UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 0:19-cv-61867-RKA

FEDERAL TRADE COMMISSION,

Petitioner,

v.

DANIEL LAMBERT, et al.,

Respondents.

FEDERAL TRADE COMMISSION'S REPLY IN SUPPORT OF PETITION FOR AN ORDER ENFORCING CIVIL INVESTIGATIVE DEMANDS

Respondents' Joint Opposition to the Federal Trade Commission's Petition for an Order Enforcing Civil Investigative Demands ("Opposition," or "Opp.") supplies no reason this Court should refuse to enforce the FTC's CIDs. Only the prospect of court intervention has pushed Respondents to proceed toward compliance; they provided the greatest portion of their production only *after* the FTC commenced this proceeding and while awaiting entry of the Court's Order. Even now—nearly 11 months after receiving the CIDs—Respondents admit they are still not done collecting and producing information to the FTC. To bring an end to Respondents' months-long strategy of gamesmanship and delay, the Court should issue an Order enforcing the CIDs and directing Respondents to either produce the remaining information or provide sworn certificates of compliance within ten days.

Argument

I. The FTC Acted Properly In the Face Of Respondents' Refusal To Engage With Or Even Acknowledge The FTC's Position.

A. There Was No December 14 Agreement.

Respondents' Opposition hinges on its insistence that Respondents and FTC staff reached an agreement modifying the CIDs captured in Respondents' counsel's December 14, 2018 email. This claim is groundless.

Respondents' counsel wrote the December 14 email purportedly to summarize a telephone conference with FTC staff the previous day. *See* Opp. Ex. B, Ex. 2 [Doc. 10-2 at 12]. It begins with a fundamental principle of the deal supposedly struck: "To the extent you all want to ask for more at a later date, you are free to do so and, in turn, our right to object and/or file a petition will begin to run from the time you seek additional documents and information." *Id.* The email then discusses a lengthy series of terms, including two key provisions, 8.b. and 8.c. *Id.* In provision 8.b., Respondents proposed to search for documents and emails to and from several entities "with the exception of" all of the Respondents. In provision 8.c., Respondents offered a list of 18 search terms for electronic information, again excepting themselves from such searches. *Id.*

FTC staff did not share Respondents' understanding of their search and production obligations. To the contrary, in a December 27 email, FTC Staff made plain that the December 14 email did *not* accurately reflect an agreement. Although the Opposition downplays this response as presenting "very minor deviations," Opp. at 4 [Doc. 10 at 4], even a cursory read shows that the FTC did not accept

Respondents' terms and instead required materially-different compliance. In particular, on 8.b., the FTC stated unequivocally (through red-colored annotations) that Respondents' attempt to except themselves from their search obligation was unacceptable: "We do not agree to these exceptions. Searches should be run on these individuals and entities." Opp. Ex. B, Ex. 3 [Doc. 10-2 at 16]. On 8.c., the purported agreement regarding search terms, the FTC also disagreed, again requiring Respondents to be included in such searches. *Id.* The FTC also directed that Respondents use 29 search terms in addition to the 18 already proposed. Opp. Ex. B, Ex. 3 [Doc. 10-2 at 16-17]. Critically, in the course of its December 27 response, the FTC expressly informed Respondents no fewer than three times that it did not agree with Respondents' summary of the telephone conference. *Id.*

Respondents' counsel plainly understood that there was no meeting of the minds. On January 1, 2019, he acknowledged, "We don't agree with many of the changes/additions you made to our prior understanding set forth in my December 14 email." Opp. Ex. B, Ex. 5 [Doc. 10-2 at 28]. FTC staff could not respond to this email because they were legally prohibited from working during the government shutdown, which ran until January 28, 2019. As Respondents' counsel recognized, the FTC's December 27 response "ask[ed] for more" and thus should have been grounds to file a petition to limit or quash the CIDs, if Respondents wanted to properly raise objections. They did not do so. Instead, Respondents' counsel chose to disregard the FTC's position and act as if his December 14 email conclusively settled the scope of Respondents' production obligations—conveniently allowing

Respondents to withhold critical and highly relevant communications between and among themselves.[1]

Once the shutdown ended, FTC staff attempted immediately to resume discussions, only to be repeatedly deflected in their efforts. On January 29, 2019, and again on February 5, FTC staff asked for a call, only to have Respondents' counsel put them off. Opp. Ex. B, Ex. 8 [Doc. 10-2 at 47-49]. Absent a response from Respondents' counsel, on February 11, FTC staff sent an email summarizing the discussions to date. Contrary to Respondents' claim that this communication represented an about-face by FTC staff, Opp. at 5 [Doc. 10 at 5], the February 11 email accurately reflected the communications so far—in particular that there had been no formal modification of the CID and that FTC staff had raised disagreements with Respondents' December 14 email. Opp. Ex. B, Ex. 8 [Doc. 10-2 at 47].

Following this email, Respondents' counsel and FTC staff did reach each other. These discussions led to a formal modification of the CIDs on February 28, 2019 by Lois Greisman, Associate Director of the FTC's Division of Marketing Practices. Opp. Ex. B, Ex. 9 [Doc. 10-2 at 55-58]. Consistent with FTC staff's position articulated on December 27, this formal modification letter made clear that "Subject Persons" included Respondents—meaning that Respondents must search

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[1] This position also bears important consequences for the investigation as a whole. For instance, Respondents dispute the FTC's description of them as "related." Opp. at 9 [Doc. 10 at 9]. Obviously, communications between and among Respondents are directly relevant to determining this point.

for documents or communications shared among themselves. Opp. Ex. B, Ex. 9 [Doc. 10-2 at 55]; Opp. Ex. B, Ex. 3 [Doc. 10-2 at 16].

At this point, if Respondents wanted to properly object to the CID modifications, they could have contacted staff to reopen discussions or filed a petition to limit or quash the CIDs (as contemplated in Respondents' December 14 email). But when it became clear that the FTC's CIDs did, in fact, seek more information than Respondents initially understood, they took neither step. Respondents' present claim that the FTC is to blame for their inaction is meritless. Opp. at 5-6, 13 [Doc. 10 at 5-6, 13]. The decision to forego administrative procedures for raising objections to the CIDs was entirely their own.

Instead, Respondents chose a third and more perilous path: to proceed as if the December 14 email was controlling and as if the FTC's many communications simply had not occurred. *See*, *e.g.*, Opp. Ex. B, Ex. 12 [Doc. 10-2 at 68] (continuing to insist that Respondents' production obligations are "based on my December 12 [sic] email"). Even after this matter was referred to the FTC's Office of General Counsel due to Respondents' failure to comply, Respondents' counsel still argued Respondents were bound only by the supposed agreements set forth in his December 14 e-mail. Opp. Ex. B, Ex. 15 [Doc. 10-2 at 84].

These facts undermine any claim of FTC impropriety. To the contrary, these communications show that the FTC maintained a consistent position on its expectations for Respondents' compliance. These communications further show that,

rather than engage and resolve the obvious and acknowledged disagreements, Respondents disengaged, deflected, and ultimately ignored their legal obligations.

Nor do Respondents provide any legal grounds for their continued insistence that their counsel's December 14 e-mail conclusively delineated their compliance obligations. Under the FTC's Rules of Practice, the Commission delegates authority to modify the terms of compliance with CIDs only to certain designated individuals, including Associate Directors in the FTC's Bureau of Consumer Protection. *See* 16 C.F.R. § 2.7(l). As a result, FTC staff attorneys have no authority to formally modify these terms; any agreements they reach must be validated by formal modification of the Associate Director. As Respondents' own Opposition recognizes, there was no such modification on December 14. *See* Opp. at 12-13 [Doc. 10 at 12-13] (recognizing that 16 C.F.R. § 2.7(1) requires a formal modification letter, so "these informal modifications were not final"). There was no modification until February 28, 2019, when the Associate Director confirmed that, contrary to Respondents' position, compliance with the CID required Respondents to produce documents and communications shared among themselves. Opp. Ex. B, Ex. 9 [Doc. 10-2 at 55-56].

B. The FTC Properly Commenced This Proceeding.

Respondents' claim that the FTC acted improperly in commencing this CID enforcement proceeding is likewise meritless. Once the matter was referred to the FTC's Office of General Counsel, the FTC allowed Respondents yet another extension—to May 30, 2019, or five months after the original deadline. Opp. Ex. B, Ex. 13 [Doc. 10-2 at 78]. Not only that, but the FTC also narrowed the specifications at issue in an effort to avoid this litigation, although it would have been well within

its rights to insist on full and complete production. Opp. Ex. B, Ex. 13 [Doc. 10-2 at 75-76]. Respondents answered by denying their production obligations. Opp. Ex. B, Ex. 15 [Doc. 10-2 at 84]. Faced with an incomplete production and Respondents' continued intransigence, the FTC properly brought this proceeding.

In filing this enforcement action, the FTC followed the same procedures it employs in all process enforcement cases, including cases filed in this very district. *See Federal Trade Commission v. National Processing Co., et al.*, Case No. 1:13-mc-23437-RSR (S.D. Fla. filed Sept. 24, 2013). Because CID enforcement actions are summary proceedings, the Commission initiates them by a petition and order to show cause rather than by complaint and summons. *See, e.g.*, 15 U.S.C. § 57b-1(e); *United States v. Zadeh*, 820 F.3d 746, 757 & n.59 (5th Cir. 2016); *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980). Respondents' assertion that the FTC's method of service was improper ignores that Rule 81 of the Federal Rules of Civil Procedure expressly allows a court to modify the application of those Rules to process enforcement proceedings to preserve the summary nature of these matters:

> These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, *except as otherwise provided by statute, by local rule, or by court order in the proceedings*.

FED. R. CIV. P. 81(a)(5) (emphasis added); *see also* FED. R. CIV. P. 81(a)(3) advisory committee's notes (1946). Here, the Court's October 1 Order authorizing service by the FTC "upon Respondents or their counsel . . . using means as expeditious as possible" constitutes such a "court order in the proceedings" sufficient to modify the provisions for service under Rule 4.

II. Respondents Do Not Properly Assert Any Undue Burden.

To assert a claim that a CID presents an undue burden, the recipient must establish that the CID "threatens to unduly disrupt or seriously hinder normal operations of a business." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977)(*en banc*). Respondents' only claim is that the FTC's search terms require them to search for and review over 15,000 emails, a task they estimate will require a maximum of 375 hours of work.[2] Opp. at 14-15 [Doc. 10 at 14-15]. These facts, however, do not establish an undue disruption or serious hindrance to their normal operations. As shown above, the FTC provided these terms to Respondents on *December 27, 2018*. Opp. Ex. B, Ex. 3 [Doc. 10-2 at 16-17]. Respondents' counsel confirmed that Respondents were running searches in his January 1, 2019, response. Opp. Ex. B, Ex. 5 [Doc. 10-2 at 28]. Given those dates, there has been more than sufficient time for Respondents to completed 375 hours of review. Yet, as Respondents admit, the review and production remains incomplete. Opp. at 15 [Doc. 10 at 15].

III. Respondents' Insufficient and Incomplete Compliance Requires A Court Order.

Respondents ask this Court to deny enforcement of the CID because they claim to have complied sufficiently. Opp. at 15-18 [Doc. 10 at 15-18]. That is not accurate: Respondents admit they still have not completed their CID responses, even at this late date. They concede they have not produced emails from 3 of the 10 CID recipients *and* that they need to supplement their written responses to the

[2] We note that in today's world of e-discovery of terabytes of information, 15,000 emails represents a small review set.

CIDs' interrogatories. Opp. at 2 & n.1, 15 [Doc. 10 at 2 & n.1, 15]. And, even now, Respondents claim (without any basis recognized in *Texaco*) they need not produce all documents related to complaints, including cease and desist letters, threats of lawsuits or actual lawsuits, because this would be unduly burdensome. Opp. at 17-18 [Doc. 10 at 17-18]. This partial and grudging compliance does not satisfy Respondents' obligations under the CIDs.

An Order enforcing the CIDs is necessary because only the prospect of court intervention has proven sufficient to motivate Respondents. Respondents ignored the FTC's deadlines, making repeated promises that they were "working" on email searches and would complete the production—promises they failed to fulfill. *See* FTC PX 16 at 5 [Doc. 1-17 at 6]. It was not until the FTC filed this case, and with the FTC's proposed Order to Show Cause pending, that Respondents finally delivered a response representing the greater portion of their total production to date.[3] Opp. at 1, 3 [Doc. 10 at 1, 3]. As Respondents have shown themselves all too willing to ignore the FTC, this Court should enter an order to ensure the FTC receives the information it needs to conduct its investigation.[4]

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[3] The FTC continues to review these late-submitted documents but does not at this time concede they represent complete productions.

[4] The Court should reject Respondents' bid to turn this limited enforcement proceeding into a vehicle for Respondents' defense of their business practices. Respondents ask (in a footnote of their pleading) to cross-examine FTC attorney Jody Goodman regarding her characterization of their practices under investigation. Opp. at 10 n.2 [Doc. 10 at n.2]. This demand mischaracterizes Ms. Goodman's Declaration and cannot be squared with the Court's October 1 Order that "[N]o party shall be entitled to discovery without further order of the Court upon a specific showing of need." Doc. 6 at 3. And such an attempt to short-circuit a potential law enforcement case is improper in any event. "As a general rule, substantive issues which may be raised in defense against an administrative

Conclusion

For these reasons, the Court should enter an order enforcing the CIDs issued by the Commission to Respondents and direct that Respondents comply, ether by producing the specified information or sworn certificates of compliance within 10 days. *See* 15 U.S.C. §§ 57b-1(c)(11), (c)(13).

Respectfully submitted,

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complaint are premature in an enforcement proceeding." *Texaco*, 555 F.2d at 879. Similarly improper is Respondents' request that this Court order the FTC investigation closed. Opp. at 18 [Doc. 10 at 18]. The only issue before the Court is whether to enforce the CIDs under the test announced in *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) and *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449, 450 (11th Cir. 1996).

Certificate of Service

I hereby certify that on October 18, 2019, I served the foregoing Reply in Support of Petition for an Order Enforcing Civil Investigative Demands by filing it with the CM/ECF system for the Southern District of Florida, which provides a notification to all counsel appearing in this matter.

s/ Burke W. Kappler
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