UFS cannot be compelled to respond to the CID in violation of its rights against self-incrimination under the Fifth Amendment; and (4) tax returns and related information are statutorily privileged pursuant to 26 U.S.C. § 6103.

A. UFS has provided no factual basis for its claim under the Fifth Amendment.

Even conceding that an individual may sometimes be protected from the compelled provision of incriminating testimony and materials by reason of the Fifth Amendment, UFS has demonstrated no factual support for its claim that such protection is available to it or even that its claim of such privilege here has been properly invoked. In the first place, the privilege against compelled incriminating testimony does not extend to corporations or other collective entities. *See, e.g., Braswell v. United States*, 487 U.S. 99 (1988); and *Bellis v. United States*, 417 U.S. 85, 88-90 (1974). UFS has provided no facts suggesting either that it is a sole proprietorship or that the circumstances of the production of the materials requested would constitute compelled testimony of an inculpatory nature by an individual. *See United States v. Hubbell*, 530 U.S. 27, 34-39 (2000). Second, the privilege against compelled testimony cannot be asserted in a wholesale fashion. "A person may not make a 'blanket assertion' of the [Fifth Amendment] privilege." *United States v. Aeilts*, 855 F. Supp. 1114, 1116 (C.D. CA 1994) (citing *United States v. Brown*, 918 F.2d 82, 84 (9th Cir. 1990)). The Commission's Rules and general investigatory practice require privilege claims to be asserted in a more detailed manner to keep blanket claims of privilege from being used to sweep in unprivileged materials. *See, e.g.,* 16 C.F.R. §§ 2.7, 2.8A, and 2.9. The privilege must be asserted on a document-by-document basis, *Aeilts, supra*, and a "question-by-question basis."[3] *United States v. Bodewell*, 66 F.3d 1000,

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[2] The "Statement of Counsel for United FreshStart" was neither certified nor did it contain any factual representations supporting any claim for relief set forth in UFS's Petition to Quash.

[3] Because the privilege must be asserted by the witness at the time each question is propounded and in response to each such question where it can be asserted, there is no reason to excuse the attendance of UFS from the investigational hearing commanded by the CID. Further, as the Sixth Circuit pointed out in United States v. Mayes, et al, 512 F.2d 637, 649 (6th Cir. 1975):

1002 (9th Cir. 1995); and *Brown*, 918 F.2d at 84 ("A person must have the chance to present himself for questioning, and as to each question elect to raise or not to raise the defense.") (internal quotation marks omitted). Third, UFS must establish a factual basis for the Commission to believe that its compelled responses to the CID would subject it to "substantial and real, and not merely trifling or imaginary[] hazards of incrimination." *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (quoting earlier Supreme Court cases – internal quotation marks omitted). Fourth, since the contents of UFS's documents were in all likelihood voluntarily prepared by UFS in the ordinary course of its business and not by reason of government commandment in furtherance of a criminal investigation, the contents of such documents are not likely to be entitled to any privilege. *United States v. Fisher*, 425 U.S. 391, 410 (1976). This is especially true with respect to so-called "required records" which must be produced even if the privilege against compelled testimony might otherwise apply. *Shapiro v. United States*, 335 U.S. 1, 17 (1948). Finally, no burden falls upon Staff to resolve any ambiguity regarding UFS's assertion of a claim of privilege until such time as UFS has established "a prima facie claim of privilege." *See United States v. Yurasovich*, 580 F.2d 1212, 1221 (3rd Cir. 1978). In the present circumstances, the Commission cannot assume that UFS is entitled to claim the privilege any more than it can assume that UFS will assert the privilege in the proper manner on each occasion where it might be entitled to do so. Accordingly, UFS's Petition to Quash must be denied on its claim arising under the Fifth Amendment.

B. UFS's business falls within the scope of the resolution authorizing the use of compulsory process.

According to the Petition, "Petitioner provides services to help homeowners avoid foreclosure proceedings against their homes. It does not provide bankruptcy counseling or *typical* financial services of any type." Petition at 2 (emphasis supplied). The Commission's resolution of March 5, 1984, which authorized Staff's use of this CID, is directed toward investigation of "the bankruptcy and financial counseling services industry." The Commission does not understand UFS to deny that it provides financial counseling services, only that its services might not be "typical." An intent to limit Staff to only those investigations of the financial counseling industry involving "typical" services cannot be found in our resolution. The present investigation of UFS is precisely the type of investigation intended by the resolution of March 5, 1984. Furthermore, the materials sought by the CID are precisely the sort of materials

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> The Fifth Amendment privilege against self-incrimination is a privilege personal to the witness. United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964). . . . While the witness is entitled to the advice of counsel before determining whether he should invoke the privilege, United States v. Compton, 365 F.2d 1 (6th Cir. 1966), and while it is within the discretion of the trial judge to permit counsel for the witness to invoke the privilege on his behalf, 8 Wigmore, supra, § 2270, the nature of the privilege is such that in the final analysis the controlling decision is that of the witness himself. . . . There may be a constitutional privilege against testifying and at the same time be a powerful incentive to get on the stand and tell the truth. The alternatives for the witness are seldom easy.

that are relevant to such an inquiry. There is, therefore, no basis for the Commission to grant this Petition to Quash on the grounds that information sought by the CID is not reasonably related to the nature and scope of the investigation authorized by the resolution.

C. Nothing contained in the Fourth Amendment supports UFS's claim for relief from the CID.

Petitioner next claims that the CID is "overbroad, unnecessarily burdensome and oppressive" and violates its Fourth Amendment right to be free from unreasonable searches and seizures. Petition at 1. The Petitioner has "the burden of showing that an agency subpoena is unreasonable . . . and, where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." *Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (1973), *cert. denied*, 415 U.S. 915 (1974). This is especially so in light of the breadth of inquiry this Commission is permitted to conduct. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."). UFS did not provide any factual or legal support for its Petition to Quash on this ground and it must, therefore, be denied.

Petitioner's claim of overbreadth is simply without merit. The materials sought are relevant to the inquiry being undertaken.[4] It would be somewhat anomalous for this Commission to grant UFS's overbreadth claim when Petitioner did not even avail itself of the opportunity to narrow the scope of its production when it conferred with Staff in advance of filing its Petition to Quash. *See United States v. Bailey*, 228 F.3d 341, 349 (4th Cir. 2000) ("But before a court will conclude that a subpoena is 'arbitrarily excessive,' it may expect the person served 'to have made reasonable efforts . . . to obtain reasonable conditions' from the government.").[5] Indeed, asking Staff for immunity from prosecution is hardly comparable to seeking relief from the scope of required production. Rather than seeking relief from production, such a request merely seeks to escape one potential, alleged consequence of such production.

Allegations of burden must likewise be supported with specificity. As the Commission stated in *National Claims Service, Inc., Response to Petition to Limit Civil Investigative Demands*, 125 F.T.C. 1325, 1328-29 (1998):

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[4] UFS claims that 14 of the Interrogatories and 10 of the document specifications "are not reasonably related to the nature and scope of the investigation. . . " Petition at 3. UFS provides no explanation of the basis for this claim. The Commission has reviewed each of the specifications cited by UFS and expressly finds that each is reasonably related to the nature and scope of the investigation. Accordingly, these claims do not provide UFS with any additional ground for relief.

[5] Quoting *Morton Salt*, 338 U.S. at 653 ("Before the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions.").

> In short, Petitioner's burden allegation must be rejected as completely unsubstantiated. At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (e.g., the person-hours and cost of meeting the particular specifications at issue). Petitioner has failed to do any of these things.

Likewise here, UFS has failed to provide "a single affidavit or shred of documentary evidence supporting the existence of this alleged burden." *Id.* at 1328. *See United States v. Stuart*, 489 U.S. 353, 360 (1989) (holding that the investigated party bears the burden of proving that the subpoena is unduly burdensome). Having failed to do any of these things with any reasonable degree of specificity, UFS is, therefore, entitled to no relief on this ground.

Invocation of the Fourth Amendment adds virtually nothing to the analysis of UFS's claim for relief. The test applied by a court to the enforcement of an administrative agency's investigative subpoena is "limited to determining 'if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.'" *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (DC Cir. 1979) (quoting *Morton Salt*, 338 U.S. at 652). This does not appear to be materially different from the Supreme Court's standard of review under the Fourth Amendment as set forth in *Donovan v. Lone Star, Inc.*, 464 U.S. 408, 415 (1984):

> We [have] . . . described the constitutional requirements for administrative subpoenas . . . as follows:
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> > "It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."
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> *See v. City of Seattle, supra*, 387 U.S., at 544, 87 S.Ct., at 1740 (footnote omitted). *See also United States v. Morton Salt Co.*, 338 U.S. 632, 652-653, 70 S.Ct. 357, 368-369, 94 L.Ed. 401 (1950).

Id. This CID is limited in scope to the subjects set forth in the Resolution attached to the CID, the materials sought have been found to be relevant to that purpose, and Petitioner makes no complaint that the materials sought are not described with sufficient particularity. The Constitution requires nothing more. Accordingly, the Petition to Quash must be denied on Fourth Amendment grounds.

D. Nothing contained in 26 U.S.C. § 6103 provides UFS with a ground for relief.

Petitioner objects to the provision of certain information on the ground that tax returns and related information are "confidential pursuant to the provisions of Title 26 U.S. Code Section 6103." Petition at 1. UFS's reliance on this provision of law is without merit. The prohibition of that statute runs against officers and agents of the United States with respect to copies of such materials in the hands of the government. If the Commission was seeking the information from the IRS, Petitioner's claim might have some merit. However, as explained by the Second Circuit Court of Appeals:

> The disclosure of tax returns which is forbidden by both federal and state law to protect the integrity of the tax reporting and collecting system is an unauthorized disclosure of the filed returns, directed primarily against employees of government in the taxing departments. Disclosure by the taxpayer himself of his copies of returns is not an unauthorized disclosure, even though it be made by reason of legal compulsion.

United States ex rel. *Carthan v. Sheriff, City of New York*, 330 F.2d 100, 101 (2nd Cir. 1964). UFS's Petition to Quash must, therefore, be denied on this ground.

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** UFS's Petition to Quash should be. and it hereby is, **DENIED**. Pursuant to 16 C.F.R. § 2.7(e), the new dates for Petitioner to comply with the subject CID are: April 8, 2005, with respect to interrogatory answers and document production; and April 15, 2005, with respect to oral testimony.

By direction of the Commission.

Donald S. Clark

Donald S. Clark
Secretary