UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

IN THE MATTER OF

CARIBBEAN CRUISE LINE, INC.

FILE NO. 0123145

CARIBBEAN CRUISE LINE, INC'S PETITION TO LIMIT OR QUASH CIVIL INVESTIGATION DEMAND

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COMISSIONERS:

Jon Leibowitz, Chairman
William E. Kovacic
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Edith Ramirez
Julie Brill

CARIBBEAN CRUISE LINE, INC'S PETITION TO LIMIT OR QUASH CIVIL INVESTIGATION DEMAND

Pursuant to 16 C.F.R. §2.7(d), Petitioner Caribbean Cruise Line, Inc. ("CCL") petitions the Federal Trade Commission ("FTC") to limit or quash the Civil Investigative Demand ("CID") issued to CCL on March 22, 2013. CCL objects to and seeks to quash and/or modify the CID as being improper and unenforceable for at least two (2) separate reasons: (1) the CID seeks irrelevant information outside the scope of the FTC's investigation; and (2) the CID seeks private trade secret and proprietary information.[1] Accordingly, CCL respectfully petitions the FTC Commissioners to reasonably modify the CID as requested below.

1. CCL further incorporates herein its objections interposed in its Petition to Quash or Modify the first CID issued by the FTC, as well as the modifications of the definitions and instructions section of the CID which the FTC previously agreed upon.

I. LEGAL STANDARD

By this Petition, CCL does not challenge the FTC's statutory authority to investigate practices that it believes may constitute deceptive or unfair trade practices when used in the course of trade under 15 U.S.C. §45(a). However, the FTC's subpoena powers are not limitless.[2] Limitations on its powers are especially necessary where, as here, the FTC is pursuing an unlimited inquiry based on a "blanket" resolution. The Resolution here predates the subpoena by some sixteen months, seeks to investigate "unnamed telemarketers, sellers, or others" and simply is not limited in nature or scope. While Congress has provided agencies with authority to conduct reasonable investigations through the use of investigatory tools such as administrative subpoenas and CIDs, the federal courts serve as a safeguard against agency abuse.[3] The broad-ranging subpoena here, under the ostensible authority of the generic and blanket Resolution, is fraught with abuse.

The reason Congress has refused to confer upon administrative agencies their own subpoena enforcement power is to "ensure that targets of investigations are accorded due process."[4] In that capacity, a federal court will not act as a rubber stamp on the FTC's civil investigative demand, but rather, as an independent reviewing authority with "the power to condition enforcement upon observance to [a party's] valid interests."[5]

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2. "A subpoena from the FTC is not self-enforcing." *Wearly v. FTC*, 616 F.2d 662, 665 (3d Cir. 1980).

3. *See, e.g., Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946).

4. Sean Doherty, Commodity Futures Tradition Comm'n v. Collins: Is the Rationale Sound for Establishing an Exception to Subpoena Law for Tax Returns?, 7 DEPAUL BUS. L.J. 365, 376 (1995).

5. *Wearly*, 616 F.2d at 665; *see, e.g., SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978) ("The federal courts stand guard, of course, against abuses of [] subpoena-enforcement processes.") (internal citations omitted).

The recognized standard for whether an administrative agency's subpoena should be enforced was established by the United States Supreme Court in *U.S. v. Morton Salt Co.*[6] In *Morton Salt*, the Supreme Court recognized that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."[7] Further, the Supreme Court instructed that an agency's subpoena, like the CID at issue here, should not be enforced it if demands information that is (1) not "within the authority of the agency"; (2) "too indefinite"; or (3) not "reasonably relevant to the inquiry."[8] Particularly relevant to the instant Petition, the Supreme Court recognized in *Morton Salt* that if the corporation had objected and presented evidence concerning the excessive scope or breadth of the investigation, the corporation "could have obtained any reasonable modification necessary."[9]

Lastly, a federal court must consider whether an agency's demand is unduly burdensome.[10] Courts applying the *Morton Salt* standard have consistently held that an administrative subpoena and other investigative demands must be "reasonable."[11] As the Court

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6. 338 U.S. 632, 652 (1950).

7. *Morton*, 338 U.S. at 652.

8. *Morton*, 338 U.S. at 652. Courts have consistently applied this test. *See, e.g., Chao v. Local 743 Int'l Brotherhood of Teamers, AFL-CIO*, 467 F.3d 1014, 1017 (7th Cir. 2006) (to obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met); *Arthur Young & Co.*, 584 F.2d at 1031 (noting a subpoena request should not be so over broad as to reach into areas that are irrelevant or immaterial).

9. *Morton*, 338 U.S. at 654.

10. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *FTC v. Mt. Olympus Fin. LLC*, 211 F.3d 1278 (10th Cir. 2000); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1993).

11. *See, e.g., United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996) ("the disclosure sought must always be reasonable"); *Texaco*, 555 F.2d at 881 ("the

recognized in *SEC v. Arthur Young & Co.*, "[t]oday, then 'the gist of the protection is in the requirement . . . that the disclosures sought shall not be unreasonable. Correspondingly, the need for moderation in the subpoena's call is a matter of reasonableness."[12] A CID that is "unduly burdensome or unreasonably broad" fails this test.[13] As such, the time, expenses, and whether compliance threatens to unduly disrupt or seriously hinder normal business operations may be raised by a party challenging a civil investigative demand.[14]

Here, the CID's specifications are not relevant to the investigation and exceeds the FTC's investigatory power in that they seek private trade secret and/or proprietary information. Moreover, the documents requested in what is now the FTC's second CID addressed to CCL appears to be duplicative of requests previously made and thus, the FTC seeks an end-run around its obligation to move to enforce the prior CID if it believes CCL's prior responses were insufficient. CCL has been more than cooperative with the FTC, producing nearly 49,000 pages of business records and otherwise being forthcoming with information sought by the FTC. Accordingly, CCL respectfully requests that the Commission limit or quash the challenged specifications and provisions in the second CID as set forth below.

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disclosure sought shall not be unreasonable").

12. *Arthur Young & Co.*, 584 F.2d at 1030.
13. *Texaco*, 555 F.2d at 882.
14. *Texaco*, 555 F.2d at 882-83.

II. OBJECTIONS

A. The CID improperly seeks irrelevant information from CCL that is outside the scope of the FTC's investigation.

The test for the relevancy of an administrative subpoena is "whether the information sought is 'reasonably relevant' to the agency's inquiry."[15] Moreover, the CID at issue must "not [be] so overbroad as to reach into areas that are irrelevant or immaterial . . . [and] the test is relevan[ce] to the specific purpose."[16] Accordingly, the CID should be limited or quashed because it demands documents and information from CCL that are not relevant to the FTC's investigation.[17] For example, request D-1 requires the following from CCL:

> D-1. All correspondence, electronic mails, notes on conversations, work orders, and other documents that relate to Firebrand Group SL, LLC, Employment for America, Inc., Political Boost LLC also dba CFPP Research Group, Linked Service Solutions, LLC, Jacob deJongh, Scott Broomfield or Jason Birkett.

The FTC failed to limit the above request to information and documents that relate to the purpose of the FTC's investigation or, for that matter, any purpose whatsoever.[18] Therefore, request D-1

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15. *FTC v. Anderson*, 631 F.2d 741, 745-46 (D.C. Cir. 1979).

16. *Arthur Young & Co.*, 584 F.2d at 1028; 1030.

17. The original Civil Investigative Demand directed to CCL dated August 28, 2012 designates the "Nature and Scope of the Investigation" as follows: "To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.C.C. §45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. pt 310 (as amended), including but not limited to the provision of substantial assistance or support – such as mailing lists, scripts, merchant accounts, and other information, products or services – to telemarketers engaged in unlawful practices. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest." *See* ***Exhibit A***, Cover Letter to August 28, 2012 CID.

18. During the parties' good faith conference, counsel for the Commission, William Maxson, Esq., assured counsel for the Petitioner that request D-1 would not require CCL to provide documents which do not relate to the investigation, however, as of the filing of the instant Petition, there is no formal agreement to this effect in place between the parties.

not only calls for information that is relevant to the investigation, but also *any* information between the parties regardless of subject matter. As stated above, the FTC cannot require the production of information that has nothing to do with the nature of the FTC's investigation.[19] Accordingly, to the extent request D-1 demands non-relevant information outside the scope of the FTC's investigation, it must be quashed by the Court.

Likewise, requests D-2 and D-4 must be quashed, as they also ask CCL to produce information that is not relevant to the FTC's investigation.[20] Specifically, requests D-2 and D-4 state the following:

> D-2. All documents that relate to any entity that used or uses phone calls to generate potential leads or customers for Caribbean Cruise Line, Inc.
>
> D-4. All documents that relate to any entity that provided or used automated dialers to generate potential leads or customers for Caribbean Cruise Line, Inc.

Complying with the above requests would require CCL to produce all of its customer lists and leads, which are outside the scope of and have nothing to do with the FTC's investigation. As stated, the test for the relevancy of an administrative subpoena is "whether the information sought is 'reasonably relevant' to the agency's inquiry."[21] As the scope of the FTC's investigation merely concerns CCL's conduct with regard to its business, it is an absurdity to state that the names of CCL's customers and/or lead generators are reasonably related to the FTC's inquiry, as names logically cannot contain information related to an entity's conduct.[22]

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19. *FTC v. Anderson*, 631 F.2d 741, 745-46 (D.C. Cir. 1979); *Arthur Young & Co.*, 584 F.2d at 1028; 1030.

20. *FTC v. Anderson*, 631 F.2d 741, 745-46 (D.C. Cir. 1979); *Arthur Young & Co.*, 584 F.2d at 1028; 1030.

21. *FTC v. Anderson*, 631 F.2d 741, 745-46 (D.C. Cir. 1979).

22. *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 57 (D.D.C. 1984) (in patent infringement case, the court ruled on a request for discovery of customer information and stated "to the extent that it seeks the number of customers, but not the

Accordingly, said requests are overbroad and are not reasonably relevant to the FTC's inquiry. Therefore, the Court must quash or limit requests D-2 and D-4, to the extent that they request any and all irrelevant information.

Without in any way limiting the foregoing objections, CCL further objects to the above requests to the extent that they purport to require CCL to produce documents that are not in its possession. Requests D-1, D-2, and D-4 have no limitations with regard to CCL's liability to produce information not within CCL's possession. CCL is a separate legal entity than the companies mentioned in request D-1 and those that may be inferred from requests D-2 and D-4. Thus, CCL does not have access to those companies' documents in the normal course of CCL's business, and it is contrary to federal law for the FTC to request said documents.[23] Therefore, CCL requests that the Court limit request D-1 so that CCL is only responsible for producing documents and information within its possession and control.

B. The CID improperly seeks trade secret data and proprietary information from CCL.

The CID should be further limited or quashed because it demands documents and information concerning CCL's private trade secret data and proprietary information.[24] A court is

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names, it is an appropriate inquiry. On the other hand, subparts (c), (d), and (e) (which seek yearly sales broken down by customer, yearly profit from sales, and all contracts relating to sales), are not likely to lead to evidence of market share, growth in the market place, etc., and therefore they are not probative"); *Tech v. United States*, 284 F.R.D. 192, 200 (M.D. Pa. 2012) (Court ruled it was overly burdensome to produce customer information because it "would risk disclosure of private information of unwitting non-parties, and would ultimately be futile").

23. *See Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 233 F.R.D. 143 (D. Del. 2005); *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009).

24. During the parties' good faith conference, counsel for the Commission, William Maxson, Esq., suggested, as a potential accommodation, that counsel for the Petitioner mark all trade secret information produced as "confidential." However, there is no formal agreement to this effect in place between the parties and there is no guarantee that said accommodation will prevent potential damage to CCL.

"permitted to quash or modify a subpoena if compliance would result in the disclosure of trade secrets."[25] To determine whether information contains a trade secret, courts look to whether the information is secret and has competitive value.[26] Moreover, if a subpoena is said to contain trade secrets, courts generally issue an order to prevent their exposure.[27] Requests D-2 and D-4 ask for secret and competitive data of CCL and state the following:

> D-2. All documents that relate to any entity that used or uses phone calls to generate potential leads or customers for Caribbean Cruise Line, Inc.
>
> D-4. All documents that relate to any entity that provided or used automated dialers to generate potential leads or customers for Caribbean Cruise Line, Inc.

Given the above requests' broad and sweeping language, the FTC is asking CCL to produce its customer lists and leads. Customer lists and leads are generally considered to be trade secrets.[28] Accordingly, the Court should limit requests D-2 and D-4 to the extent that they require the production of trade secret and proprietary information.

CONCLUSION

For the foregoing reasons, CCL respectfully requests that the Commission limit or quash the challenged specifications and provisions in the CID as set forth above.

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25. *Brubaker Kitchens, Inc. v. Brown*, CIV.A. 05-6756, 2006 WL 1193223 (E.D. Pa. 2006); Fed.R.Civ.P. 45(c)(3)(B)(i).

26. *Id.*

27. *Liveware Publ'g, Inc. v. Best Software, Inc.*, 252 F. Supp. 2d 74, 85 (D. Del. 2003) ("When information, such as the customer list at issue here, is confidential and subject to misuse by a litigant, it is appropriate for the Court to order that the information be made subject to a protective order and be available only to trial counsel").

28. *Id*; *NaturaLawn of Am., Inc. v. W. Group*, LLC, 484 F. Supp. 2d 392, 399 (D. Md. 2007) ("Plaintiff has developed these lists over time. It clearly takes effort (establishing goodwill) and money (advertising) to establish any customer base. Therefore, plaintiff's customer lists are trade secrets"); *SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1258 (3d Cir.1985) (customer lists are a "subject matter that has long been protectable as trade secrets").

CERTIFICATION OF GOOD FAITH CONFERENCE

Pursuant to 16 C.F.R. §2.7(d)(2), counsel for Petitioner conferred with counsel for the Commission, William Maxson, Esq. at 2pm on Thursday, April 4, 2013 in a good faith effort to resolve by agreement the issues raised by the Petition. Counsel for Petitioner and counsel on this file, William Maxson, Esq., were not able to confer to reach a formal agreement by the deadline to file this Petition.

DATED: April 5, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the following via overnight Federal Express and electronic mail on this 5th day of April, 2013.

William Maxson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail Stop H-266
Washington, DC 20580
wmaxson@ftc.gov

Donald Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
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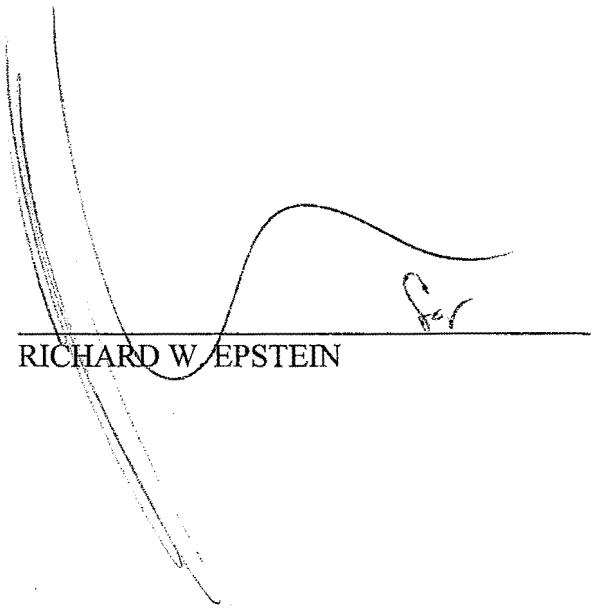

RICHARD W. EPSTEIN

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