



Office of the Secretary

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

July 2, 2008

VIA FACSIMILE AND EXPRESS MAIL

West Asset Management, Inc.
c/o Andrew G. Berg, Esquire
Sonnenschein, Nath & Rosenthal, LLP
1301 K Street, N.W.
Washington, DC 20005-3364

Re: *Request for Review of Denial of Petition to Limit Civil Investigative Demand*, File No. 0723006

Dear Mr. Berg:

This letter advises you of the Commission's disposition of West Asset Management, Inc.'s ("WAM") Request for Review of Denial of Petition to Limit Civil Investigative Demand ("Request for Review") issued in conjunction with an investigation of WAM by the Federal Trade Commission (hereinafter "FTC" or "Commission"). For the reasons stated below, the Letter Ruling Denying WAM's Petition to Limit (Apr. 18, 2008) ("Letter Ruling") is affirmed.

I. Background and Summary

The present investigation seeks to determine whether there is any reason to believe that WAM, a debt collection firm, may have violated either the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, or the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* The Commission issued a Civil Investigative Demand ("CID") to WAM on August 13, 2007. On November 5, 2007, WAM filed a Petition to Limit Civil Investigative Demand ("Petition to Limit"). WAM requested that the CID be limited "because: (1) the requests are unduly burdensome and can be reasonably limited without adversely impacting the FTC's investigation; and (2) the requests require the disclosure of confidential and personally identifiable consumer and client information that is not relevant in any manner to the FTC's investigation." Petition to Limit at 1.

After Commissioner Harbour issued the Letter Ruling denying the Petition to Limit, WAM filed its Request for Review on April 25, 2008. WAM's Request for Review questions the denial of its Petition to Limit, and supplements and clarifies some of the facts supporting its burdensomeness claim by submitting a second declaration from its Associate Counsel for

Compliance, Nancy Van Hoven, and a declaration from its Senior Vice President for Systems and Technology, Michael Regalla.

As Commissioner Harbour noted in the Letter Ruling, WAM’s argument that it must be permitted to redact non-privileged, confidential third-party information from its CID responses bears directly on the extent of the burden WAM claims will be imposed on it by CID compliance. Letter Ruling at 3. We therefore address redaction of non-privileged information first.

II. WAM Is Not Entitled to Redact Non-Privileged Information

In its Request for Review, WAM renews its objection to Interrogatories 8, 22, and 26 and Document Requests 21-25 and 27. WAM argues that it should be entitled to review and redact “confidential and personal identifying information” from its CID responses. Petition to Limit at 22.¹ In support of this argument, WAM submits that this information is not relevant to the staff’s investigation, and that the lack of need for the information should be weighed against the harm of disclosure. *See, e.g.*, Request for Review at 11.² WAM’s objections fail on several grounds.

The Commission is entitled to information if it is “reasonably relevant” to the investigation. *See, e.g., Fed. Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (“It is well established that a district court must enforce a federal agency’s investigative subpoena if the information is reasonably relevant . . . or, put differently, not plainly incompetent or irrelevant to any lawful purpose. . . and not unduly burdensome to produce.”) (citations and internal quotation marks omitted). Like Commissioner Harbour, we find that the information sought by these specifications, including any non-privileged confidential information, is reasonably relevant to the investigation of WAM’s debt collection practices. Letter Ruling at 2 n.4.

¹ The Request for Review also stated that the Letter Ruling compels WAM to produce privileged attorney-client and work product information. Request for Review at 2-3. WAM specifically faults the Letter Ruling for failing to distinguish between privileged information and confidential information. WAM’s claim is wide of the mark for two reasons. First, the CID does not require WAM to produce any privileged information. CID ¶ I.I.B. (“Claims of Privilege) (permitting redaction of such materials and requiring the service of a specified form of privilege log). Second, the Petition to Limit did not seek leave to delete privileged information, only several varieties of third-party confidential information. Accordingly, the fact that the Letter Ruling failed to make an unrequested redaction distinction, *see* Request for Review at 2, is hardly surprising. Further, WAM’s unsupported speculation that the Letter Ruling “intended to accomplish a punitive purpose” is beyond the limits of legitimate advocacy. Request for Review at 3.

² In addition to consumer and creditor information, WAM proposes to redact “other confidential information of little conceivable value to the investigation”. *Id.*

In many cases the “confidential and personal identifying information” WAM seeks to redact is not only relevant, it is often the most relevant evidence sought by the CID specification. For example, Interrogatory 26 asks WAM to “identify the name, address, and telephone number of each consumer from whom WAM has received a complaint, directly either from the consumer or from a third party on behalf of the consumer.”³ If the contact information for the individuals who complained were redacted as confidential, staff would not be able to contact those individuals and the investigation would be hampered materially. The complementary Document Request, Document Request 23, required WAM to provide the complete consumer file for each person who complained – information that, again, is highly relevant to determining whether the company’s practices violated the FDCPA and would be significantly less useful if it could not be matched to the actual consumer who complained. Similarly, Interrogatory 22 asks that WAM “identify all client-creditors who have instructed WAM not to file suit or commence litigation to collect a debt.” A “threat to take any action that cannot legally be taken or that is not intended to be taken” violates Section 807(5) of the FDCPA,⁴ so this information – combined with complaint information that a threat to take legal action was made on behalf of a particular creditor – would enable staff to determine when any threat to take legal action to collect a debt on behalf of a particular client creditor would constitute a violation.⁵ If the creditor’s identity were redacted and replaced with a coded identifier, staff would not be able to verify whether complaints obtained from sources other than WAM (such as the Better Business Bureau or the Commission’s own complaint database) about threats by WAM to take legal action on behalf of that creditor were empty threats, thus violating the FDCPA.

WAM’s belief that it is entitled to withhold production of responsive documents and material so that it can redact non-privileged information is misplaced. First, WAM objects that disclosure of information that identifies its clients would cause “substantial economic harm to [its] competitive position.” Petition at 28 (citing *Diamond State Ins. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 697 (D. Nev. 1994)). The court in *Diamond State* did note that under Fed. R. Civ. P. 45 a federal court may limit or quash a subpoena requesting confidential commercial information which, if disclosed, would cause substantial economic harm to the competitive position of the entity from whom the information was obtained. The court went on to hold, however, that the subpoenaed party’s claim was “unsubstantiated” and that a “generalized, self-serving, conclusory assertion of protection or privilege is without merit.” *Id.* at 698. Further, WAM cites no authority that extends this discovery rule to the investigatory process of the FTC.

³ WAM objected to this demand for consumers’ names, addresses, and telephone numbers on the basis of an unspecified privilege and on the basis that the interrogatory called for confidential personal information. Petition to Limit, Exhibit F, WAM Non-Public Response to August 13, 2007 CID (undated) at 23-24. WAM does not specify the legal grounds for either objection.

⁴ 15 U.S.C. § 1692e(5).

⁵ See also Letter Ruling at 3 n.5.

WAM's claim of substantial harm is inadequate for the same reasons. Neither WAM's Petition nor its Request for Review demonstrate how disclosure of its clients' names to the Commission—which is required to afford it substantial confidentiality protections⁶—would cause “substantial economic and competitive harm” to WAM. At most, WAM indicates that it entered a non-disclosure agreement with at least one client that places certain restrictions on WAM's disclosure of that client's relationship with WAM. WAM, however, does not cite any case law suggesting that a company can shield information from a federal inquiry by entering a non-disclosure agreement with a private party, even if its contract, properly construed, so provided.⁷ The district court in *Fed. Trade Comm'n v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353-54 (D.D.C. 1991), rejected precisely this argument, holding that Invention Submission Corp. must produce documents demanded by the Commission even if so doing would breach its confidentiality agreements with third parties. The court recognized that “any other state of affairs would undermine the Commission's mandate to investigate unfair business practices and allow any organization under investigation to escape scrutiny simply by protecting all information under confidentiality agreements.” *Id.* at 65,353; Letter Ruling at 5. Moreover, the Petition does not demonstrate how producing information in response to a lawful demand of a federal agency—which is expressly contemplated in the agreement excerpted by WAM, Petition to Limit, Exhibit Y, ¶ IV.C.—would lead to substantial economic and competitive harm for WAM.⁸

Second, WAM objects to producing unredacted documents and material on the basis that various statutes relating to particular types of data place restrictions on disclosure of that data, suggesting that if WAM were to provide the information responsive to the CID it would be violating some other law. WAM's primary argument relates to protected health information that

⁶ See, e.g., 15 U.S.C. §§ 46(f) (protecting trade secrets and confidential financial or commercial information), 57b-2(b) (protecting documents obtained under compulsory process in a law enforcement investigation). See also 16 C.F.R. § 4.10; 5 U.S.C. § 552(b)(7)(C) (provision of the Freedom of Information Act exempting from mandatory disclosure records or information compiled for law enforcement purposes, to the extent that production could reasonably be expected to constitute an unwarranted invasion of personal privacy).

⁷ See Letter Ruling at 6 n.13.

⁸ WAM argues that WAM would be prejudiced in that it would have to disclose the FTC's investigation to its clients. Petition at 28; Van Hoven Declaration (Nov. 5, 2007) at ¶¶ 33-35 (substantial and irreparable commercial and competitive harm would result to WAM because WAM would have “to provide notification. . . to every one of WAM's clients of the FTC's preliminary non-public investigation”). However, the non-disclosure agreement WAM cites required WAM to have notified its client of the CID “promptly upon [its] receipt” in August 2007. Petition to Limit, Exhibit Y, ¶ IV.C. In any event, as pointed out in the Letter Ruling, the existence of the investigation is now a matter of public record. Letter Ruling at 6 (citing 16 C.F.R. § 2.7(g)).

it may have received from health care clients that would be protected under the Health Information Portability and Accountability Act of 1996.⁹ As a preliminary matter, any health care client, as a covered entity under HIPAA, would be required to ensure that disclosures made to a business associate, such as WAM, for purposes of obtaining payment involved the minimum necessary disclosure. *See* 45 C.F.R. §§ 164.502(b), 164.514(d). Just as WAM apparently needed protected health information for its collection purposes, the context for the debt is relevant to the Commission’s investigation of WAM’s debt collection practices and is an integral part of the consumer’s file.¹⁰ WAM implicitly concedes as much by offering to turn over this information if Commission staff shows a “specifically identified and justifiable need for the information – an analysis that should be performed on case-by-case basis.” Request for Review at 7. Like the Letter Ruling, the Commission finds that HIPAA regulations allow protected health information to be disclosed to Commission staff in response to a CID where, as here, any protected health information is relevant and material to a legitimate law enforcement inquiry, the Commission’s requests are specific and limited in scope to the extent practicable, and de-identified information – as noted above – would not suffice. 45 C.F.R. § 164.512(f); Letter Ruling at 5. *See also* 45 C.F.R. § 164.512(e)(1) (exceptions for production of information responsive to administrative order or subpoena, including information responsive to an order of a court or administrative tribunal).¹¹

WAM argues that other statutes or regulations may somehow be implicated in addition to HIPAA, but does not identify which statutory provisions apply or how they would apply to WAM. Most of the statutes, however, do not on their face apply to debt collectors such as WAM. Petition to Limit at 21 (citing 18 U.S.C. § 2702(a)(3)–disclosure of information by communications providers, 20 U.S.C. § 1232g–disclosure of information by educational

⁹ Pub. L. 105-34 (Aug. 21, 1996, *as amended* by Pub. L. 105-33 (Aug. 5, 1997) *and* Pub. L. 105-34 (Aug. 5, 1997)) (“HIPAA”).

¹⁰ Under 45 C.F.R. § 160.103, protected health information includes individually identifiable health information that is created by a health care provider, health plan, employer, or health care clearinghouse and that relates to the past, present, or future payment for the provision of health care to an individual.

¹¹ The Commission fully understands that preserving the confidentiality of consumers’ protected health information is important, and the Commission does not take the protection of that information lightly. Commission staff routinely handles highly sensitive information. Documents and material produced to the Commission that are marked confidential are accorded substantial protections against public disclosure equivalent to those in a protective order. *See, e.g.*, 15 U.S.C. 46(f) (governing trade secrets and confidential financial or commercial information); 15 U.S.C. § 57b–2 (protecting confidentiality of information obtained by compulsory process or otherwise in an investigation, including requiring 10 days notice prior to disclosure and providing for return of material produced); 16 C.F.R. § 4.10 (applying to non-public material, including material obtained in an investigation).

institutions, 42 U.S.C. § 1320d-2—disclosure of information by health care plans, providers and clearinghouses). WAM also cites the Gramm-Leach-Bliley Privacy of Consumer Financial Information Rule, 16 C.F.R. § 313, which does apply to debt collectors in some respects, but specifically allows disclosure to the Federal Trade Commission. 16 CFR § 313.15(a)(4). Moreover, WAM does not cite a single case either in the Petition to Limit or its Request for Review where the Commission or any federal court limited a discovery request to allow a party to redact such non-privileged information, even in litigation between private parties.¹²

For the reasons stated above, we reject WAM’s contention that HIPAA, other federal statutes or rules, or WAM’s client contracts justify redacting the non-privileged confidential information that WAM seeks to exclude from its CID responses. This holding eliminates most of the burden claimed by WAM for producing material responsive to the CID. *See, e.g.,* Request for Review, Van Hoven Decl. (Apr. 25, 2008) at ¶ 3 (estimating it would take one week to gather documents responsive to a specification, and three to five weeks to review and redact them).¹³

¹² WAM does not cite any case law supporting its redaction arguments in its Request for Review. The case law cited in its Petition to Limit involved challenges to production of confidential *commercial* information, Petition to Limit at 21, and the courts in those cases invariably ordered the parties to produce, subject to confidentiality protections, the requested information. *See, e.g., Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D.D.C. 1963) (plaintiff had shown a clearly defined and serious injury to his business from public disclosure of confidential business information in a public Commission hearing, but plaintiff must produce the documents provided that they would not be made public unless necessary for proper enforcement of the law); *Fed. Trade Comm’n v. Bowman*, 149 F. Supp. 624 (N.D. Ill.), *aff’d*, 248 F.2d 456 (7th Cir. 1957).

¹³ WAM suggests that its demand to redact responsive documents before producing them is somehow “part of its effort to narrow the scope of the CID,” Request for Review at 7, but clearly the process of review and redaction would take a considerable amount of time to redact a single document. WAM made a significant number of redactions to Exhibit W of the Petition to Limit. We assume WAM took particular care when it redacted confidential information from that exhibit; even then, one Social Security number was overlooked on page 2.

III. WAM Has Not Established that Compliance with the CID Would Be Unduly Burdensome.

WAM challenges Document Requests 23-25 and 27 as unduly burdensome.¹⁴ WAM contends that “several of the requests are so broad and burdensome that compliance with them would cause significant hardship for WAM,” Petition at 14, and “would severely disrupt WAM’s business operations.” Request for Review at 8. WAM objects that production of computerized voice recordings would cost “approximately \$262,000 (hardware and labor cost total)” and that “even with a sufficient increase in WAM’s computing capacity, WAM lacks the personnel to carry out the necessary task of reviewing the consumer and regulatory inquiries as well as employee files” for responsiveness and privilege. Request for Review at 8. WAM states that only two individuals could be made available to produce responsive material and that it would take “nearly 4 months of full-time work by those employees to review and make necessary redactions to all of the computer and hardcopy records responsive to the CID.” Request for Review at 8-9, Request for Review, Exhibit B.¹⁵

WAM bears the burden of demonstrating that a CID request is unduly burdensome. As noted in *Fed. Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977):

Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. . . . Further, that burden is not easily met where. . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. . . . Broadness alone is not sufficient justification to refuse enforcement of a subpoena. . . . Thus, courts have refused to modify investigative subpoenas

¹⁴ WAM notes that Document Request 23 includes all of the material that would be responsive to Requests 24 and 27. Petition to Limit at 18 n.5. Document Request 23 seeks, “for every consumer who complained about WAM, whether directly to the company or through a third party, the complete consumer file, including, but not limited to, each complaint, each recording made of any telephone contacts with the complaining consumer, and WAM’s response to each complaint.” The other request at issue, Document Request 25, seeks “all recordings of telephone calls, in whatever format stored, between any WAM debt collector and any other person made in the process of attempting to collect a debt.”

¹⁵ We note that WAM’s estimates include substantial costs (and additional time) to redact documents to remove non-privileged information. Request for Review, Exhibit B; *see also* Petition to Limit at 17 (“efforts would need to be undertaken to listen to each call in order to determine whether they contain any confidential or personally identifiable information of consumers, which would require audio redaction”). As noted above, WAM will not have to incur those costs.

unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

Texaco, 555 F.2d at 882 (footnotes and citations omitted).¹⁶

WAM's allegations of burden relate in substantial part to the production of digital recordings of "telephone calls. . . between any WAM debt collector and any other person made in the process of attempting to collect a debt." Document Request 25 (Petition to Limit Exhibit F at 38).¹⁷ WAM notes that it is unlikely that staff will listen to all of these recordings. WAM, therefore, proposes that the Commission should alleviate its burden of producing all of the recordings by accepting only a sample of them. Sampling can sometimes obviate a complete production; however, this is normally done when the issue is genuinely one of whether the requested evidence is actually relevant or useful. *See Texaco*, 555 F.2d at 883 ("The Commission notes that other studies have utilized random sampling techniques and that, in its opinion, such studies are inadequate for its purposes. . . . We therefore enforce the subpoena as originally conceived, without production on a random sample basis."). Here there is no legitimate question about the relevance or utility of these recordings.

Staff needs access to all of the recordings so it can correlate particular (and as yet unidentified) calls to particular (and as yet unidentified) consumer complaints. Further, staff may devise its own samples of these calls to determine whether particular WAM employees might have engaged in suspect, but not subject of complaint, conduct. If only a sample of calls were initially produced, Commission staff following up on a complaint or targeted employee would likely find that many of the calls required for further investigation were not included in the sample received. Staff would then have to ask WAM to provide those particular calls,

¹⁶ WAM's reliance on discovery cases involving disputes between private litigants for the claim that an undue burden arises whenever it can be shown that the burden of production outweighs the probative value of the information is misplaced. *See* Request for Review at 7 (citing *N.C. Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005) and *Travelers Indem. Co. v. Metro. Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005)). Both cases, moreover, involved discovery demands directed to non-parties. WAM also cited *Fed. Trade Com'n v. Jim Walter Corp.*, 651 F.2d 251 (1981), which involved a challenge to an FTC subpoena. That court discussed weighing the "hardships and benefits" of production "when a subpoena threatens to be unreasonable," but applied the "unduly disrupt or seriously hinder normal operations" standard from *Texaco* in rejecting the allegation of burden. *Id.* at 258.

¹⁷ Like its redaction arguments, WAM claims these recordings are of little or no relevance. WAM seemingly ignores the fact that these recordings, by themselves, might substantially confirm or refute consumers' complaints about misrepresentations, harassment, empty threats, or other violations of FDCPA or the FTC Act. The records are, therefore, especially relevant to the investigation.

thereby enabling WAM, were it so inclined, to impede the investigation based on its ability to monitor and anticipate the investigation's progress and focus.

WAM's financial burden to produce the recordings, relative to its annual gross revenue of nearly \$300 million, Letter Ruling at 8, does not demonstrate undue burden. *See, e.g., Fed. Trade Comm'n v. Rockefeller*, 591 F.2d 182, 190 (DC Cir. 1979) ("The compliance cost . . . estimates . . . simply do not appear to pose a threat to the normal operations of appellants' businesses considering their size."). WAM has not satisfied its burden of demonstrating compliance with the CID would be unduly burdensome.

Further, we reject WAM's assumption that tasking two employees to perform production review is adequate. The record is unclear regarding WAM's size. *Cf.* Petition to Limit at 16 (1198 employees) *versus* Petition to Limit, Exhibit F at 2-3 (1856 employees). WAM's website claims it has over 2600 employees.¹⁸ Regardless of which number is correct, more than two employees need to be dedicated to CID production review. Further, WAM's burden claims appear to be based on the assumption that compliance should be organized "in a manner that will minimize as much as possible the disruption to WAM's business operations." Request for Review at 4 (noting that "the time and cost burden analysis set forth in the Petition to Limit and supplemental affidavit reflects tasking in a manner that will minimize as much as possible the disruption to WAM's business operations that would arise from the production of such material to the Commission in compliance with the CID"). WAM has not cited, and the Commission is unaware of, any cases to support WAM's minimize-disruption standard. *See Texaco*, 555 F.2d at 882 ("Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business."). As in *Texaco* the breadth of the CID is a reflection of the comprehensiveness of the inquiry being undertaken and the magnitude of WAM's business operations. *Id.*

We hold that WAM need not review and redact the production to delete nonprivileged confidential information. We also cannot rely on WAM's estimates based on the work of only two of its employees. In short, we cannot rely on WAM's estimates of time for its production; those estimates included substantial time for such redactions to be performed by only two employees. Accordingly, we direct that WAM comply with the CID immediately, subject to any discreet extensions pursuant to 16 C.F.R. § 2.7(c) to which the Staff agrees with respect to particular specifications.¹⁹

¹⁸ West Asset Management, About Us, http://www.westassetmanagement.com/who_about.cfm?g=1 (last visited Jun. 16, 2008).

¹⁹ This decision moots WAM's motion to stay or extend the May 8, 2008 return date. Request for Review at 2.

IV. Order

For the reasons set forth herein, the Letter Ruling should be, and it hereby is, **AFFIRMED.**

By Direction of the Commission.

Donald S. Clark
Secretary