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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

)	
FEDERAL TRADE COMMISSION,)	
)	
Petitioner,)	
v.)	Misc. Case No. <u>MC-14-02-M-JCL</u>
)	
COUNTRYWIDE)	
PERIODICALS, LLC,)	
)	
Respondent.)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PETITION OF THE FEDERAL TRADE COMMISSION FOR AN
ORDER TO ENFORCE CIVIL INVESTIGATIVE DEMAND**

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1. Declaration of Megan A. Bartley (May 19, 2014) (with Appendix A: Countrywide's Responses to the CID) ("Bartley Decl.")
2. Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others, April 11, 2011 (FTC File No. 0123145) ("Resolution")
3. Civil Investigative Demand Issued to Countrywide Periodicals, LLC (May 6, 2013) ("CID")
4. Countrywide Periodicals, LLC's Petition to Quash Civil Investigative Demand (May 31, 2013) ("Countrywide's Petition to Quash")
5. Federal Trade Commission's Order Denying Petition to Quash Civil Investigative Demand (July 3, 2013) ("FTC's Order")
6. *FTC v. Nat'l Processing Co.*, No. 13-23437-MC-ROSENBAUM (S.D. Fla. Dec. 18, 2013) (unpublished opinion)

I. INTRODUCTION

The FTC is investigating the magazine subscription telemarketing practices of Countrywide Periodicals, LLC (“Countrywide”) a company owned and controlled by Jason W. Ellsworth. Ellsworth and another company he controls, Your Magazine Provider, Inc. (“YMP”) settled allegations with the Commission in 2009 that resulted in a permanent injunction and monetary relief.¹ The Commission is concurrently moving in that action for contempt and to enforce subpoenas issued under Fed. R. Civ. P. 45.²

After the FTC settled its case against Ellsworth and YMP, it began receiving hundreds of consumer complaints about the marketing practices of Countrywide, a company that was not a defendant in the original action but is closely related to those defendants. Accordingly, the Commission began an investigation of Countrywide and

¹ The 2009 settlement prohibited Ellsworth and YMP from engaging in unfair or deceptive practices in the sale of magazine subscriptions, required the defendants to pay \$600,000 in equitable monetary relief, and established procedures for monitoring compliance with the order. Stipulated Final Judgment and Order for Permanent Injunction at 8-24, *FTC v. Your Magazine Provider, Inc.*, No. CV-08-64-M-DWM (D. Mont. Oct. 7, 2009), ECF No. 91 (attached to Petition Exhibit (“Pet. Exh.” 4), Countrywide’s Petition to Quash).

² *See id.*, Motion to Hold Jason W. Ellsworth in Contempt of this Court’s October 7, 2009 Order and to Enforce Subpoenas Issued Pursuant to that Order. The Court may [footnote continues on next page]

issued a civil investigative demand (“CID”) to it in order to determine whether that firm has engaged in unfair or deceptive acts or practices or deceptive or abusive telemarketing acts or practices in connection with its sales of magazine subscriptions.³ Countrywide has not complied with most of the CID and the Commission has accordingly brought this enforcement action to secure compliance pursuant to Section 20 of the FTC Act.⁴ 15 U.S.C. § 57b-1.

This statutory enforcement proceeding is thus closely related to, but governed by different standards than, the contempt and Fed. R. Civ. P. 45 motions that the Commission has concurrently filed in the original *Your Magazine Provider* proceeding against the defendants and others. The Court may wish to consider this enforcement proceeding and the pending discovery motions at the same time.

wish to refer to that motion for a more complete background and context in which the instant Civil Investigative Demand (“CID”) enforcement proceeding arises.

³ 15 U.S.C. § 45; 16 C.F.R. pt. 310.

⁴ A CID is a form of administrative compulsory process akin to a subpoena *duces tecum* or subpoena *ad testificandum*. The FTC’s authority to issue civil investigative demands under Section 20 of the FTC Act, 15 U.S.C. § 57b-1, was modeled on the Department of Justice’s authority to issue civil investigative demands under the Antitrust Civil Process Act, 15 U.S.C. § 1311. *See* H.R.Cong.Rep. No. 917, 96th Cong., 2d Sess. 32 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1143, 1149; S.Rep. No. 500, 96th Cong., 1st Sess. 23–25 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1124–26. *See also* *FTC v. O’Connell Assocs., Inc.*, 828 F. Supp. 165, 169 (E.D.N.Y. 1993).

II. JURISDICTION AND VENUE

Section 20(c) of the FTC Act, 15 U.S.C. § 57b-1(c), authorizes the Commission to issue CIDs to require the production of documents or information relating to any matter under investigation. If the recipient does not comply, the Commission may petition the district court for an enforcement order, 15 U.S.C. § 57b-1(e); and the court is empowered “to enter such . . . orders as may be required.” 15 U.S.C. § 57b-1(h). Section 20(e) of the FTC Act authorizes the Commission to seek enforcement of its CID in any judicial district where the CID recipient “resides, is found, or transacts business.” Section 16 of the FTC Act, 15 U.S.C. § 56, provides authority to the Commission to litigate such matters in its own name. This Court is empowered to entertain the Commission’s enforcement petition because Countrywide “resides, is found, or transacts business” in this judicial district.⁵ *See* 15 U.S.C. § 57b-1(e); Pet. Exh. 1 (Bartley Decl.) ¶ 3. Such enforcement proceedings are initiated by an ex parte petition to the court and the issuance of an Order to Show Cause. 15 U.S.C. § 57b-1(e).

⁵ Although Countrywide’s owner Ellsworth has stated that the company has relocated to Lolo, Montana, records of the Montana Secretary of State reflect a Hamilton, Montana address. In any event, Hamilton and Lolo are both located in this judicial district.

III. STATEMENT OF FACTS

A. The FTC's Investigation and Issuance of the CID

Countrywide is a telemarketer that sells magazine subscriptions. Pet. Exh. 1 (Bartley Decl.) ¶ 4. After the FTC settled its case against Your Magazine Provider and Ellsworth, it began receiving consumer complaints about Countrywide's telemarketing practices. The FTC has received hundreds of consumer complaints about Countrywide's business practices, including complaints about order fulfillment, its billing and cancellation policies, and its statements about its relationship with magazine publishers, credit card companies, and banks. Consumers have also complained that Countrywide's telemarketers have made deceptive representations and engaged in abusive practices in telephone calls. *Id.*

On May 6, 2013, as part of its investigation, the Commission issued a CID to Countrywide directing it to respond to fifteen document requests and two interrogatories. Pet. Exh. 3 (CID).⁶ The Commission issued the CID as part of an

⁶ The CID sought documents and responses to interrogatories from "any Telemarketing Entity," which the CID defined to include other entities owned or controlled by Countrywide's owner Ellsworth. *See* Pet. Exh. 3 (CID) at 2. After counsel for Countrywide represented that his client did not have access to responsive documents of related entities, the Commission served discovery requests on these other [footnote continues on next page]

industry investigation to determine whether “telemarketers, sellers, or others assisting them” have engaged in “unfair or deceptive acts or practices in or affecting commerce” in violation of the FTC Act, or “deceptive or abusive telemarketing acts or practices in violation of” the Telemarketing Sales Rule (“TSR”). Resolution Directing Use of Compulsory Process in A Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others, April 11, 2011 (FTC File No. 0123145) (“Resolution”) (Pet. Exh. 2).

Among other things, the CID requested documents and information regarding customer orders, including magazine titles purchased, subscription terms, and customer payments. The CID also requested documents concerning: (1) the company’s sales practices, including scripts, training materials, and audio recordings of sales calls; (2) the company’s authority to offer specific subscription pricing and terms for magazines; (3) its affiliation with banks or credit card companies; (4) its agreements and payment arrangements with magazine clearinghouses; (5) its sources of prospective customers; (6) copies of customer complaints, and (7) employee contact and employment-related information. Pet. Exh. 1 (Bartley Decl.) ¶ 7; Pet. Exh. 3 (CID) at 10-12.⁷ The CID

entities under the 2009 order. Those discovery demands are the subject of a pending contempt motion in that case.

⁷ Page citations to Pet. Exh. 3 (CID) are to the Schedule attached to the CID.

directed Countrywide to provide the responsive materials no later than June 3, 2013.

Id.

B. Countrywide's Petition to Quash and the Commission's Ruling

On July 3, 2013, the Commission denied an administrative petition to quash and directed Countrywide to comply with the CID by July 19, 2013. Pet. Exh. 5 (FTC's Order). The Commission ruled first that all the CID's specifications were "clearly relevant" to its investigation and that Countrywide had not shown that the CID is overbroad or imposes an undue burden. *Id.* at 4-6. The Commission also rejected Countrywide's contention that it was not required to produce customer order and certain employee information because such information is sensitive or "private." The Commission explained that such information was fully protected by the FTC Act, 15 U.S.C. § 57b-2, and the FTC's Rules of Practice, 16 C.F.R. § 4.10, and that it is "highly relevant" to the Commission's inquiry. *Id.* at 6-7. Finally, the Commission rejected as unfounded Countrywide's allegation that the Commission had acted in bad faith in issuing the CID. *Id.* at 7-8.

C. Countrywide's Incomplete Responses to the CID Specifications

Countrywide produced some responsive documents and information in July 2013. Pet. Exh. 1 (Bartley Decl.) ¶ 9. The production was deficient in numerous

ways. For example, the company failed to produce audio recordings of sales calls, customer billing and subscription information, the requested employee information, or the company's contracts or payment arrangements with magazine clearinghouses. Further, Countrywide produced only twelve customer complaints even though FTC staff was aware of hundreds of such complaints. The company refused to provide the requested customer magazine titles or certain employee information, citing the sensitive and private nature of that information. *Id.*

In October and November 2013, Countrywide submitted additional responsive materials. *Id.*, ¶ 10. Those submissions did not completely cure most of the deficiencies. Most notably, Countrywide continued to refuse to provide magazine titles ordered by its customers, and failed to produce any customer billing information, employee employment-related information, or any of the requested audio recordings of sales calls. *Id.* Overall, Countrywide has failed to provide complete responses to 11 of the 17 CID specifications. *Id.*, ¶ 11. Each of the deficiencies is specifically identified in Appendix A to the supporting declaration, Pet. Exh. 1 (Bartley Decl.).

IV. LEGAL STANDARD FOR ENFORCEMENT

Actions to enforce administrative compulsory process are “summary procedure[s] designed to allow ‘speedy investigation of [agency] charges.’” *EEOC v.*

Karuk Tribe Hous. Auth., 260 F.3d 1071, 1078 (9th Cir. 2001) (citing *EEOC v. St. Regis Paper Co.*, 717 F.2d 1302, 1304 (9th Cir. 1983)). For this reason, they are instituted by a petition and an order to show cause rather than by a complaint and summons. *See, e.g., FTC v. Sherry*, 1969 WL 98583 at *3-4, 13 Fed. R. Serv.2d 1382 (D.D.C. 1969) (citing, *inter alia*, *Venn v. United States*, 400 F.2d 207, 212 n.12 (5th Cir. 1968)); *cf. FTC v. Carter*, 636 F.2d 781, 791 (D.C. Cir. 1980). Further, because these proceedings are summary in nature, discovery is allowed only in “exceptional circumstances.” *St. Regis Paper*, 717 F.2d at 1304; *see also* Fed. R. Civ. P. 26(a)(1)(B)(v) (no initial discovery disclosures in such cases).

In this Circuit, courts are limited to determining: “(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.” *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 848-49 (9th Cir. 2008) (citing *Karuk Tribe*, 260 F.3d at 1076); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950)). When these requirements are met, agency process must be enforced “unless the party being investigated proves the inquiry is unreasonable because it is overbroad or unduly burdensome.” *NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996) (citation omitted).

As we show in Part V, the Commission's CID meets all the criteria for summary enforcement.

V. ARGUMENT

A. The CID is Within the Lawful Authority of the Agency

The Commission has broad authority to investigate acts or practices that may violate Section 5(a) of the FTC Act or the TSR. Section 3 of the Act, 15 U.S.C. § 43, empowers the Commission to “prosecute any inquiry necessary to its duties in any part of the United States.” Section 6(a) of the Act, 15 U.S.C. § 46(a), authorizes the Commission “[t]o gather and compile information concerning, and to investigate . . . the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce,” with certain exceptions not applicable here. And as noted above, Section 20 authorizes the Commission to issue CIDs in all its investigations. Thus, the Commission indisputably is authorized to conduct its investigation and issue the CID at issue here.

These statutes leave no room for Countrywide's argument that the Commission may not use process to obtain sensitive customer or employee information. The Commission's authority to seek materials relevant to an investigation plainly encompasses the authority to request such materials. Indeed, the Commission's

statutes and its Rules of Practice implicitly recognize the authority and expressly protect such information from improper disclosure. *E.g.*, 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10; *see* Pet. Exh. 5 (FTC’s Order) at 6 (citing *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338, at 65,353, 1991 U.S. Dist. LEXIS 5523, *15-16 (D.D.C. 1991), *aff’d*, 965 F.2d 1086, 1089 (D.C. Cir. 1992)).

Nor is there any basis for Countrywide’s contention that the CID is beyond the Commission’s authority, because it seeks information about activities similar to those the Commission challenged in its earlier action against Your Magazine Provider. Pet. Exh. 4 (Countrywide’s Petition to Quash) at 5-7.⁸ The Commission issued the CID only after it had received hundreds of consumer complaints about Countrywide’s practices. *See* Pet. Exh. 1 (Bartley Decl.) ¶ 4. More importantly, nothing in the previous settlement order and no legal principle precludes the Commission from pursuing new or additional law violations now. *See* Pet. Exh. 5 (FTC’s Order) at 7-8; *see also* *FTC v. Nat’l Processing Co.*, No. 13-23437-MC-ROSENBAUM (S.D. Fla. Dec. 18, 2013) (FTC retains authority to issue CIDs to investigate “additional

⁸ To the extent that Countrywide raises any other objections to the CID that it did not raise in its petition to quash, it is barred from raising such claims here without having first exhausted its administrative remedies. *See* 15 U.S.C. § 57b-1(f); 16 C.F.R. § [footnote continues on next page]

wrongdoing” by respondents even where the agency had already filed suit “against separate, albeit related, parties”) (unpublished opinion) (Pet. Exh. 6).

Here, Countrywide cannot show that the CID was issued for an improper purpose. *See FDIC v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997) (subpoena recipients failed to show bad faith or improper purpose by agency). Accordingly, the Commission is entitled to a presumption of regularity regarding its investigation and its CID. *See FCC v. Schreiber*, 381 U.S. 279, 296 (1965).

B. The Procedural Requirements were Followed

The Commission also properly followed all the required procedures in issuing the CID. The CID was issued pursuant to a valid Commission resolution, Pet. Exh. 2, and was signed by a Commissioner and served in accordance with the Commission’s Rules of Practice. *See* 16 C.F.R. §§ 2.7, 4.4; Pet. Exh. 1 (Bartley Decl.) ¶ 5. Further, Countrywide received the required notice of the scope and purpose of the investigation, *see* 15 U.S.C. § 57b-1(c)(2), 16 C.F.R. § 2.6, through the resolution and the CID. *See* Pet. Exh. 2 (Resolution), 3 (CID).

2.10(a); *see also Morton Salt*, 338 U.S. at 653 (respondents must challenge agency requests for information administratively before raising judicial challenge).

C. The CID Seeks Information and Documents that are Relevant and Material to the Commission's Investigation

The information and materials requested by the CID are also highly relevant and material to the FTC's investigation. Pet. Exh. 1 (Bartley Decl.) ¶ 6. Government agencies have wide latitude to determine what information is relevant to a law enforcement investigation. Indeed, the Commission need not have a justifiable belief that wrongdoing has actually occurred, but "can investigate merely on suspicion that the law is being violated, or even just because it wants an assurance that it is not." *Morton Salt*, 338 U.S. at 642-43. Thus, administrative process must be enforced "unless 'the evidence sought by the [CID] is "plainly incompetent or irrelevant" to "any lawful purpose of the agency."'" *Karuk Tribe*, 260 F.3d at 1076 (citation omitted). This requirement is "not especially constraining." *Fed. Express*, 558 F.3d at 854 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984)). A district court should "defer to the agency's appraisal of relevancy, which must be accepted so long as it is not obviously wrong." *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 97 (2d Cir. 1997) (quoting *McVane v. FDIC (In re McVane)*, 44 F.3d 1127, 1135 (2d Cir. 1995)).

The Commission is investigating whether Countrywide or its telemarketers engaged in unfair or deceptive acts or practices in selling magazine subscriptions.

Consumers have complained, among other things, that Countrywide failed to fulfill its subscription orders as promised; misrepresented its billing and cancellation policies, its affiliations with magazine publishers, banks, and credit card companies, and its authority to sell magazines on the terms it offers its customers; and that its telemarketers engaged in deceptive and abusive telemarketing conduct. As described above, the CID specifications at issue here seek, among other things, information and documents regarding customer orders, the company's sales practices, its authority to offer specific subscription pricing and terms, its affiliation with banks or credit card companies, its agreements and payment arrangements with magazine clearinghouses, its sources of prospective customers, customer complaints, and employee contact and employment-related information. Pet. Exh. 3 (CID) at 10-12; Pet. Exh. 1 (Bartley Decl.) ¶ 7. As the Commission concluded in its order denying Countrywide's petition to quash, all the CID specifications are "clearly relevant" to the Commission's investigation. Pet. Exh. 5 (FTC's Order) at 4-5; *see also* Pet. Exh. 1 (Bartley Decl.) ¶ 6 and Appendix A.

D. The CID Requests are Neither Overbroad Nor Unduly Burdensome

The CID consists of fifteen document requests and two interrogatories that are clear and specific. Indeed, Countrywide has not disputed the meaning of the CID

requests. Each request was narrowly tailored to enable the Commission to determine if Countrywide has violated the FTC Act or the TSR and, to the extent possible, was designed to reduce Countrywide's burden. For example, several CID specifications request only those documents that are "sufficient to show" or to "establish" the requested information and do not demand all responsive materials. As the Commission concluded in its order, Countrywide's vague and unsupported assertions fall far short of showing that the CID imposed an undue burden or was overbroad. Pet. Exh. 5 (FTC's Order) at 6; *see also FTC 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.").

CONCLUSION


For the foregoing reasons, this Court should enter an order, substantially in the form appended hereto, requiring Countrywide, within ten calendar days of entry of an order compelling compliance, to provide complete responses to the CID's written interrogatories and document requests, and a sworn certificate of compliance in the form provided in Pet. Exh. 3 (CID).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant D. Mont. Local Rule 7.1(d)(2)(E), I hereby certify that the foregoing document consists of 3,095 words, excluding caption, certificate of compliance, table of contents and authorities, and exhibit index.

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1. Declaration of Megan A. Bartley (May 19, 2014) (with Appendix A: Countrywide's Responses to the CID) ("Bartley Decl.")
2. Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others, April 11, 2011 (FTC File No. 0123145) ("Resolution")
3. Civil Investigative Demand Issued to Countrywide Periodicals, LLC (May 6, 2013) ("CID")
4. Countrywide Periodicals, LLC's Petition to Quash Civil Investigative Demand (May 31, 2013) ("Countrywide's Petition to Quash")
5. Federal Trade Commission's Order Denying Petition to Quash Civil Investigative Demand (July 3, 2013) ("FTC's Order")
6. *FTC v. Nat'l Processing Co.*, No. 13-23437-MC-ROSENBAUM (S.D. Fla. Dec. 18, 2013) (unpublished opinion)

I. INTRODUCTION

The FTC is investigating the magazine subscription telemarketing practices of Countrywide Periodicals, LLC (“Countrywide”) a company owned and controlled by Jason W. Ellsworth. Ellsworth and another company he controls, Your Magazine Provider, Inc. (“YMP”) settled allegations with the Commission in 2009 that resulted in a permanent injunction and monetary relief.¹ The Commission is concurrently moving in that action for contempt and to enforce subpoenas issued under Fed. R. Civ. P. 45.²

After the FTC settled its case against Ellsworth and YMP, it began receiving hundreds of consumer complaints about the marketing practices of Countrywide, a company that was not a defendant in the original action but is closely related to those defendants. Accordingly, the Commission began an investigation of Countrywide and

¹ The 2009 settlement prohibited Ellsworth and YMP from engaging in unfair or deceptive practices in the sale of magazine subscriptions, required the defendants to pay \$600,000 in equitable monetary relief, and established procedures for monitoring compliance with the order. Stipulated Final Judgment and Order for Permanent Injunction at 8-24, *FTC v. Your Magazine Provider, Inc.*, No. CV-08-64-M-DWM (D. Mont. Oct. 7, 2009), ECF No. 91 (attached to Petition Exhibit (“Pet. Exh.” 4), Countrywide’s Petition to Quash).

² *See id.*, Motion to Hold Jason W. Ellsworth in Contempt of this Court’s October 7, 2009 Order and to Enforce Subpoenas Issued Pursuant to that Order. The Court may [footnote continues on next page]

issued a civil investigative demand (“CID”) to it in order to determine whether that firm has engaged in unfair or deceptive acts or practices or deceptive or abusive telemarketing acts or practices in connection with its sales of magazine subscriptions.³ Countrywide has not complied with most of the CID and the Commission has accordingly brought this enforcement action to secure compliance pursuant to Section 20 of the FTC Act.⁴ 15 U.S.C. § 57b-1.

This statutory enforcement proceeding is thus closely related to, but governed by different standards than, the contempt and Fed. R. Civ. P. 45 motions that the Commission has concurrently filed in the original *Your Magazine Provider* proceeding against the defendants and others. The Court may wish to consider this enforcement proceeding and the pending discovery motions at the same time.

wish to refer to that motion for a more complete background and context in which the instant Civil Investigative Demand (“CID”) enforcement proceeding arises.

³ 15 U.S.C. § 45; 16 C.F.R. pt. 310.

⁴ A CID is a form of administrative compulsory process akin to a subpoena *duces tecum* or subpoena *ad testificandum*. The FTC’s authority to issue civil investigative demands under Section 20 of the FTC Act, 15 U.S.C. § 57b-1, was modeled on the Department of Justice’s authority to issue civil investigative demands under the Antitrust Civil Process Act, 15 U.S.C. § 1311. *See* H.R.Cong.Rep. No. 917, 96th Cong., 2d Sess. 32 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1143, 1149; S.Rep. No. 500, 96th Cong., 1st Sess. 23–25 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1102, 1124–26. *See also* *FTC v. O’Connell Assocs., Inc.*, 828 F. Supp. 165, 169 (E.D.N.Y. 1993).

II. JURISDICTION AND VENUE

Section 20(c) of the FTC Act, 15 U.S.C. § 57b-1(c), authorizes the Commission to issue CIDs to require the production of documents or information relating to any matter under investigation. If the recipient does not comply, the Commission may petition the district court for an enforcement order, 15 U.S.C. § 57b-1(e); and the court is empowered “to enter such . . . orders as may be required.” 15 U.S.C. § 57b-1(h). Section 20(e) of the FTC Act authorizes the Commission to seek enforcement of its CID in any judicial district where the CID recipient “resides, is found, or transacts business.” Section 16 of the FTC Act, 15 U.S.C. § 56, provides authority to the Commission to litigate such matters in its own name. This Court is empowered to entertain the Commission’s enforcement petition because Countrywide “resides, is found, or transacts business” in this judicial district.⁵ *See* 15 U.S.C. § 57b-1(e); Pet. Exh. 1 (Bartley Decl.) ¶ 3. Such enforcement proceedings are initiated by an ex parte petition to the court and the issuance of an Order to Show Cause. 15 U.S.C. § 57b-1(e).

⁵ Although Countrywide’s owner Ellsworth has stated that the company has relocated to Lolo, Montana, records of the Montana Secretary of State reflect a Hamilton, Montana address. In any event, Hamilton and Lolo are both located in this judicial district.

III. STATEMENT OF FACTS

A. The FTC's Investigation and Issuance of the CID

Countrywide is a telemarketer that sells magazine subscriptions. Pet. Exh. 1 (Bartley Decl.) ¶ 4. After the FTC settled its case against Your Magazine Provider and Ellsworth, it began receiving consumer complaints about Countrywide's telemarketing practices. The FTC has received hundreds of consumer complaints about Countrywide's business practices, including complaints about order fulfillment, its billing and cancellation policies, and its statements about its relationship with magazine publishers, credit card companies, and banks. Consumers have also complained that Countrywide's telemarketers have made deceptive representations and engaged in abusive practices in telephone calls. *Id.*

On May 6, 2013, as part of its investigation, the Commission issued a CID to Countrywide directing it to respond to fifteen document requests and two interrogatories. Pet. Exh. 3 (CID).⁶ The Commission issued the CID as part of an

⁶ The CID sought documents and responses to interrogatories from "any Telemarketing Entity," which the CID defined to include other entities owned or controlled by Countrywide's owner Ellsworth. *See* Pet. Exh. 3 (CID) at 2. After counsel for Countrywide represented that his client did not have access to responsive documents of related entities, the Commission served discovery requests on these other [footnote continues on next page]

industry investigation to determine whether “telemarketers, sellers, or others assisting them” have engaged in “unfair or deceptive acts or practices in or affecting commerce” in violation of the FTC Act, or “deceptive or abusive telemarketing acts or practices in violation of” the Telemarketing Sales Rule (“TSR”). Resolution Directing Use of Compulsory Process in A Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others, April 11, 2011 (FTC File No. 0123145) (“Resolution”) (Pet. Exh. 2).

Among other things, the CID requested documents and information regarding customer orders, including magazine titles purchased, subscription terms, and customer payments. The CID also requested documents concerning: (1) the company’s sales practices, including scripts, training materials, and audio recordings of sales calls; (2) the company’s authority to offer specific subscription pricing and terms for magazines; (3) its affiliation with banks or credit card companies; (4) its agreements and payment arrangements with magazine clearinghouses; (5) its sources of prospective customers; (6) copies of customer complaints, and (7) employee contact and employment-related information. Pet. Exh. 1 (Bartley Decl.) ¶ 7; Pet. Exh. 3 (CID) at 10-12.⁷ The CID

entities under the 2009 order. Those discovery demands are the subject of a pending contempt motion in that case.

⁷ Page citations to Pet. Exh. 3 (CID) are to the Schedule attached to the CID.

directed Countrywide to provide the responsive materials no later than June 3, 2013.

Id.

B. Countrywide's Petition to Quash and the Commission's Ruling

On July 3, 2013, the Commission denied an administrative petition to quash and directed Countrywide to comply with the CID by July 19, 2013. Pet. Exh. 5 (FTC's Order). The Commission ruled first that all the CID's specifications were "clearly relevant" to its investigation and that Countrywide had not shown that the CID is overbroad or imposes an undue burden. *Id.* at 4-6. The Commission also rejected Countrywide's contention that it was not required to produce customer order and certain employee information because such information is sensitive or "private." The Commission explained that such information was fully protected by the FTC Act, 15 U.S.C. § 57b-2, and the FTC's Rules of Practice, 16 C.F.R. § 4.10, and that it is "highly relevant" to the Commission's inquiry. *Id.* at 6-7. Finally, the Commission rejected as unfounded Countrywide's allegation that the Commission had acted in bad faith in issuing the CID. *Id.* at 7-8.

C. Countrywide's Incomplete Responses to the CID Specifications

Countrywide produced some responsive documents and information in July 2013. Pet. Exh. 1 (Bartley Decl.) ¶ 9. The production was deficient in numerous

ways. For example, the company failed to produce audio recordings of sales calls, customer billing and subscription information, the requested employee information, or the company's contracts or payment arrangements with magazine clearinghouses. Further, Countrywide produced only twelve customer complaints even though FTC staff was aware of hundreds of such complaints. The company refused to provide the requested customer magazine titles or certain employee information, citing the sensitive and private nature of that information. *Id.*

In October and November 2013, Countrywide submitted additional responsive materials. *Id.*, ¶ 10. Those submissions did not completely cure most of the deficiencies. Most notably, Countrywide continued to refuse to provide magazine titles ordered by its customers, and failed to produce any customer billing information, employee employment-related information, or any of the requested audio recordings of sales calls. *Id.* Overall, Countrywide has failed to provide complete responses to 11 of the 17 CID specifications. *Id.*, ¶ 11. Each of the deficiencies is specifically identified in Appendix A to the supporting declaration, Pet. Exh. 1 (Bartley Decl.).

IV. LEGAL STANDARD FOR ENFORCEMENT

Actions to enforce administrative compulsory process are “summary procedure[s] designed to allow ‘speedy investigation of [agency] charges.’” *EEOC v.*

Karuk Tribe Hous. Auth., 260 F.3d 1071, 1078 (9th Cir. 2001) (citing *EEOC v. St. Regis Paper Co.*, 717 F.2d 1302, 1304 (9th Cir. 1983)). For this reason, they are instituted by a petition and an order to show cause rather than by a complaint and summons. *See, e.g., FTC v. Sherry*, 1969 WL 98583 at *3-4, 13 Fed. R. Serv.2d 1382 (D.D.C. 1969) (citing, *inter alia*, *Venn v. United States*, 400 F.2d 207, 212 n.12 (5th Cir. 1968)); *cf. FTC v. Carter*, 636 F.2d 781, 791 (D.C. Cir. 1980). Further, because these proceedings are summary in nature, discovery is allowed only in “exceptional circumstances.” *St. Regis Paper*, 717 F.2d at 1304; *see also* Fed. R. Civ. P. 26(a)(1)(B)(v) (no initial discovery disclosures in such cases).

In this Circuit, courts are limited to determining: “(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.” *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 848-49 (9th Cir. 2008) (citing *Karuk Tribe*, 260 F.3d at 1076); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950)). When these requirements are met, agency process must be enforced “unless the party being investigated proves the inquiry is unreasonable because it is overbroad or unduly burdensome.” *NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996) (citation omitted).

As we show in Part V, the Commission's CID meets all the criteria for summary enforcement.

V. ARGUMENT

A. The CID is Within the Lawful Authority of the Agency

The Commission has broad authority to investigate acts or practices that may violate Section 5(a) of the FTC Act or the TSR. Section 3 of the Act, 15 U.S.C. § 43, empowers the Commission to “prosecute any inquiry necessary to its duties in any part of the United States.” Section 6(a) of the Act, 15 U.S.C. § 46(a), authorizes the Commission “[t]o gather and compile information concerning, and to investigate . . . the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce,” with certain exceptions not applicable here. And as noted above, Section 20 authorizes the Commission to issue CIDs in all its investigations. Thus, the Commission indisputably is authorized to conduct its investigation and issue the CID at issue here.

These statutes leave no room for Countrywide's argument that the Commission may not use process to obtain sensitive customer or employee information. The Commission's authority to seek materials relevant to an investigation plainly encompasses the authority to request such materials. Indeed, the Commission's

statutes and its Rules of Practice implicitly recognize the authority and expressly protect such information from improper disclosure. *E.g.*, 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10; *see* Pet. Exh. 5 (FTC's Order) at 6 (citing *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶¶ 69,338, at 65,353, 1991 U.S. Dist. LEXIS 5523, *15-16 (D.D.C. 1991), *aff'd*, 965 F.2d 1086, 1089 (D.C. Cir. 1992)).

Nor is there any basis for Countrywide's contention that the CID is beyond the Commission's authority, because it seeks information about activities similar to those the Commission challenged in its earlier action against Your Magazine Provider. Pet. Exh. 4 (Countrywide's Petition to Quash) at 5-7.⁸ The Commission issued the CID only after it had received hundreds of consumer complaints about Countrywide's practices. *See* Pet. Exh. 1 (Bartley Decl.) ¶ 4. More importantly, nothing in the previous settlement order and no legal principle precludes the Commission from pursuing new or additional law violations now. *See* Pet. Exh. 5 (FTC's Order) at 7-8; *see also* *FTC v. Nat'l Processing Co.*, No. 13-23437-MC-ROSENBAUM (S.D. Fla. Dec. 18, 2013) (FTC retains authority to issue CIDs to investigate "additional

⁸ To the extent that Countrywide raises any other objections to the CID that it did not raise in its petition to quash, it is barred from raising such claims here without having first exhausted its administrative remedies. *See* 15 U.S.C. § 57b-1(f); 16 C.F.R. § [footnote continues on next page]

wrongdoing” by respondents even where the agency had already filed suit “against separate, albeit related, parties”) (unpublished opinion) (Pet. Exh. 6).

Here, Countrywide cannot show that the CID was issued for an improper purpose. *See FDIC v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997) (subpoena recipients failed to show bad faith or improper purpose by agency). Accordingly, the Commission is entitled to a presumption of regularity regarding its investigation and its CID. *See FCC v. Schreiber*, 381 U.S. 279, 296 (1965).

B. The Procedural Requirements were Followed

The Commission also properly followed all the required procedures in issuing the CID. The CID was issued pursuant to a valid Commission resolution, Pet. Exh. 2, and was signed by a Commissioner and served in accordance with the Commission’s Rules of Practice. *See* 16 C.F.R. §§ 2.7, 4.4; Pet. Exh. 1 (Bartley Decl.) ¶ 5. Further, Countrywide received the required notice of the scope and purpose of the investigation, *see* 15 U.S.C. § 57b-1(c)(2), 16 C.F.R. § 2.6, through the resolution and the CID. *See* Pet. Exh. 2 (Resolution), 3 (CID).

2.10(a); *see also Morton Salt*, 338 U.S. at 653 (respondents must challenge agency requests for information administratively before raising judicial challenge).

C. The CID Seeks Information and Documents that are Relevant and Material to the Commission's Investigation

The information and materials requested by the CID are also highly relevant and material to the FTC's investigation. Pet. Exh. 1 (Bartley Decl.) ¶ 6. Government agencies have wide latitude to determine what information is relevant to a law enforcement investigation. Indeed, the Commission need not have a justifiable belief that wrongdoing has actually occurred, but "can investigate merely on suspicion that the law is being violated, or even just because it wants an assurance that it is not." *Morton Salt*, 338 U.S. at 642-43. Thus, administrative process must be enforced "unless 'the evidence sought by the [CID] is "plainly incompetent or irrelevant" to "any lawful purpose of the agency."'" *Karuk Tribe*, 260 F.3d at 1076 (citation omitted). This requirement is "not especially constraining." *Fed. Express*, 558 F.3d at 854 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984)). A district court should "defer to the agency's appraisal of relevancy, which must be accepted so long as it is not obviously wrong." *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 97 (2d Cir. 1997) (quoting *McVane v. FDIC (In re McVane)*, 44 F.3d 1127, 1135 (2d Cir. 1995)).

The Commission is investigating whether Countrywide or its telemarketers engaged in unfair or deceptive acts or practices in selling magazine subscriptions.

Consumers have complained, among other things, that Countrywide failed to fulfill its subscription orders as promised; misrepresented its billing and cancellation policies, its affiliations with magazine publishers, banks, and credit card companies, and its authority to sell magazines on the terms it offers its customers; and that its telemarketers engaged in deceptive and abusive telemarketing conduct. As described above, the CID specifications at issue here seek, among other things, information and documents regarding customer orders, the company's sales practices, its authority to offer specific subscription pricing and terms, its affiliation with banks or credit card companies, its agreements and payment arrangements with magazine clearinghouses, its sources of prospective customers, customer complaints, and employee contact and employment-related information. Pet. Exh. 3 (CID) at 10-12; Pet. Exh. 1 (Bartley Decl.) ¶ 7. As the Commission concluded in its order denying Countrywide's petition to quash, all the CID specifications are "clearly relevant" to the Commission's investigation. Pet. Exh. 5 (FTC's Order) at 4-5; *see also* Pet. Exh. 1 (Bartley Decl.) ¶ 6 and Appendix A.

D. The CID Requests are Neither Overbroad Nor Unduly Burdensome

The CID consists of fifteen document requests and two interrogatories that are clear and specific. Indeed, Countrywide has not disputed the meaning of the CID

requests. Each request was narrowly tailored to enable the Commission to determine if Countrywide has violated the FTC Act or the TSR and, to the extent possible, was designed to reduce Countrywide's burden. For example, several CID specifications request only those documents that are "sufficient to show" or to "establish" the requested information and do not demand all responsive materials. As the Commission concluded in its order, Countrywide's vague and unsupported assertions fall far short of showing that the CID imposed an undue burden or was overbroad. Pet. Exh. 5 (FTC's Order) at 6; *see also FTC 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.").

CONCLUSION

For the foregoing reasons, this Court should enter an order, substantially in the form appended hereto, requiring Countrywide, within ten calendar days of entry of an order compelling compliance, to provide complete responses to the CID's written interrogatories and document requests, and a sworn certificate of compliance in the form provided in Pet. Exh. 3 (CID).

Respectfully submitted,

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Dated: May 19, 2014

*Attorneys for Petitioner
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CERTIFICATE OF COMPLIANCE

Pursuant D. Mont. Local Rule 7.1(d)(2)(E), I hereby certify that the foregoing document consists of 3,095 words, excluding caption, certificate of compliance, table of contents and authorities, and exhibit index.

/s/ 
Michael D. Bergman
Attorney
Federal Trade Commission

FEDERAL TRADE COMMISSION v.
COUNTRYWIDE PERIODICALS, LLC.

PETITION EXHIBIT 1

**Declaration of Megan A. Bartley (May 19, 2014) (with Appendix A:
Countrywide's Responses to the CID)**

and authorities in support of the petition (hereinafter referred to as “Pet. Exh.”), and verify that Pet. Exh. 2 through Pet. Exh. 5 are true and correct copies of original documents contained in the official files of the FTC. The facts set forth herein are based on my personal knowledge or information made known to me in the course of my official duties.

3. Countrywide is a Montana corporation that operates and is located within this judicial district. It solicits, through telemarketing, magazine subscriptions from consumers throughout the United States. Countrywide is engaged in, and its business affects “commerce,” as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. Countrywide markets magazine subscriptions to consumers, usually by offering multi-year subscriptions for a bundle of four to six magazines. Countrywide’s owner and managing member is Jason W. Ellsworth. After the Commission settled its previous case against Ellsworth and a related company he owns, Your Magazine Provider, Inc., the Commission began receiving hundreds of consumer complaints about the telemarketing practices of Countrywide. Consumers have complained, among other things, that Countrywide fails to fulfill magazine orders as promised, and that its telemarketers have misrepresented various aspects of its business, including its

billing and cancellation policies. These complaints also indicate that Countrywide may have misrepresented the nature of its relationship with magazine publishers, banks, or credit card companies, and that its telemarketers may have made deceptive representations and engaged in abusive telemarketing practices.

5. On May 6, 2013, as part of its investigation to determine whether Countrywide's marketing practices violate Section 5(a) of the FTC Act or the Telemarketing Sales Rule, 16 C.F.R. pt. 310 ("TSR"), the Commission issued a CID to Countrywide. The CID was signed by a Commissioner and authorized by an agency Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others, April 11, 2011 (FTC File No. 0123145) ("Resolution"). Pet. Exh. 2. This Resolution authorized the use of compulsory process

[t]o 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.S.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.

6. The CID required Countrywide to respond to fifteen narrowly tailored document requests and two interrogatories highly relevant and material to the Commission's inquiry to determine whether Countrywide has violated Section 5 of the FTC Act or the TSR. Pet. Exh. 3 (CID). The CID specifications were designed to assist staff to determine, among other things, whether Countrywide fulfills customer orders as it promises, whether it misrepresents its relationship with magazine publishers, banks, or credit card companies, and whether it engages in deceptive or abusive telemarketing practices.
7. More specifically, the CID requested documents and information regarding customer orders, including payments made, magazine titles ordered and subscription terms. The CID also requested documents concerning, among other things: (1) customer complaints; (2) Countrywide's sales practices, including scripts, training materials, and audio recordings of sales calls; (3) the company's authority to offer specific subscription pricing and terms; (4) its agreements and payment arrangements with magazine clearinghouses; (5) its affiliation with customers' banks and credit card companies; (6) the source of potential customers; and (7) employee contact and employment-related information. The CID required Countrywide to respond by June 3, 2013.

Pet. Exh. 3 (CID).

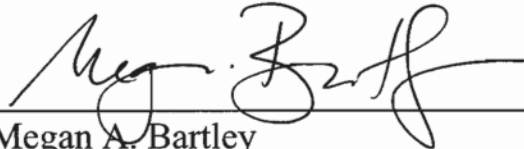
8. On May 31, 2013, Countrywide filed a petition to quash the CID. Pet. Exh. 4. On July 3, 2013, the full Commission denied Countrywide's petition to quash in its entirety and ordered Countrywide to comply with the CID by the extended due date of July 19, 2013. Pet. Exh. 5 (FTC's Order).
9. On July 19, 2013, Countrywide made certain information and documents available for review. However, after reviewing the production, FTC staff discovered numerous deficiencies. For example, Countrywide refused to respond to many of the Commission's requests, including those seeking audio recordings of sales calls, customer billing and subscription information, the requested employee information, and all contracts and payment arrangements with magazine clearinghouses. Countrywide produced only twelve consumer complaints, even though FTC staff was aware of hundreds. The company refused to provide the requested magazine titles or employee information, claiming that such information was private and sensitive.
10. In October and November 2013, Countrywide submitted additional materials to the Commission. These submissions, however, did not completely cure most of the deficiencies. Most notably, Countrywide continued to withhold

the magazine titles ordered by its customers, and failed to produce any customer billing information, employee employment-related information, or any of the requested audio recordings of sales calls.

11. To date, Countrywide has failed to provide complete responses to 11 of the 17 CID document requests and interrogatories. Each of the deficiencies is identified in Appendix A to this declaration. Countrywide's failure to comply with the CID in full has burdened, delayed, and impeded the Commission's investigation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 19, 2014



Megan A. Bartley
Attorney
Bureau of Consumer Protection
Federal Trade Commission

APPENDIX A¹
Countrywide's Responses to the CID

Request	Response
(1) Contracts with magazine clearinghouses	(1) NO PRODUCTION²
(2) Contracts with other entities selling magazines, or other entities providing products or services (other than magazines) that Countrywide sells	(2) One agreement ³
(3) Documents sufficient to show all payment arrangements with magazines clearinghouses	(3) NO PRODUCTION
(4) Agent and sub-agent applications and authorizations, and documents sufficient to show that Countrywide is authorized to offer the subscription pricing and terms that it does	(4) NO PRODUCTION⁴

¹ Appendix A summarizes the FTC's CID requests and Countrywide's responses. The final two requests (nos. 16 and 17) are interrogatories.

² The FTC received a contract for Countrywide from a magazine clearinghouse.

³ Countrywide produced an agreement with ACCESS VG, LLC for "Savers Club."

⁴ In July 2013, Countrywide informed the FTC that it had no documents responsive to this request. The FTC, however, received an agent authorization form for Countrywide from a magazine clearinghouse.

APPENDIX A (cont'd)
Countrywide's Responses to the CID

Request	Response
(5) Databases with customer information, including subscriptions ordered, payments made, and complaints	(5) NO PRODUCTION
(6) Documents sufficient to show consumers' requests to switch from one subscription to another, and Countrywide's responses to such requests	(6) NO PRODUCTION ⁵
(7) Telemarketing scripts and related materials	(7) 12 pages of scripts
(8) Training materials for employees	(8) 4-page "Employee Handbook"
(9) Documents sufficient to substantiate Countrywide's claim that it contacts consumers due to its relationship with a bank or credit card company, or the consumer's "preferred status" with a bank or credit card company	(9) NO PRODUCTION
(10) Documents sufficient to establish the source of prospective customers	(10) List of lead providers

⁵ Countrywide produced a spreadsheet that may identify consumers who apparently switched from one subscription to another (it is unclear). In any event, it produced nothing that shows what consumers requested, or how it responded.

APPENDIX A (cont'd)
Countrywide's Responses to the CID

Request	Response
(11) Audio recordings of customers or prospective customers recorded (a) within specified date ranges; and (b) of certain identified persons	(11) NO PRODUCTION ⁶
(12) Provide all complaints and responses	(12) Spreadsheet reflecting 12 complaints for Countrywide; 181 responses to complaints by Countrywide (some do not contain the consumer's initial complaint) (<i>Incomplete</i>) ⁷
(13) Information regarding employees including each person's: (a) name, address, phone number, and email; (b) dates of employment; (c) position, role, and responsibilities; (d) terms and amount of compensation; and (e) reason for termination, if terminated	(13) List of employee names and addresses; no production of any of the other requested information (<i>Incomplete</i>)
(14) Documents sufficient to show merchant account numbers, payment processors, and contacts at each payment processor	(14) NO PRODUCTION

⁶ Instead, Countrywide produced audio recordings that it selected.

⁷ Given that the FTC has received several hundred complaints regarding Countrywide, Pet. Exh. 1 (Bartley Decl.) ¶ 4, this is very likely incomplete.

APPENDIX A (cont'd)
Countrywide's Responses to the CID

Request	Response
(15) Countrywide's document retention policy	(15) One-page document ⁸
(16) [Interrogatory 1] To the extent not produced in response to (5), above, provide the following information about each consumer (beginning on February 1, 2011) in an electronically sortable format: (a) First Name; (b) Last Name; (c) Address; (d) Phone Number; (e) Sales Date; (f) Amount Paid; (g) Monthly Payment Amount; (h) Payment Dates; (i) Orders Requested; (j) Submission Date; (k) Orders Submitted; (l) Confirmation Date; (m) Remit Amount; and (n) Remit Date.	(16) Spreadsheet containing the names and addresses of approximately 30,713 consumers. The spreadsheet has columns for "changed" and "status." 20,043 consumers have their status listed as "canceled." There was no response to eleven of the other categories of sales and payment information requested. (Incomplete) ⁹
(17) [Interrogatory 2] Identify all officers, directors, managers, and owners for each entity.	(17) Ellsworth stated that he is the sole owner of Countrywide.

⁸ The document Countrywide produced contains text copied from Section VI of the 2009 settlement order in the *Your Magazine Provider* case as to which it is not a party; it does not reflect whether this is Countrywide's actual policy.

⁹ The spreadsheet does not indicate that these are all Countrywide's customers (as opposed to customers of other entities controlled by Ellsworth).

FEDERAL TRADE COMMISSION v.
COUNTRYWIDE PERIODICALS, LLC.

PETITION EXHIBIT 2

**Resolution Directing Use of Compulsory Process in a Nonpublic Investigation
of Telemarketers, Sellers, Suppliers, or Others, April 11, 2011
(FTC File No. 0123145)**

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN A NONPUBLIC
INVESTIGATION OF TELEMARKETERS, SELLERS, SUPPLIERS, OR OTHERS

File No. 0123145

Nature and Scope of Investigation:

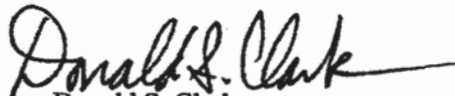
To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive 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.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed five years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, 57b-1 (as amended); and FTC Procedures and Rules of Practice, 16 C.F.R. §§ 1.1 *et seq.* and supplements thereto.

By direction of the Commission.


Donald S. Clark
Secretary

Issued: April 11, 2011

FEDERAL TRADE COMMISSION v.
COUNTRYWIDE PERIODICALS, LLC.

PETITION EXHIBIT 3

Civil Investigative Demand Issued to Countrywide Periodicals, LLC (May 6, 2013)



CIVIL INVESTIGATIVE DEMAND

1. TO

Countrywide Periodicals, LLC
Attn: Jason W. Ellsworth
737 U.S. Highway 93 North
Hamilton, MT 59840

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED

You are required to appear and testify.

LOCATION OF HEARING

YOUR APPEARANCE WILL BE BEFORE

DATE AND TIME OF HEARING OR DEPOSITION

You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.

You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS MUST BE AVAILABLE

JUN 03 2013

3. SUBJECT OF INVESTIGATION

See attached resolution.

4. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN

Ronald Lewis/Megan Bartley
Federal Trade Commission
600 Pennsylvania Ave., NW, Mail Stop M-8102B
Washington, DC 20580
(202) 326-2985

5. COMMISSION COUNSEL

Megan Bartley
Federal Trade Commission
600 Pennsylvania Ave., NW, Mail Stop M-8102B
Washington, DC 20580
(202) 326-3424

DATE ISSUED

5/6/13

COMMISSIONER'S SIGNATURE

INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documents or the submission of answers and report in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responsible for answering each interrogatory or report question. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

Form of Certificate of Compliance*

I/We do certify that all of the documents and information required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objections to such interrogatory or uncompleted portion and the reasons for the objections have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

*In the event that more than one person is responsible for complying with this demand, the certificate shall identify the documents for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 28 U.S.C. § 1746.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN A NONPUBLIC
INVESTIGATION OF TELEMARKETERS, SELLERS, SUPPLIERS, OR OTHERS

File No. 0123145

Nature and Scope of Investigation:


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.S.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.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed five years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, 57b-1 (as amended); and FTC Procedures and Rules of Practice, 16 C.F.R. §§ 1.1 *et seq.* and supplements thereto.

By direction of the Commission.


Donald S. Clark
Secretary

Issued: April 11, 2011

**CIVIL INVESTIGATIVE DEMAND
SCHEDULE FOR PRODUCTION OF DOCUMENTS AND WRITTEN REQUESTS TO
INTERROGATORIES**

I. DEFINITIONS

As used in this Civil Investigative Demand, the following definitions shall apply:

- A. **“And,”** as well as **“or,”** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any specification in this Schedule all information that otherwise might be construed to be outside the scope of the specification.
- B. **“Any”** shall be construed to include **“all,”** and **“all”** shall be construed to include the word **“any.”**
- C. **“CID”** shall mean the Civil Investigative Demand, including the attached Resolution and this Schedule, and including the Definitions, Instructions, and Specifications.
- D. **“Document”** shall mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, transcript of audio or video recording, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, or label. **“Document” shall also include all documents, materials, and information, including Electronically Stored Information, within the meaning of the Federal Rules of Civil Procedure.**
- E. **“Each”** shall be construed to include **“every,”** and **“every”** shall be construed to include **“each.”**
- F. **“Electronically Stored Information” or “ESI”** shall mean the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by you into a reasonably usable form. This includes, but is not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards; magnetic or electronic tapes; disks; computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media.

- G. “**FTC**” or “**Commission**” shall mean the Federal Trade Commission.
- H. “**Identify**” or “**the identity of**” shall be construed to require identification of (a) natural persons by name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home addresses; and (b) businesses or other organizations by name, address, identities of natural persons who are officers, directors or managers of the business or organization, and contact persons, where applicable.
- I. “**Magazine Clearinghouse**” shall mean any entity that directly or indirectly clears, processes, or fulfills magazine subscriptions on behalf of any **Telemarketing Entity** including but not limited to a magazine clearinghouse or magazine fulfillment house.
- J. “**Magazine Sales**” shall mean any activity in any way related to the marketing, telemarketing, or sale of magazines, magazine subscriptions, magazine services or magazine subscription services, or the purchasing or servicing of magazine subscription orders.
- K. “**Relating to**” shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.
- L. “**Telemarketing Entity**” shall mean:
- (a) Countrywide Periodicals, Inc.; Countrywide Periodicals, LLC; Customer Service, Inc.; JBS Enterprises LLC; Periodicals; Lavell Enterprises; Magazine Services, Inc.; Old West Publications; Romp Inc.; U.S. Magazine Service; or Your Magazine Provider; their wholly or partially owned subsidiaries, incorporated and unincorporated divisions, joint ventures, operations under assumed names, and affiliates; and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of any of the foregoing;
 - (b) Any entity involved in **Magazine Sales** that is owned, operated, controlled, managed, or directed, in whole or in part, by Jason W. Ellsworth, Elizabeth J. Hartman, Louis J. Laverne, Wayne Shiever; or
 - (c) Any entity involved in **Magazine Sales** using any of the following addresses for any purpose: 737 Highway 93 N, Hamilton, MT; 11300 Highway 93 N, Suite K, Lolo, MT; 1073 Golf Course Rd, Hamilton, MT; P.O. Box 750, Lolo, MT; or P.O. Box 770, Lolo, MT.
- M. “**Training Materials**” shall mean any handbooks, guidelines, outlines, presentations, memos, notes, or related documents that describe any policy, procedure, or practice of any **Telemarketing Entity**, including but not limited to **Magazine Sales**, billing, customer service, sales techniques, and compliance with the Stipulated Final Judgment and Order in *FTC v. Your Magazine Provider, Inc.*, No. 08-64 (D. Mont, Oct. 7, 2009), the Telemarketing Sales Rule (16 C.F.R. Part 310), and the FTC Act (15 U.S.C. § 45)

N. “You” and “Your” shall mean the person or entity to whom this CID is issued.

II. INSTRUCTIONS

- A. **Sharing of Information:** The Commission often makes its files available to other civil and criminal federal, state, local, or foreign law enforcement agencies. The Commission may make information supplied by you available to such agencies where appropriate pursuant to the Federal Trade Commission Act and 16 C.F.R. § 4.11 (c) and (j). Information you provide may be used in any federal, state, or foreign civil or criminal proceeding by the Commission or other agencies.
- B. **Meet and Confer:** You must contact **Megan Bartley at (202) 326-3424** as soon as possible to schedule a meeting (telephonic or in person) to be held **within fourteen (14) days after receipt of this CID**, or before the deadline for filing a petition to quash, whichever is first, in order to discuss compliance and to address and attempt to resolve all issues, including issues relating to protected status and the form and manner in which claims of protected status will be asserted, and the submission of ESI and other electronic productions as described in these Instructions. Pursuant to 16 C.F.R. § 2.7(k), you must make available personnel with the knowledge necessary for resolution of the issues relevant to compliance with this CID, including but not limited to personnel with knowledge about your information or records management systems, relevant materials such as organizational charts, and samples of material required to be produced. If any issues relate to ESI, you must make available a person familiar with your ESI systems and methods of retrieval.
- C. **Applicable time period:** Unless otherwise directed in the specifications, the applicable time period for the request shall be from **January 1, 2009 until the date of full and complete compliance with this CID**.
- D. **Claims of Privilege:** If any material called for by this CID is withheld based on a claim of privilege, work product protection, or statutory exemption, or any similar claim (*see* 16 C.F.R. § 2.7(a)(4)), the claim must be asserted no later than the return date of this CID. In addition, pursuant to 16 C.F.R. § 2.11(a)(1), submit, together with the claim, a detailed log of the items withheld. The information in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. Submit the log in a searchable electronic format, and, for each document, including attachments, provide:
1. Document control number(s);
 2. The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);
 3. A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;
 4. The date the material was created;

5. The date the material was sent to each recipient (if different from the date the material was created);
6. The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;
7. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors;
8. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;
9. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;
10. The factual basis supporting the claim that the material is protected; and
11. Any other pertinent information necessary to support the assertion of protected status by operation of law.

16 C.F.R. § 2.11(a)(1)(i)-(xi).

In the log, identify by an asterisk each attorney who is an author, recipient, or person copied on the material. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, provide in the log the information required by Instruction D.6. 16 C.F.R. § 2.11(a)(2). The lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim of protected status must attest to the log. 16 C.F.R. § 2.11(a)(1).

If only some portion of any responsive material is privileged, all non-privileged portions of the material must be submitted. Otherwise, produce all responsive information and material without redaction. 16 C.F.R. § 2.11(c). The failure to provide information sufficient to support a claim of protected status may result in denial of the claim. 16 C.F.R. § 2.11(a)(1).

- E. **Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this CID. The Commission may require the submission of additional documents at a later time during this investigation. Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this investigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise. *See* 15 U.S.C. § 50; *see also* 18 U.S.C. §§ 1505, 1519.
- F. **Petitions to Limit or Quash:** Any petition to limit or quash this CID must be filed with

the Secretary of the Commission no later than twenty (20) days after service of the CID, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of protected status or other factual and legal objections to the CID, including all appropriate arguments, affidavits, and other supporting documentation. 16 C.F.R. § 2.10(a)(1). Such petition shall not exceed 5,000 words as set forth in 16 C.F.R. § 2.10(a)(1) and must include the signed separate statement of counsel required by 16 C.F.R. § 2.10(a)(2). **The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process.** 16 C.F.R. § 2.7(k); *see also* § 2.11(b).

- G. **Modification of Specifications:** If you believe that the scope of the required search or response for any specification can be narrowed consistent with the Commission's need for documents or information, you are encouraged to discuss such possible modifications, including any modifications of definitions and instructions, with **Megan Bartley at (202) 326-3424**. All such modifications must be agreed to in writing by the Bureau Director, or a Deputy Bureau Director, Associate Director, Regional Director, or Assistant Regional Director. 16 C.F.R. § 2.7(l).
- H. **Certification:** A responsible corporate official shall certify that the response to this CID is complete. This certification shall be made in the form set out on the back of the CID form, or by a declaration under penalty of perjury as provided by 28 U.S.C. § 1746.
- I. **Scope of Search:** This CID covers documents and information in your possession or under your actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, and other agents and consultants, whether or not such documents and information were received from or disseminated to any person or entity.
- J. **Document Production:** You shall produce the documentary material by making all responsive documents available for inspection and copying at your principal place of business. Alternatively, you may elect to send all responsive documents to **Ron Lewis, Federal Trade Commission, 600 Pennsylvania Ave., NW, Mailstop M-8102B, Washington, DC 20580**. Because postal delivery to the Commission is subject to delay due to heightened security precautions, please use a courier service such as Federal Express or UPS. Notice of your intended method of production shall be given by email or telephone to **Megan Bartley at mbartley@ftc.gov, (202) 326-3424 at least five days prior to the return date**.
- K. **Document Identification:** Documents that may be responsive to more than one specification of this CID need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission. Documents should be produced in the order in which they appear in your files or as electronically stored and without being

manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.

- L. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this CID. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to Commission staff upon request. Copies of marketing materials and advertisements shall be produced in color, and copies of other materials shall be produced in color if necessary to interpret them or render them intelligible.
- M. **Electronic Submission of Documents:** The following guidelines refer to the production of any Electronically Stored Information (“ESI”) or digitally imaged hard copy documents. Before submitting any electronic production, You must confirm with the Commission counsel named above that the proposed formats and media types will be acceptable to the Commission. The FTC requests Concordance load-ready electronic productions, including DAT and OPT load files.
- (1) **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to the FTC as follows:
- (a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;
 - (b) All ESI other than those documents described in (1)(a) above must be provided in native electronic format with extracted text or Optical

Character Recognition (OCR) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (TIFF) or as color JPEG images (where color is necessary to interpret the contents); and

- (c) Each electronic file should be assigned a unique document identifier ("DocID") or Bates reference.
- (2) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:
- (a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number);
 - (b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and
 - (c) Documents shall be produced in color where necessary to interpret them or render them intelligible.
- (3) For each document electronically submitted to the FTC, You should include the following metadata fields in a standard ASCII delimited Concordance DAT file:
- (a) **For electronic mail:** begin Bates or unique document identification number ("DocID"), end Bates or DocID, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DocID of the attachments (AttachIDs) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;
 - (b) **For email attachments:** begin Bates or DocID, end Bates or DocID, parent email ID (Bates or DocID), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;
 - (c) **For loose electronic documents (as retrieved directly from network file stores, hard drives, etc.):** begin Bates or DocID, end Bates or DocID, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;

- (d) **For imaged hard copy documents:** begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.
- (4) If You intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in Your computer systems or electronic storage media, or if Your computer systems contain or utilize such software, You must contact the Commission counsel named above to determine whether and in what manner You may use such software or services when producing materials in response to this Request.
- (5) Submit electronic productions as follows:
 - (a) With passwords or other document-level encryption removed or otherwise provided to the FTC;
 - (b) As uncompressed electronic volumes on size-appropriate, Windows-compatible, media;
 - (c) All electronic media shall be scanned for and free of viruses;
 - (d) Data encryption tools may be employed to protect privileged or other personal or private information. The FTC accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by the FTC.
 - (e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

**MAGNETIC MEDIA – DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.**

- (6) All electronic files and images shall be accompanied by a production transmittal letter which includes:
 - (a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and
 - (b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the

index both as a printed hard copy and in machine-readable form (provided that the Commission counsel named above determines prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission counsel named above will provide a sample index upon request.

A Bureau of Consumer Protection Production Guide is available upon request from the Commission counsel named above. This guide provides detailed directions on how to fully comply with this instruction.

- N. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information or sensitive health information of any individual, please contact us before sending those materials to discuss whether it would be appropriate to redact the sensitive information. If that information will not be redacted, contact us to discuss encrypting any electronic copies of such material with encryption software such as SecureZip and provide the encryption key in a separate communication.

For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number in combination with one or more of the following: date of birth; Social Security number; driver's license number or other state identification number or a foreign country equivalent; passport number; financial account number; credit card number; or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

- O. **Certification of Records of Regularly Conducted Activity:** Attached is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena You to testify at future proceedings in order to establish the admissibility of documents produced in response to this CID. You are asked to execute this Certification and provide it with your response.

III. SPECIFICATIONS

REQUESTS FOR PRODUCTION OF DOCUMENTS AND ANSWERS TO WRITTEN INTERROGATORIES

- (1) Provide all contracts and agreements, regardless of date, between any **Telemarketing Entity** and any **Magazine Clearinghouse**.
- (2) Provide all documents, regardless of date, relating to any relationship or agreement between any **Telemarketing Entity** and: (a) any other entity engaged in **Magazine Sales**; and (b) any other entity that provides a product or service (other than magazine subscriptions) that any **Telemarketing Entity** markets or sells to consumers.
- (3) For each magazine title for which any **Telemarketing Entity** engages in **Magazine Sales**, provide documents sufficient to show all payment arrangements, including remit rates and any other fees paid to any **Magazine Clearinghouse**.
- (4) Provide: (a) all agent and sub-agent applications and authorizations, regardless of date and regardless of whether the application was approved, between any **Telemarketing Entity** and any **Magazine Clearinghouse** or entity that engages in **Magazine Sales**; and (b) documents sufficient to show that any **Telemarketing Entity** is authorized to offer the subscription pricing and terms for the magazine titles any **Telemarketing Entity** offers to customers.
- (5) For all **Databases** any **Telemarketing Entity** maintains containing any information or data relating to customers, provide: (a) the full and complete database in native format with all available fields and data, including but not limited to all fields relating to customer names and contact information, the magazine titles to which the customer subscribed, all customer inquiries and complaints, and all payments made by customers; and (b) any key or list explaining all fields and codes that appear in the **Database**.

Produce all **Databases** in accordance with **Instruction M (Electronic Submission of Documents)**, including a database schema and any other software or interface required to read or access the data. Provide the full and complete **Database** regardless of whether any information is also provided in response to any other Request.
- (6) Provide documents sufficient to show: (a) all requests any **Telemarketing Entity** submitted to any **Magazine Clearinghouse** to switch a customer's subscription from one magazine title to a new magazine title; and (b) all responses to such requests.
- (7) Provide all scripts, rebuttal scripts, outlines, guides, or related documents, used by any **Telemarketing Entity on or after October 7, 2009**, relating to any communication with customers or prospective customers, including but not limited to outbound sales calls, follow up calls, closing calls, "verification" calls, customer inquiries, complaints, cancellation requests, and refund requests.

- (8) Provide all **Training Materials** for all employees of any **Telemarketing Entity** used in any way **on or after October 7, 2009**.
- (9) Provide: (a) documents sufficient to demonstrate any marketing relationship or affiliation between any **Telemarketing Entity** and any credit card company, bank, or financial institution that relates to any representation any **Telemarketing Entity** made to consumers; and (b) documents sufficient to substantiate claim that any **Telemarketing Entity** contacts consumers because of the consumer's relationship or preferred status with a credit card company, bank, or financial institution.
- (10) Provide documents sufficient to establish the source of all lists of prospective customers and any lead lists.
- (11) Provide all audio recordings of: (a) all customers or prospective customers recorded on each day within the date ranges listed in Appendix A (90 days total); and (b) all customers or prospective customers listed in Appendix B.
- (12) Provide all complaints and inquiries received by any **Telemarketing Entity**, including but not limited to those received from consumers directly or indirectly through any other entity, and provide any communications from or on behalf of any **Telemarketing Entity** in response to such complaints and inquiries.
- (13) For each employee, agent, and consultant of any **Telemarketing Entity** provide each person's: (a) full name, address, phone number, and email address; (b) starting and ending dates of employment; (c) position, role, and responsibilities; (d) terms and amount of compensation; and (e) reason for termination, if terminated.
- (14) Provide documents sufficient to show all merchant account numbers, payment processors, and contacts at each payment processor for any merchant account used by any **Telemarketing Entity**.
- (15) Provide documents sufficient to establish the document retention policies employed by any **Telemarketing Entity** during the **Applicable Time Period**.

INTERROGATORIES

- (1) To the extent not produced in a fully accurate and accessible format in response to Request for Production No. 5, for each customer of any **Telemarketing Entity** from **January 1, 2011** through the date of full and complete compliance with this request, provide the following in a sortable spreadsheet (in MS Excel, MS Access, or other format allowable under the **Instructions**):
 - (a) Customer First Name; (b) Customer Last Name; (c) Street Address; (d) Phone Number; (e) Sales Date (date of telemarketing sales call); (f) Total Amount Paid (total amount paid by customer); (g) Monthly Payment Amount (monthly amount paid by customer); (h) Payment Dates (date of first and last payment by customer); (i) Orders Requested (magazine titles and subscription length requested by customer); (j)

Submission Date (date each magazine title was submitted to a **Magazine Clearinghouse** or publisher for fulfillment); (k) Orders Submitted (magazine titles and subscription length submitted to a **Magazine Clearinghouse** or publisher on a customer's behalf); (l) Confirmation Date (date fulfillment of requested title and length was confirmed); (m) Remit Amount (amount any **Telemarketing Entity** remitted to secure the fulfillment); and (n) Remit Date (date any **Telemarketing Entity** paid remit amount).

- (2) Identify all officers, directors, managers, and owners for any **Telemarketing Entity**, and, for each individual or entity, state the corresponding dates and ownership share.

APPENDIX A
Dates for Audio Recording Production (Request for Production 11)

1	3/26/2012 – 3/30/2012
2	6/4/2012 – 6/8/2012
3	6/18/2012 – 6/22/2012
4	7/2/2012 – 7/6/2012
5	8/6/2012 – 8/10/2012
6	8/13/2012 – 8/17/2012
7	9/10/2012 – 9/14/2012
8	11/5/2012 – 11/9/2012
9	11/12/2012 – 11/16/2012
10	12/3/2012 – 12/7/2012
11	12/10/2012 – 12/14/2012
12	12/17/2012 – 12/21/2012
13	12/24/2012 – 12/29/2012
14	1/28/2013 – 2/1/2013
15	2/4/2013 – 2/8/2013
16	2/11/2013 – 2/15/2013
17	2/18/2013 – 2/22/2013
18	2/25/2013 – 2/29/2013

APPENDIX B**Consumers for Audio Recording Production (Request for Production 11)**

	LAST NAME	FIRST NAME	CITY	STATE
1	Baughman	Thomas	Anacoco	LA
2	Chung	Dahwa	Morrisville	NC
3	Covarruvias	Jess	Stockton	CA
4	Diehl	Rachelle	Bella Vista	CA
5	DiNapoli	Kate	Concord	NH
6	Eason	Brandon	Norfolk	VA
7	Faulstick	Joseph	Sammamish	WA
8	Franklin	Kevin	Louisville	KY
9	Gilmer	Jeffery	Rome	GA
10	Gluntz	Belinda	Soquel	CA
11	Hefner	Brittany	Tiffin	OH
12	Mackie	Elizabeth	Buxton	ME
13	Mendez	Tracie	Brookings	SD
14	Moua	Gillian	Hickory	NC
15	Nunziata	Gina	West Haven	CT
16	Perryman-Vasquez	Maria	San Bernardino	CA
17	Preseault	Kristen	Bradenton	FL
18	Rodriguez	Norma	Brooklyn	OH
19	Rowland	Jessica	West Windsor	NJ
20	Ruelas	Rabekah	Lancaster	CA
21	Slaton	Christopher	Wolfforth	TX
22	Smith	Emily	Cuyahoga Falls	OH
23	Sorrisso	Angela	Cicero	IL
24	Spinelli	Joseph	Old Bridge	NJ
25	Topel	Jessica	Rockville	MD
26	Wood	Aliscia	Buffalo	MN

FEDERAL TRADE COMMISSION v.
COUNTRYWIDE PERIODICALS, LLC.

PETITION EXHIBIT 4

**Countrywide Periodicals, LLC's Petition to Quash Civil Investigative Demand
(May 31, 2013)**

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Countrywide Periodicals, LLC

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF:

CIVIL INVESTIGATIVE DEMAND ISSUED
ON MAY 6, 2013, TO COUNTRYWIDE
PERIODICALS, LLC

FILE NO. 123145

PETITION TO QUASH

PURSUANT to 16 C.F.R. § 2.7(d), Countrywide Periodicals, LLC (CWP) and Jason W. Ellsworth (Ellsworth), by and through their counsel, respectfully PETITION this Commission to quash the Civil Investigative Demand (CID) issued on May 6, 2013, in its entirety. CWP objects to and seeks to quash the CID as being improper and unenforceable for two separate and distinct reasons. First, several of the requests propounded under the CID exceed the nature and scope of the investigation as set forth in the Resolution Directing Use of Compulsory Process in a Non-Public Investigation of Telemarketers, Sellers, Suppliers or Others for File Number 123145. Second, the entire CID is unduly oppressive considering the previous FTC litigation against Your Magazine Provider, Inc. *Case CV-08-64-M-DWM, District of Montana (Stipulated Final Judgment and Order for Permanent Injunction* attached as Exhibit 1).

BACKGROUND

CWP is a magazine service company producing sales via telemarketing and is owned by Jason W. Ellsworth. Ellsworth was also the majority owner of Your Magazine Provider, Inc. (YMP). CWP's business model and operations are essentially the same as YMP, which ceased operations more than a year ago.

On May 14, 2008, upon application made by the FTC and without notice to YMP or Ellsworth, the District Court of Montana entered a Temporary Restraining Order and Asset Freeze against YMP and Jason W. Ellsworth. The Court's Order was premised on the FTC's allegations that YMP and Ellsworth were violating the FTC Act and the Telemarketing Sales Rule (TSR). After the conclusion of the Show Cause hearing on May 29, 2008, the parties entered into a Stipulated Preliminary Injunction including a partial asset freeze dated June 5, 2008. After more than six months of discovery, monitoring of YMP by the FTC, and failed negotiations to settle, YMP and Ellsworth moved the Court to dissolve the Stipulated Preliminary Injunction. On February 4, 2009, the Court entered an Order dissolving the Stipulated Preliminary Injunction and accompanying partial asset freeze. (Attached as Exhibit 2). In part, the Court stated, "[a]fter considering the evidence presented by the parties at the show cause hearing, as well as the additional evidence submitted by the FTC with its briefing on this motion, the FTC is unlikely to succeed on the merits of its claims." *Exhibit 2 at p.2, ll.10-12*. The parties eventually reached a settlement that was memorialized as the Stipulated Final Judgment and Order for Permanent Injunction dated October 7, 2009. *Exhibit 1*.

YMP suspended operations for less than one week after the initial Temporary Restraining Order and Asset Freeze was entered without notice to YMP or Ellsworth on May 14, 2008. Prior to resuming sales operations, YMP made one change to their sales scripts at the request of the

FTC – the word “rescind” was changed to “cancel.” This change was also made contemporaneously to the scripts used by CWP. During the more than sixteen months that the litigation was active and YMP continued sales operations, the FTC had the opportunity to monitor thousands of recordings of customer sales transactions, interview current and former employees, and review sales scripts. It is inconceivable that the FTC entered into the Stipulated Final Judgment and Order for Permanent Injunction without having the opportunity to thoroughly review all of YMP’s sales practices. Tellingly, the Stipulated Final Judgment and Order for Permanent Injunction does not include any additional prohibitions on YMP’s sales practices nor were any modifications to the sales processes requested or required.

ARGUMENT

Petitioners acknowledge that the FTC has statutory authority to investigate practices that it reasonably believes may constitute deceptive or unfair trade practices in violation of the FTC Act and/or the Telemarketing Sales Rule (TSR). However, these powers are not limitless and should be tempered by actual legal restraints imposed by the federal courts and the fair-minded oversight of the FTC Commissioners.

1. The CID clearly exceeds the Nature and Scope of the Resolution.

The Resolution Directing Use of Compulsory Process in a Non-Public Investigation of Telemarketers, Sellers, Suppliers or Others for File Number 123145 defines the nature and scope of the investigation as, “[t]o 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.S.C. § 45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission’s Telemarketing Sales Rule ...” However, the Requests for Production and

Interrogatories that comprise the CID in this case read much more like a litigation checklist than an inquiry to determine if violations have occurred.

Requests for Production numbers 1-4 are all related to CWP's contractual agreements with Magazine Clearinghouses. It is difficult to imagine how CWP's relationship with its vendors is reasonably related to an inquiry into alleged unfair, deceptive or abusive acts or practices involving consumers. Similarly, Request for Production 10 seeks CWP's sources for all lead lists. Again, how are lead sources relevant to the stated nature and scope of investigation? Request for Production 14, which seeks merchant account information, should make it abundantly clear that the purpose of this CID is to prepare for litigation, not simply to, "determine whether unnamed telemarketers ... have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce ... and/or (2) deceptive or abusive telemarketing acts or practices..."

There are separate concerns related to several other Requests for Production. Specifically, Requests for Production 5 and 13 are overly broad and unduly burdensome to CWP and potentially require the disclosure of protected personal information of customers and employees. Do CWP's customers have any say in whether or not the government has access to records showing what reading materials they enjoy? If CWP is forced to comply with Request for Production 5, the FTC will have access to, "the magazine titles to which the customer subscribes." Do CWP's former employees have any privacy rights concerning the potential reasons for termination of employment as sought by the FTC in Request for Production 13? CWP is essentially the guardian of its customers' and employees' private information. The FTC should be required to show a specific need for this information. Instead, the FTC simply says

that we cannot tell you why that information is relevant to the inquiry at hand. That cannot be good enough.

In total, CWP and Ellsworth object to Requests for Production 1,2,3,4,5,6,9,10,13 and 14 and Interrogatory 1 as overly burdensome, beyond the scope and nature of the investigation, and/or seeking protected, private information of customers and employees. Specifically, (1) Requests for Production 1,2,3,4,5,6,9,10,13 and 14 and Interrogatory 1 are clearly outside the stated nature and scope of the investigation; (2) Requests for Production 5,10,13 and Interrogatory 1 are also overly burdensome; and (3) Requests for Production 5,13 and Interrogatory 1 seek to force CWP to disclose private information of customers and employees without their consent. Simply put, this CID is a fishing expedition, not a reasonably relevant inquiry into whether the FTC Act or the TSR has been violated. In addition, CWP and Ellsworth are aware that a separate CID supported by the same Resolution has been sent to Farmer's State Bank – again, how are bank accounts relevant to whether or not the FTC Act or TSR have been violated?

2. The CID is oppressive, punitive and intended to harass CWP and Ellsworth.

While the FTC has the authority to investigate suspected violations; that authority should be accompanied with the responsibility to ensure that those powers are not used simply to harass and punish targeted entities. When parties reach a settlement with the FTC, they should be able to rely on the fact that the FTC is acting in good faith and truly considers the matter closed. Of course, the FTC has the authority and obligation to examine additional violations; however, in the instant case, CWP is operating virtually exactly as YMP was at the time of the settlement with the FTC.

At the time of the settlement of the FTC case against YMP, the FTC had had more than sixteen months to examine the operations of YMP. The FTC had access to all customer recordings, all sales scripts, and interviewed dozens of current and former employees. Some of these former YMP employees were currently CWP employees when they were actually interviewed. For this entire time, the FTC was aware of the existence of CWP, Ellsworth's ownership of CWP, and that the business practices of YMP and CWP were identical.

Any modifications to CWP's business practices since October 7, 2009, were made after consultation with the Better Business Bureau (BBB) office in Spokane, Washington. CWP and Ellsworth reached out to the BBB in part because the impetus for the 2008 action against YMP was clearly the BBB's "investigation" of YMP. For the past several years, CWP and Ellsworth have had significant, open communication with the BBB. The BBB has had access to any customer recordings it has requested and has had input on sales scripts. According to the primary contact for CWP at the BBB, the FTC did not even contact the BBB before issuing the CID. While the FTC is apparently not legally obligated to perform even a cursory informal inquiry before imposing the significant hardship of a CID on a targeted business, in this case, considering the history, it seems that such an action would have been advisable.

As is apparently the consistent practice, FTC counsel claims that it cannot discuss the reason for a CID or the basis for an investigation with the subject business or its counsel. Therefore, CWP and Ellsworth are clearly at a disadvantage concerning what legitimate reasons, if any, FTC counsel had for issuing this CID and the CID to Farmer's State Bank. Due to the refusal to divulge any information, CWP and Ellsworth have no idea what justification there could possibly be for harassing and embarrassing them with this CID and the CID served on their

local bank, or why the FTC needs banking information before determining that any violations have even occurred. Fortunately, the FTC Commissioners are not similarly disadvantaged.

This petition is, in large part, a plea to the Commissioners to examine the legitimacy of this CID and investigation of CWP and Ellsworth in general. There are simply too many questions that CWP and Ellsworth have been denied the ability to even meaningfully address. Based on the information that is available to CWP and Ellsworth, there does not seem to be any significant reason for the FTC to re-open these issues. Surely, the FTC entered into the Stipulated Final Judgment and Order for Permanent Injunction dated October 7, 2009, in good faith. Without question, the FTC had ample opportunity to examine the then current business practices of YMP and, by extension, CWP. CWP's business practices are essentially the same now with only minor modifications made to further insure compliance with the FTC Act, the TSR and other applicable regulations and to address any concerns raised by the BBB.

CONCLUSION

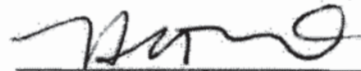
Countrywide Periodicals, LLC and Jason W. Ellsworth petition the FTC Commissioners to quash the subject CID in part because it does exceed the restrictions placed on agency investigative power by federal courts. However, the primary focus of this petition is to genuinely ask the Commissioners to review the legitimacy of this CID as it relates to FTC policy.

Obviously, this petition does not read like the typical dry run for a future filing with a federal court as CWP and Ellsworth are not simply going through the required motions before asking a court to intercede. CWP and Ellsworth are petitioning and imploring the Commissioners to do what the courts cannot – examine the basis for this CID in detail considering the 2008 FTC action against YMP and the resulting Stipulated Final Judgment and

Order for Permanent Injunction. If the FTC does not have a reasonable basis for believing that CWP's business practices have changed since the settlement was reached and now likely violate the FTC Act and/or the TSR, is there a legitimate reason to further burden and harass CWP and Ellsworth? Please utilize your oversight authority to truly examine whether this CID is appropriate and is consistent with the FTC's mission and policies.

Dated this 31st day of May, 2013.

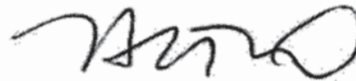
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CERTIFICATION OF GOOD FAITH MEET AND CONFER CONFERENCE

Pursuant to 16 C.F.R. §2.7(d)(2), counsel for Petitioner conferred with Megan Bartley and Jonathan Cohen, counsel for the Commission, on Tuesday, May 28, 2013, at 4:00pm in a good faith effort to resolve by agreement the issues raised in this Petition. However, we were not able to reach an agreement.



Hank T. Waters

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 2013, I served true and correct copies of the foregoing document via Federal Express for delivery on Monday morning, June 3rd, 2013, postage prepaid, to the following:

Megan Bartley
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mail Stop M-8102B
Washington, DC 20580
mbartley@ftc.gov (e-mailed on May 31, 2013)

Donald Clark, Secretary (original and 12 copies plus pdf version)
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-113
Washington, DC 20580



Hank T. Waters

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

YOUR MAGAZINE PROVIDER,
INC., a corporation, also D.B.A.
PERIODICALS, and
U.S. MAGAZINE SERVICES; and
JASON W. ELLSWORTH,

Defendants.

Case No. CV-08-64-M-DWM

STIPULATED FINAL JUDGMENT
AND ORDER FOR PERMANENT
INJUNCTION

Plaintiff, the Federal Trade Commission (“Commission” or “FTC”), has filed its Complaint for permanent injunction and other equitable relief pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C.

§§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101 *et seq.*, charging Defendants Your Magazine Provider, Inc., also doing business as Periodicals and as U.S. Magazine Services, and Jason W. Ellsworth with violating Section 5 of the FTC Act, 15 U.S.C. § 45, and the FTC’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310.

Plaintiff FTC and Defendants Your Magazine Provider, Inc., and Jason W. Ellsworth have agreed to entry of this Stipulated Final Judgment and Order for Permanent Injunction (“Order”) by this Court to resolve all matters of dispute between them in this action.

NOW, THEREFORE, the Commission and Defendants Your Magazine Provider, Inc., and Jason W. Ellsworth, having requested the Court to enter this Order, it is **ORDERED, ADJUDGED, AND DECREED** as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and personal jurisdiction over Defendants.
2. Venue is proper as to all parties in the District of Montana under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c).
3. The activities of Defendants are in or affecting commerce, as defined in

Section 4 of the FTC Act, 15 U.S.C. § 44.

4. The Complaint states a claim upon which relief may be granted against Defendants under Sections 5(a), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 57b; and under the TSR, 16 C.F.R. Part 310.

5. Defendants waive any and all rights that may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412, *amended by* Pub. L. 104-121, 110 Stat. 847, 863-64 (1996).

6. This Order is in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law.

7. Defendants waive all rights to seek appellate review or otherwise challenge or contest the validity of this Order. Defendants further waive and release any claim that they may have against the Commission, its employees, agents, and representatives.

8. Defendants enter into this Order freely and acknowledge that they have read and understand the provisions of this Order and agree to abide by them.

9. This Order is for settlement purposes only, and does not constitute and shall not be interpreted to constitute an admission by Defendants or a finding that the law has been violated as alleged in the Complaint, or that the facts alleged in the Complaint, other than the jurisdictional facts, are true.

10. Entry of this Order is in the public interest.
11. Each party shall bear its own costs and attorneys' fees.

DEFINITIONS

For the purpose of this Order, the following definitions shall apply:

1. **"Assets"** means any legal or equitable interest in, right to, or claim to, any real or personal property including, but not limited to, chattel, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, receivables (as those terms are defined in the Uniform Commercial Code), and all cash, wherever located.
2. **"Assisting others"** means knowingly providing any of the following goods or services to another person or entity:
 - a. performing customer service functions including, but not limited to, receiving or responding to consumer complaints;
 - b. formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other marketing material;
 - c. providing names of, or assisting in the generation of, potential customers;
 - d. hiring, recruiting, or training personnel;
 - e. advising or acting as a consultant to others on the

commencement or management of a telemarketing or prize promotion business; or

f. performing marketing services of any kind.

3. **“In a clear and conspicuous manner”** means:

a. in print communications, the message shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. If the information is contained in a multi-page document, the disclosure shall appear on the first page;

b. in communications disseminated orally, the message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it;

c. in communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the message shall be presented simultaneously in both the audio, if any, and visual portions of the communication. In any communication presented solely through visual or audio means, the message may be made through the same means in which the communication is presented. In any communication disseminated by means of an interactive

electronic medium such as software, the Internet, or online services, a disclosure must be unavoidable and presented prior to the consumer incurring any financial obligation. Any audio message shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual message shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location sufficiently noticeable for an ordinary consumer to read and comprehend it; and

d. regardless of the medium used to disseminate it, the message shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the message shall be used in any communication.

4. **“Consumer”** means an actual or potential purchaser, customer, licensee, or lessee, regardless of whether that person is a corporation, limited liability corporation, partnership, association, other business or governmental entity, or natural person, and regardless of whether the purchase is made for business purposes or for personal or household purposes.

5. **“Corporate Defendant”** means Your Magazine Provider, Inc., d.b.a. Periodicals and d.b.a. U.S. Magazine Services, and its successors and assigns.

6. **“Defendants”** means the Individual Defendant and the Corporate Defendant, individually, collectively, or in any combination.

7. **“Document”** is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

8. **“Individual Defendant”** means Jason W. Ellsworth.

9. **“Material”** means likely to affect a person’s choice of, or conduct regarding, goods or services.

10. **“Person”** means any individual, group, unincorporated association, limited or general partnership, corporation, or other business or governmental entity.

11. **“Prize promotion”** means:

- a. a sweepstakes or other game of chance; or
- b. an oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

12. **“Telemarketing Sales Rule” or “Rule” or “TSR”** means the FTC Rule entitled “Telemarketing Sales Rule,” 16 C.F.R. Part 310, or as it may be hereafter amended.

13. The terms **“and”** and **“or”** shall be construed conjunctively or disjunctively as necessary to make the applicable phrase or sentence inclusive rather than exclusive.

ORDER

I. PROHIBITED PRACTICES

IT IS THEREFORE ORDERED that, in connection with the marketing, offering for sale, or sale of any product or service, Defendants and their officers, agents, servants, and employees, and all other persons who are in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from:

A. Failing to disclose truthfully, in a clear and conspicuous manner, before consumers provide their credit or debit card account numbers or any other billing information:

1. The amount, frequency, and duration of any payments;
2. Any policy of not making refunds or cancellations or, if Defendants make a representation about a refund or cancellation

policy, all material terms and conditions of any such policy; and

3. Any other fact material to a consumer's decision to purchase such product or service;

B. Misrepresenting, directly or by implication, any fact material to a consumer's decision to purchase such product or service;

C. Charging or debiting, or causing to be charged or debited, a credit card or bank account of any consumer for renewal of a magazine or other subscription without the express informed consent of the consumer; and

D. Violating, or assisting others in violating, any provision of the Telemarketing Sales Rule, 16 C.F.R. Part 310, including, but not limited to:

1. Section 310.3(a)(1)(ii) of the TSR, 16 C.F.R. § 310.3(a)(1)(ii), by failing to disclose truthfully, in a clear and conspicuous manner, before a consumer pays for the goods or services offered, all material restrictions, limitations, or conditions to purchase from Defendants, including the amount, frequency, and duration of any payments;
2. Section 310.3(a)(1)(iii) of the TSR, 16 C.F.R. § 310.3(a)(1)(iii), by failing, if they have a policy of not making refunds, cancellations, exchanges, or repurchases, to disclose that this is

their policy; or by failing, if they make a representation about a refund, cancellation, exchange, or repurchase policy, to disclose all material terms and conditions of such policy;

3. Section 310.3(a)(1)(iv) of the TSR, 16 C.F.R. § 310.3(a)(1)(iv), by failing to disclose truthfully, in a clear and conspicuous manner, before a consumer pays for the goods or services offered, in any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; and that no purchase or payment is required to win a prize or participate in a prize promotion and that any purchase or payment will not increase the consumer's chances of winning a prize in a prize promotion;
4. Section 310.3(a)(2)(iii), 16 C.F.R. § 310.3(a)(2)(iii), by misrepresenting, directly or by implication, any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;
5. Section 310.3(a)(2)(v) of the TSR, 16 C.F.R. § 310.3(a)(2)(v), by misrepresenting, directly or by implication, in the sale of goods or services, the odds of being able to receive a prize in a prize

promotion;

6. Section 310.4(a)(6) of the TSR, 16 C.F.R. § 310.4(a)(6), by causing any billing information to be submitted for payment without the express informed consent of the consumer; or
7. Section 310.4(d)(1)-(3) of the TSR, 16 C.F.R. § 310.4(d)(1)-(3), by failing, in an outbound telephone call or internal or external upsell to induce the purchase of goods or services, to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:
 - a. The identity of the seller;
 - b. That the purpose of the call is to sell goods or services;
and
 - c. The nature of the goods or services.

II. MONETARY RELIEF

IT IS FURTHER ORDERED that:

- A. Judgment in the amount of \$600,000 (six hundred thousand dollars) (“Judgment Amount”) is hereby entered against Defendants, jointly and severally, as equitable monetary relief in favor of the Commission;
- B. Defendants shall pay the Judgment Amount in three installments. The

first installment of \$50,000 (fifty thousand dollars) shall be paid no later than five (5) days after the date of entry of this Order. The second installment of \$250,000 (two hundred fifty thousand dollars) shall be paid no later than six (6) months after the date of entry of this Order. The third and final installment of \$300,000 (three hundred thousand dollars) shall be paid no later than twelve (12) months after the date of entry of this Order. All payments to the Commission shall be made by certified check or other guaranteed funds payable to and delivered to the Commission, or by wire transfer in accordance with directions provided by the Commission, on or before the due dates given above;

C. To secure the payments required by Subsection II. B of this Order, Defendants hereby grant to the Commission a lien on and security interest in certain real property as described in Attachment A to this Order, together with all dwelling houses, other structures, improvements, appurtenances, hereditaments and other rights appertaining or belonging thereto (collectively referred to as the "Collateral"). Defendants represent and acknowledge that the Commission is relying on the material representations that one or more of the Defendants are the sole owners in fee simple of the Collateral, that title to the Collateral is marketable, and that the Collateral currently is not encumbered by any other lien, mortgage, deed of trust, assignment, pledge, security interest or other interest except as disclosed to the

Commission in the financial statements dated May 21-24, 2008, and updated asset list sent to FTC counsel via email on July 9, 2009. Defendants represent that none of the encumbrances on the Collateral are in default. Defendants further agree that, as of the date on which they sign this Order, they shall refrain from transferring, converting, encumbering, selling, assigning, or otherwise disposing of the Collateral, except with the express prior written permission of counsel for the Commission. The individual Defendant hereby releases and waives any statutory, common law, or other homestead exemption that may apply to the Collateral and shall not declare and claim any homestead exemption in the Collateral;

D. Defendants shall cooperate fully with the Commission and be responsible for preparing, executing, and recording the necessary documents and doing whatever else the Commission deems necessary or desirable to perfect, evidence, and effectuate its liens and security interests granted herein. No later than five (5) days after the date on which the Commission authorizes staff to sign this Order, Defendants shall prepare, execute and deliver (at their expense) to the Commission mortgages or deeds of trust in form and substance satisfactory to the Commission (the "Security Documents") and take such other steps as the Commission may require to perfect, evidence, and effectuate its liens, security interests, and assignments and to carry out the purposes of this Order. The

Commission shall refrain from recording the Security Documents until after the Court's entry of this Order. In the event that the Court does not enter this Order, within five (5) days after receipt of the Court's denial of this Order the FTC shall return the Security Documents to Defendants. Defendants shall be responsible for paying all costs and fees (including attorneys' fees and filing fees) required in connection with the liens and security interests granted herein, including all fees and costs related to the preparation, execution, delivery, filing, continuation, and termination of such liens and security interests and to carry out the purposes of this Order;

E. Upon Defendants' timely and complete satisfaction of the payments required by Subsection II. B of this Order, the Commission agrees to release the liens and security interests granted herein and Defendants shall be responsible for preparing and filing (at their expense) any termination or other statements reasonably required in connection therewith. The Commission shall also promptly release such liens and security interests to the extent necessary to permit the sale or encumbrance of part or all of the Collateral if the proceeds of such sale or financing are remitted directly to the Commission immediately upon closing of such sale or financing in partial or complete satisfaction of this Order and Defendants shall pay all fees and costs related to such release, including filing fees;

F. All funds paid pursuant to this Section II shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief including, but not limited to, consumer restitution and any attendant expenses for the administration of any restitution fund. Defendants shall cooperate in identifying and locating consumers entitled to restitution under this Order. In the event that direct restitution to consumers is wholly or partially impracticable or funds remain after restitution is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited in the United States Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Section. No portion of any payments or assets assigned under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment;

G. In the event of default on the payments required to be made by this Section, the entire unpaid amount, together with interest computed under 28 U.S.C. § 1961, accrued from the date of default until the date of payment, shall be immediately due and payable;

H. Defendants relinquish all dominion, control, and title to the funds paid

to the fullest extent permitted by law. Defendants shall make no claim to or demand return of the funds, directly or indirectly, through counsel or otherwise; and

I. Defendants agree that the facts as alleged in the Complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this Order, including, but not limited to, a nondischargeability complaint in any bankruptcy case. Defendants further stipulate and agree that the facts alleged in the Complaint establish all elements necessary to sustain an action pursuant to, and that this Order shall have collateral estoppel effect for purposes of, Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S. C. § 523(a)(2)(A).

III. CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendants, and their officers, agents, servants, employees, and attorneys, and all other persons who are in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from:

A. Disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account

(including a credit card, bank account, or other financial account), of any person which any Defendant obtained prior to entry of this Order in connection with the telemarketing of magazine subscriptions, other than collecting on open subscription accounts; and

B. Failing to dispose of such customer information in all forms in their possession, custody, or control within thirty (30) days after entry of this Order, except that information relating to open subscription accounts shall be disposed of within thirty (30) days of the end of the subscription period. Disposal shall be by means that protect against unauthorized access to the customer information, such as by burning, pulverizing, or shredding any papers, and by erasing or destroying any electronic media, to ensure that the customer information cannot practicably be read or reconstructed.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by a law, regulation, or court order.

IV. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Order:

A. Within ten (10) days of receipt of written notice from a representative

of the Commission, Defendants each shall submit additional written reports that are true and accurate and sworn to under penalty of perjury; produce documents or recordings for inspection and copying; appear for deposition; and provide entry during normal business hours to any business location in such Defendant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to use all other lawful means, including, but not limited to:

1. Obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45, and 69; and
2. Having its representatives pose as consumers and suppliers to Defendants, their employees, or any other entity managed or controlled in whole or in part by any Defendant, without the necessity of identification or prior notice; and

C. Defendants each shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

Provided, however, that nothing in this Order shall limit the Commission's

lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

V. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

- A. For a period of five (5) years from the date of entry of this Order,
 1. The Individual Defendant shall notify the Commission of the following:
 - a. Any changes in such Defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
 - b. Any changes in such Defendant's employment status (including self-employment), and any change in such Defendant's ownership in any business entity, within ten (10) days of the date of such change. Such notice shall include the name and address of each business that such Defendant is affiliated with, employed by, creates or

forms, or performs services for; a detailed description of the nature of the business; and a detailed description of such Defendant's duties and responsibilities in connection with the business or employment; and

c. Any changes in such Defendant's name or use of any aliases or fictitious names within (10) days of such change;

2. Defendants shall notify the Commission of any changes in structure of the Corporate Defendant or any business entity that either Defendant directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this Order, including, but not limited to: incorporation or other organization; a dissolution, assignment, sale, merger, or other action; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; or a change in the business name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change in the business entity about which a Defendant learns less than thirty

(30) days prior to the date such action is to take place, such Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge;

B. One hundred eighty (180) days after the date of entry of this Order and annually thereafter for a period of five (5) years, Defendants each shall provide a written report to the FTC that is true and accurate and sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

1. For the Individual Defendant:
 - a. such Defendant's then-current residence address, mailing addresses, and telephone numbers;
 - b. such Defendant's then-current employment status (including self-employment), including the name, addresses, and telephone numbers of each business that such Defendant is affiliated with, employed by, or performs services for; a detailed description of the nature of the business; and a detailed description of such Defendant's duties and responsibilities in connection with the business or employment; and

- c. Any other changes required to be reported under Subsection A of this Section;
 2. For both Defendants:
 - a. A copy of each acknowledgment of receipt of this Order, obtained pursuant to the Section titled "Distribution of Order"; and
 - b. Any other changes required to be reported under Subsection A of this Section;
- C. Each Defendant shall notify the Commission of the filing of a bankruptcy petition by such Defendant within fifteen (15) days of filing;
- D. For the purposes of this Order, Defendants shall, unless otherwise directed by the Commission's authorized representatives, send by overnight courier all reports and notifications required by this Order to the Commission, to the following address:

Associate Director for Enforcement
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room NJ-2122
Washington, D.C. 20580
Re: FTC v. Your Magazine Provider, Inc., et al,
CV 08-64-DWM

Provided that, in lieu of overnight courier, Defendants may send such reports or notifications by first-class mail, but only if Defendants contemporaneously send

an electronic version of such report or notification to the Commission at:

DEBrief@ftc.gov; and

E. For purposes of the compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with each Defendant.

VI. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Order, the Defendants, while engaged in conduct related to the subject matter of this Order, and their agents, employees, officers, corporations, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;

B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;

C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

D. Complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;

E. Copies of all sales scripts, training materials, advertisements, or other marketing materials; and

F. All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order, required by the Sections titled "Distribution of Order" and "Acknowledgment of Receipt of Order," and all reports submitted to the FTC pursuant to the Section titled "Compliance Reporting."

VII. DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendants shall deliver copies of the Order as directed below:

A. Corporate Defendant: The Corporate Defendant must deliver a copy of this Order to (1) all of its principals, officers, directors, and managers; (2) all of its

employees, agents, and representatives who engage in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting." For current personnel, delivery shall be within five (5) days of service of this Order upon such Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting," delivery shall be at least ten (10) days prior to the change in structure;

B. Individual Defendant as Control Person: For any business that the Individual Defendant controls, directly or indirectly, or in which he has a majority ownership interest, the Individual Defendant must deliver a copy of this Order to (1) all principals, officers, directors, and managers of that business; (2) all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting." For current personnel, delivery shall be within five (5) days of service of this Order upon such Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance

Reporting,” delivery shall be at least ten (10) days prior to the change in structure;

C. Individual Defendant as employee or non-control person: For any business where the Individual Defendant is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, he must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct; and

D. Defendants must secure a signed and dated statement acknowledging receipt of the Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this Section.

VIII. ACKNOWLEDGMENT OF RECEIPT OF ORDER

IT IS FURTHER ORDERED that each Defendant, within five (5) business days of receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this Order.

IX. SEVERABILITY

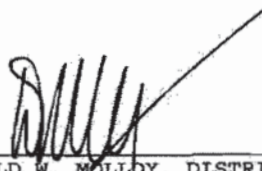
IT IS FURTHER ORDERED that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, all of the remaining provisions shall remain in full force and effect.

X. RETENTION OF JURISDICTION

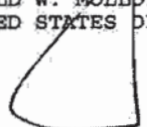
IT IS FURTHER ORDERED that this Court shall retain jurisdiction over the injunction entered in this case.

The Clerk is directed to close the case.

DATED this 7th day of October, 2009. 15:10 p.m.



DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT



ATTACHMENT A

DESCRIPTION OF COLLATERAL

Property 1 - 737 HWY 93N, Hamilton, MT 59840

A parcel of land situated in the SE1/4 of Section 1, Township 6 North, Range 21 West, P.M.M., Ravalli County, Montana, and more particularly described as Tract B, Certificate of Survey

No. 321.

Property 2 - 739 HWY 93N, Hamilton, MT 59840

A parcel of land situated in the SE1/4 of Section 1, Township 6 North, Range 21 West, P.M.M., Ravalli County, Montana, and more particularly described as Tract A, Certificate of Survey

No. 321.

Property 3 - Land in Victor, MT, on Mittower Rd.

A parcel of land situated in Section 8, Township 8 North, Range 20 West, P.M.M., Ravalli County, Montana, and more particularly described as Lot 9, Certificate of Survey No. 2721.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FEDERAL TRADE COMMISSION,)	CV 08-64-M-DWM
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
YOUR MAGAZINE PROVIDER,)	
INC., a corporation, also D.B.A.)	
PERIODICALS and U.S.)	
MAGAZINE SERVICES; and)	
JASON W. ELLSWORTH,)	
)	
Defendants.)	

I. Introduction

Plaintiff, Federal Trade Commission (“FTC”), brought suit against Defendants, Your Magazine Provider, Inc., and Jason W. Ellsworth, alleging Defendants violated the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108. A temporary restraining order was

issued on May 14, 2006 after a preliminary examination based on evidence submitted by the FTC, that the FTC was likely to succeed on the merits of its claims. Subsequently, a hearing was held so that Defendants had an opportunity to show cause why a preliminary injunction should not be issued. Following the hearing, the parties entered a Stipulated Preliminary Injunction and asset freeze, based on their agreement to engage in negotiations to resolve this case. The parties have not resolved their differences. The Defendants now move to dissolve the stipulated preliminary injunction and asset freeze, claiming the FTC has not demonstrated it is likely to succeed on the merits.

After considering the evidence presented by the parties at the show cause hearing, as well as the additional evidence submitted by the FTC with its briefing on this motion, the FTC is unlikely to succeed on the merits of its claims. At the time of the show cause hearing, the FTC submitted affidavits from approximately twenty consumers who, ultimately, either agreed to accept Defendants' magazine subscription offer or were not charged in connection with the offer. The FTC also submitted evidence of about 200 general consumer complaints, most of which were handled to the consumers' satisfaction. In light of the fact that Defendants have contacted over 5,000,000 people in the last three years and sold magazine subscriptions to approximately 36,000 consumers, a small number of complaints is

to be expected. The FTC submitted additional evidence in opposition to Defendants' motion to dissolve the injunction, including declarations of former employees and dissatisfied customers, recordings of calls from some complainants, and data regarding sampling of verification recordings. The current evidence is insufficient to show the FTC is likely to succeed on the merits of its claims. Consequently, the Defendants' motion to dissolve the stipulated preliminary injunction is granted.

II. Legal Standards

To obtain a preliminary injunction, the FTC must demonstrate a likelihood of success on the merits and that the equities weigh in favor of granting temporary relief. FTC v. Affordable Media, LLC, 179 F.3d 1228, 1233 (9th Cir. 1999).

Irreparable harm is presumed in a statutory enforcement action such as this one.

Id. An asset freeze is appropriate when the government demonstrates a likelihood of success on the merits and a possibility of dissipation of assets. Fed. Sav. & Loan Inc. Corp. v. Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989).

III. Analysis

The FTC alleges Defendants violated section 5(a) of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). An act or practice is deceptive if "first, there is a

representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.” FTC v. Gill, 265 F.3d 944, 950 (9th Cir. 2001). Courts examine the “overall net impression” of all representations to determine whether they are misleading. FTC v. Gill, 71 F. Supp. 2d 1030, 1043 (C.D. Cal. 1999), aff’d, 265 F.3d 944 (9th Cir. 2001). The FTC also alleges Defendants violated various provisions of the Telemarketing Sales Rule.

The FTC first claims Defendants violated section 5(a) of the FTC Act and section 310.3(a)(1)(ii) of the Telemarketing Sales Rule¹ by telling consumers the magazine subscriptions Defendants offered would cost only \$3.83 per week for 48 months, but then billing consumers \$49.81 per month for 16 months. The FTC position is that consumers are not made aware of the accelerated monthly charge when they agree to purchase the magazine subscriptions. In support of this allegation, at the time of the show cause hearing, the FTC presented affidavits from approximately twenty consumers, some of whom stated they believed the magazine subscriptions they were purchasing cost only \$3.83 per week. These consumers indicated they were surprised when they were billed \$49.81 per month.

¹Section 310.3(a)(1)(ii) of the Telemarketing Sales Rule requires telemarketers to disclose all material restrictions, limitations, or conditions to purchase, receive, or use goods. 16 C.F.R. § 310.3(a)(1)(ii).

Evidence presented by Defendants at the show cause hearing raises questions about the accuracy of these consumers' recollections. Specifically, Defendants presented tape recordings of telephone calls from Defendants to about one-half of the consumers who submitted affidavits during which the consumers agreed to pay \$49.81 per month for the magazine subscriptions. Ex. 505–514.² The evidence shows, in an initial sales call, consumers are told they can purchase 48-month subscriptions for “just 3.83 per week.” Ex. 502. That price is repeated a second time in the initial sales call. Ex. 502. Once the consumer expresses interest in the magazines, they are given an order number and told they will be contacted again.

Ex. 502. During the second sales call, the consumers are told the following:

It is just \$3.83 per week guaranteed to you for the full 48 months of service; now we would never bother you for \$3.83 every single week for 48 months cause that would drive you nuts! And we certainly wouldn't ask you to pay for it all at once, so what we do for you is set you up on our P.D.S. Service and take the total of the 48 months and break that into 16 consecutive monthly payments of just \$49.81. We do that each month but only for the first 16 months and then you have 32 remaining months of service where you don't have to make anymore payment.

Ex. 502. In the third and final sales call, the consumers are again told the cost of the magazine subscriptions will be \$49.81 per month for 16 months. Ex. 502, 505–514.

² Exhibits submitted at the time of the show cause hearing as designated as Ex. [number].

The FTC produced additional evidence in opposition to Defendants' motion to dissolve the injunction regarding the sales calls. The consumer declarations do not show the FTC is likely to succeed on the merits of this claims. For example, three of the consumers do not remember whether they were told about the pricing before the final verification call. Dec. of Dover, ¶ 3; Dec. of Foote, ¶ 2; Dec. of Salazar, ¶ 2. The fourth consumer stated that she was told during the initial call about the payment amount of \$49.81. Dec. of Joseph, ¶ 3.

The employee declarations submitted by the FTC are also unconvincing. Neither of the employees ever worked as a "closer," during the second stage when Defendants state they review the billing information. Dec. of Buller, ¶ 2; Dec. of Gould, ¶ 2. Further, Buller states that the closer script described the monthly payments. Dec. of Buller, ¶ 12. While Gould states that the closers did not disclose the monthly cost of \$49.81, this contradicts the other evidence submitted both by the Defendants and the FTC. Dec. of Gould, ¶ 9.

Considering the overall net impression of all representations made during the three sales calls, the FTC has not presented sufficient evidence to show it is likely to succeed on its claim that Defendants misrepresented the price of the magazine subscriptions. Consumers are told on several occasions that the magazine subscriptions will cost \$49.81 per month for 16 months and are asked to

agree to paying this amount. Although the FTC has presented documentation of complaints from about 200 consumers, as well as affidavits from four dissatisfied customers, Defendants have sold approximately 36,000 magazine subscriptions in the last three years. Second Aff. of Bryce Eggleston ¶ 10. The small percentage of consumers who were confused by Defendants' marketing practices is not sufficient to demonstrate FTC is likely to succeed on this claim.

The FTC next claims Defendants' failure to disclose its no-cancellation policy violates section 5(a) of the FTC Act and section 310.3(a)(1)(iii) of the Telemarketing Sales Rule.³ The claim is that the no-cancellation policy is undisclosed until consumers try to cancel their order, at which point the consumer is told it is too late. Defendants maintain they do not have a no-cancellation policy. Rather, according to Defendants, they allow consumers to cancel within three days of placing an order. Defendants further note this policy is disclosed to consumers during the second sales call.

At the show cause hearing, the FTC presented a tape recording of Defendants' telephone call to Marcia Walsh. During the telephone call, when Walsh is told the magazine subscriptions will cost \$49.81 per month for 16

³Section 310.3(a)(1)(iii) requires clear and conspicuous disclosure of any no-cancellation or no-refund policy. 16 C.F.R. § 310.3(a)(1)(ii).

months, she states she thought the magazines were only \$3.83 per week and cannot afford the accelerated rate. Walsh asks to cancel her order and is told that Defendants have a no-cancellation policy. Although this telephone call is disturbing, the FTC has not presented evidence that Defendants routinely apply a no-cancellation policy. As an initial matter, the employee who told Walsh she could not cancel her order was terminated for failing to follow Defendants' script. Second Aff. of Bryce Eggleston ¶ 5.

In addition, approximately one-half of the consumers who submitted affidavits to the FTC concerning their displeasure with Defendants' marketing practices were never charged for magazine subscriptions. See, e.g., Ex. 2, 8, 9, 12. Of the 250,000 consumers who moved on to the second telephone call in Defendants' sales process, approximately 184,000 have canceled before confirming their order during the third sales call. Second Aff. of Bryce Eggleston ¶¶ 7–10. Of the 66,000 consumers who moved on to the third sales call, approximately 24,000 decided not to place an order. Second Aff. of Bryce Eggleston ¶¶ 7–10. Of the 42,000 consumers who confirmed their order during the third sales call, approximately 6,000 canceled their order thereafter. Second Aff. of Bryce Eggleston ¶¶ 7–10. This evidence suggests Defendants do not have a no-cancellation policy. Based on the evidence presented by the FTC at the show

cause hearing, it is not likely the FTC will succeed on its claim that Defendants have, but do not disclose, a no-cancellation policy.

The additional evidence submitted by the FTC also does not show a likelihood of success on this claim. The sample verification recordings and consumer declarations provided by the FTC are drawn from 330 complaints received by the FTC. Of these 330, the FTC has provided transcripts from 30 of the verification calls which it claims show the Defendants have not properly disclosed their cancellation policies. Even so, these calls represent a very small percentage of complaints, given the number of calls completed by the Defendants. The inference drawn by the FTC is weak. The four consumer declarations are drawn from these 30 calls. Two of these consumers state they were not clear on the cancellation policy during the initial call and were then later told they could not cancel. Dec. of Dover, ¶ 3; Dec. of Joseph, ¶ 4. Two of the consumers do not remember any of the details from the calls prior to the final verification call and do not state whether or not they were informed of any cancellation policy. Dec. of Foote, ¶ 2; Dec. of Salazar ¶ 2. Defendants state that their review of the 30 recordings showed that several were not in compliance with company policies, including three of the four consumers who filed declarations, and these accounts have been cancelled. Second Aff. of L. Lavergne, ¶ 12.

The FTC also randomly selected 200 names from Defendants' customer list and found that in 20 of them (10%), the consumer asked about cancellation and received the scripted response regarding cancellation. Based on this sample, an economist estimated that 6%-15% of consumers asked about cancellation. However, this merely indicates the number of consumers who may have asked about cancellation, and not the number of times Defendants may have committed a violation of the FTC Act and Telemarketing Sales Rule. Again, while the inference may have some foundation in the proof, it is still weak.

In a few instances, Defendants' callers have not followed proper policy with consumers regarding cancellation policies. The existence of some problems does not demonstrate the FTC is likely to succeed on the merits of this claim. Nor, in this case, does it establish grounds to infer a pattern of conduct.

The FTC further alleges Defendants violated section 310.3(a)(1)(iv) of the Telemarketing Sales Rule. This section requires telemarketers to disclose that no purchase is necessary to win a prize or that any purchase will not increase a person's chances of winning a prize. 16 C.F.R. § 310.3(a)(1)(iv). The FTC claims Defendants failed to disclose this information when they told consumers about their sweepstakes. According to Defendants' script, they tell consumers their name has been entered in a sweepstakes and that the odds of winning are

determined by the number of entries. Ex. 502. Several of the consumer affidavits submitted by the FTC confirm Defendants' use of this portion of the script. See, e.g., Ex. 2 (“[The caller] started out by saying that I had been automatically entered in a million dollar sweepstakes.”), 5, 8, 13, 15, 18. But see Ex. 4, 11. This disclosure appears to comply with the requirements of section 310.3(a)(1)(iv), and thus, the FTC has not shown a likelihood of success on this claim.

The FTC finally alleges Defendants violated section 310.4(a)(6) of the Telemarketing Sales Rule, which prohibits a telemarketer from causing billing information to be submitted for payment without the express informed consent of the customer. 16 C.F.R. § 310.4(a)(6). The FTC asserts Defendants tell some consumers they need their credit card number to verify the consumer's eligibility and then charge the card without the consumer's express consent. Defendants acknowledge they ask consumers for their credit card number to verify that the consumer can afford the magazine subscriptions. Defendants note, however, the card is not charged unless the consumer gives oral consent. Several of the consumers who submitted affidavits to the FTC indicated Defendants requested their credit card number for verification. See, e.g., Ex. 1, 13, 15. Nevertheless, the evidence submitted by Defendants shows either the consumer's credit card was not charged or the consumer later orally agreed to purchase the magazine

subscriptions. Ex. 1, 13, 15.

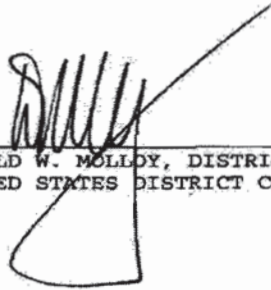
Additionally, the four declarations from consumers fail to show that the consumers did not give consent to be billed. The consumer declarations show that the consumers either did not remember whether they were told the price during the initial call, or remember being told about the price. All of them subsequently agreed during the verification call to purchase the subscription. Dec. of Dover, ¶ 5; Dec. of Foote, ¶ 3; Dec. of Salazar, ¶ 3; Dec. of Joseph, ¶ 4. Based on all this evidence, the FTC has not demonstrated a likelihood of success on this claim.

The stipulated preliminary injunction also included a freeze of certain assets owned by the Defendants. An asset freeze is appropriate if the FTC demonstrates both (1) a likelihood of success on the merits and (2) a possibility of dissipation of assets. Fed. Sav. & Loan Inc. Corp., 868 F.2d at 1097. Because the FTC has not met the first requirement by showing it is likely to succeed on the merits, the asset freeze must also be dissolved.

IV. Conclusion

IT IS HEREBY ORDERED that Defendants' Motion to Dissolve Stipulated Preliminary Injunction (dkt #74) is GRANTED. The Stipulated Preliminary Injunction and asset freeze are dissolved.

DATED this 4th day of February, 2009.



DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

FEDERAL TRADE COMMISSION v.
COUNTRYWIDE PERIODICALS, LLC.

PETITION EXHIBIT 5

**Federal Trade Commission's Order Denying Petition to Quash Civil
Investigative Demand (July 3, 2013)**

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright**

)	
In the Matter of)	
)	File No. X080036
MAY 6, 2013 CIVIL INVESTIGATIVE DEMAND)	
ISSUED TO COUNTRYWIDE PERIODICALS, LLC)	July 3, 2013
)	
)	

**ORDER DENYING PETITION TO QUASH
CIVIL INVESTIGATIVE DEMAND**

By OHLHAUSEN, Commissioner:

Countrywide Periodicals, LLC (“CWP”) has filed a petition to quash a civil investigative demand (“CID”) issued by the Federal Trade Commission (“FTC” or “Commission”). For the reasons stated below, the petition is denied in its entirety.

I. Background

CWP is a telemarketing business that offers consumers a magazine subscription service, which purportedly provides consumers with a four-year subscription to between four and six magazines at a flat rate.

On May 6, 2013, after receiving a number of consumer complaints about misrepresentations by CWP’s telemarketers regarding CWP’s affiliations, the costs and billing for the magazine subscriptions, and the consumers’ rights to cancel, the Commission issued a CID in the course of an investigation to determine whether CWP or its owner, Jason Ellsworth, have engaged in unfair or deceptive practices in connection with CWP’s telemarketing of magazines to consumers. The purpose of the investigation is to assess, *inter alia*, whether there is reason to believe that CWP’s telemarketers have made misrepresentations to consumers, including false or misleading representations about CWP’s affiliations; the availability, terms, and costs of magazine subscriptions; the magazines that will be delivered to consumers upon payment; and CWP’s cancellation policies. The Commission also seeks to determine whether CWP has complied with the Commission’s Telemarketing Sales Rule, 16 C.F.R. pt. 310.

The CID was authorized by Resolution No. 0123145, “Resolution Directing the Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, and Others,” which authorizes the use of compulsory process 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.S.C. § 45 (as amended); and/or deceptive or abusive telemarketing acts or practice 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.¹

The CID specifications require CWP to complete two interrogatories and produce documents relating to its telemarketing activities from January 1, 2009, to date. Several of the specifications require CWP to produce documents relating to Your Magazine Provider (“YMP”) and other entities that are involved in magazine sales and that are also owned by Jason Ellsworth and others.² YMP and Ellsworth were the subjects of an earlier FTC investigation. At the conclusion of that investigation, YMP and Ellsworth entered into a Stipulated Final Judgment and Order for Permanent Injunction (“Order”) that settled allegations that YMP and Ellsworth had violated Section 5 of the FTC Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule, 16 C.F.R. pt. 310, by engaging in deceptive telemarketing of magazines.³ The Order contains a number of provisions necessary for assessing their compliance with it, including a provision that reserves the right to monitor and investigate their compliance by using the Commission’s process authority or the specific monitoring provisions of the Order.⁴ Thus, the present investigation also seeks to determine whether Ellsworth is complying with the terms of the 2009 Order.

¹ A copy of the Civil Investigative Demand issued to CWP is attached as Order Exh. 1. The resolution is included as part of the CID.

² Order Exh. 1, at 2.

³ Pet. Exh. 1.

⁴ The Order provides, *inter alia*, “[N]othing in this Order shall limit the Commission’s lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).” Pet. Exh. 1 at 18-19. Citations are to page numbers in the PACER header, where available.

II. ANALYSIS

A. The Applicable Legal Standards

Compulsory process issued by a federal agency is proper if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the inquiry, as defined by the investigatory resolution.⁵ Agencies have wide latitude to determine what information is relevant and needed to conduct a law enforcement investigation, and are not required to have “a justifiable belief that wrongdoing has actually occurred.”⁶ As the D.C. Circuit has explained, the standard for judging relevance in an administrative investigation is “more relaxed” than in an adjudicatory proceeding.⁷ Thus, to justify a refusal to comply with the Commission’s demands, it is incumbent on the recipient of process to show that the requested documents are “plainly irrelevant” to the investigation’s purpose.⁸

CWP contends that the instant CID does not satisfy these standards. First, CWP asserts that Requests for Production 1-6, 9-10, 13-14, and Interrogatory 1 exceed the scope and nature of the resolution – *i.e.*, that the information demands are not relevant to the investigation. CWP cites, for example, specifications requiring CWP to produce contracts with magazine clearinghouses or CWP’s sources of lead lists that it asserts are irrelevant to the stated purpose of the investigation.⁹ Second, CWP contends that Requests for Production 5, 10, 13 and Interrogatory 1 are overly burdensome.¹⁰ Third, CWP asserts that Requests for Production 5 and 13 require it to produce “private information,” such as the names of the magazines that consumers have purchased, as well as personal information about CWP employees. Finally,

⁵ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (*en banc*).

⁶ *See, e.g., Morton Salt*, 338 U.S. at 642-43 (“[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 an assurance that it is not.”).

⁷ *Invention Submission Corp.*, 965 F.2d at 1090.

⁸ *Id.* at 1089; *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980).

⁹ Pet., 3-4.

¹⁰ CWP’s petition to quash does not state an objection to Requests for Production 7, 8, 12, and 15 or to Interrogatory 2. Pet. at 5.

CWP contends that the CID is oppressive, punitive, and intended to harass. As shown below, none of these contentions has merit.

B. The CID specifications are relevant to the purpose of the investigation

The purpose of the investigation – as set forth in the resolution quoted above – is to determine whether telemarketers, sellers, or others have engaged in unfair or deceptive acts or practices, or have violated the Commission’s Telemarketing Sales Rule, including by providing support and assistance to telemarketers that may be engaged in unlawful practices. The investigation also seeks to determine whether Ellsworth may be in violation of the 2009 Order. Applying the standard appropriate for administrative investigations, the specifications of the CID are clearly relevant to those purposes.¹¹ The obvious relevance of the requested materials is not cast into doubt merely because the same materials might also be relevant to future litigation should the Commission later decide that an enforcement action is warranted, as CWP seems to contend.¹²

CWP challenges the specifications calling for documents related to its contracts with magazine clearinghouses. However, CWP’s relationship with those entities is an important component of CWP’s own magazine sales business, and learning more about that relationship will help FTC staff assess whether CWP’s representations to consumers about the availability, terms, and costs of magazine subscriptions are deceptive or misleading. CWP also objects to Request for Production 10, which requires it to produce documents sufficient to establish the source of all lists of prospective customers and any lead lists. But this information is reasonably relevant to several issues in the instant investigation, including whether CWP is complying with the Telemarketing Sales Rule, which prohibits telemarketers from contacting phone numbers that appear on the National Do Not Call Registry, whether CWP is misrepresenting its affiliations in its contacts with potential consumers, and whether there are other individuals or entities that are

¹¹ CWP also questions the relevance of a separate CID issued to Farmer’s State Bank. Pet. Exh. 5. It is questionable whether CWP has standing to seek to quash a CID directed to a third party. *See, e.g., Greene v. Phila. Hous. Auth.*, 789 F. Supp. 2d 582, 586 (E.D. Pa. 2011); *see also FTC v. Trudeau*, 2012 U.S. Dist. LEXIS 160545, at *8 (N.D. Ohio Nov. 8, 2012). But we need not decide that issue because the investigational resolution specifically authorizes compulsory process to determine whether consumer redress is in the public interest. Financial information in the hands of a third-party bank that could bear on the amount of consumers’ losses and whether they are capable of being redressed is directly relevant to that purpose. *See, e.g., Invention Submission Corp.*, 965 F. 2d at 1089-90.

¹² *See* Pet., 4. CWP highlights the specification requesting merchant account information, but such accounts are expressly identified in the resolution as a form of “substantial assistance or support[.]”

assisting CWP in potentially unlawful conduct.¹³ In particular, the staff is investigating reports from consumers claiming to have been called by CWP even though the consumers had registered their telephone numbers in the National Do Not Call Registry. Understanding how and from where CWP obtained its lists of potential consumers to contact is important background information that is reasonably relevant to understanding CWP's business practices and processes for determining which consumers to call and whether these practices include complying with the Telemarketing Sales Rule.

C. CWP's claims that the specifications are overly broad or unduly burdensome are without support.

CWP further claims that Requests for Production 5, 10, 13 and Interrogatory 1 are overbroad and unduly burdensome.¹⁴ CWP's vague and nonspecific assertions fall far short of meeting well-established standards for the recipients of process from an administrative agency to demonstrate undue burden.

When an agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose, the reasonableness of its request is presumed absent a showing that compliance threatens to disrupt or unduly hinder the normal operations of the business.¹⁵ Some burden on the recipient of process is "to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest."¹⁶ Thus, a recipient of process must produce the requested materials unless the request is unduly burdensome or unreasonably broad.¹⁷ In other words, the recipient must make a record to show the "measure of their grievance rather than [asking the court] to assume it."¹⁸

¹³ Identifying the sources of customer lists may also uncover other entities that have violated the Telemarketing Sales Rule by providing assistance and support to CWP, a purpose expressly provided in the resolution. Order Exh. 1. As we recently noted, "[d]ocuments related to third-party telemarketing lead generators . . . go to the heart of an investigation looking into . . . possible violations of the Telemarketing Sales Rule." Order Denying Petition to Limit or Quash Civil Investigative Demand Filed by Caribbean Cruise Line, Inc., at 6, File No. 122 3196 (May 9, 2013).

¹⁴ Pet., 4, 5.

¹⁵ *In re Line of Business Report Litig.*, 595 F.2d 685, 703 (D.C. Cir. 1978) (citing *Texaco*, 555 F.2d at 882).

¹⁶ *Texaco*, 555 F.2d at 882.

¹⁷ *Texaco*, 555 F.2d at 882 & n.49 (citing *United States v. Powell*, 379 U.S. 48, 58 (1964)).

¹⁸ *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 654 (1950); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 217-18 (1946)).

CWP has not even attempted to substantiate its claims of undue burden with facts that might support its grievance against the CID. It alleges burden, but makes no factual claims regarding the existence or extent of its burden. Nor does it make any factual claims to support an argument that compliance with the CID would “threaten to disrupt or unduly hinder” its normal operations.¹⁹ CWP’s vague and nonspecific assertions are not sufficient to justify quashing, or even limiting, the challenged specifications.

D. The CID specifications do not infringe the privacy rights of CWP’s customers or employees.

In further support of its petition to quash, CWP objects that Requests for Production 5 and 13 require it to disclose the “protected personal information” of its customers and employees without their consent. Specifically, CWP claims that Request for Production 5 – which calls for customer databases that include “the magazine titles to which the customer subscribed” – implicates the privacy rights of these consumers by disclosing to the government what they are reading. CWP also objects to Request for Production 13, which requires CWP to produce contact and employment-related information about CWP’s and other Telemarketing Entities’ employees.²⁰

CWP did not raise this issue during the mandatory pre-petition meet-and-confer with staff, as required by the Commission’s Rules of Practice.²¹ In any event, as courts have recognized, the confidential or sensitive nature of the required materials is not a proper basis for limiting the Commission’s information demands.²² The FTC Act, as well as the Commission’s Rules of Practice, provides CWP and its customers with ample protection for any sensitive information that its documents might contain.²³ Consequently, there is no basis to limit or quash the CID for this reason. The only relevant issue is whether the materials sought are “reasonably relevant to its investigation[.]”²⁴ Here, the materials sought by FTC staff are highly relevant to

¹⁹ Pet., 4, 5.

²⁰ The CID asks for employee contact information; period of employment; position, role, and responsibilities; and the reason for termination, if the employee was terminated. Order Exh. 1, at 11.

²¹ See 16 C.F.R. § 2.7(k).

²² *FTC v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338, at 65,353 (D.D.C. 1991), *aff’d*, 965 F.2d 1086, 1089 (D.C. Cir. 1992).

²³ See, e.g., 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10. The Commission has robust internal controls to safeguard non-public information obtained in the course of a law enforcement investigation (such as the personal information of consumers) that include limiting access to authorized FTC personnel for authorized purposes.

²⁴ *FTC v. Green*, 252 F. Supp. 153, 157 (S.D.N.Y. 1966).

the current investigation. Staff seeks to understand whether CWP is fulfilling consumers' magazine orders as it promises to do. For instance, the Commission has received complaints from consumers that they have not received all of the magazines they ordered through CWP, or that the magazines they have received are different from the ones they ordered. To assess the validity of these complaints and to determine whether CWP has failed to provide consumers with the services they paid for, FTC staff must therefore ascertain precisely which magazines consumers ordered. As for the requested employee information, employees may be witnesses with first-hand knowledge of CWP's directions and instructions for contacting potential customers. Where the purpose of the investigation is to determine whether there is reason to believe that CWP made deceptive representations to consumers, the employees directly involved in those contacts are a critical source of information.

E. CWP has not established that the CID is oppressive, punitive, or intended to harass CWP or Ellsworth.

Finally, CWP contends that the CID is oppressive, punitive, and intended to harass CWP and Ellsworth because CWP's business operations are "identical" to YMP, the subject of the FTC's earlier investigation and 2009 Order.

CWP has not offered anything of a factual nature to support its allegations that the investigation has been conducted merely to harass and embarrass CWP and Ellsworth.²⁵ Though the Commission need not make a factual showing to justify the issuance of process, here there are sufficient grounds to warrant the present investigation.²⁶ The Commission has received multiple complaints from consumers regarding several different aspects of CWP's and Ellsworth's magazine telemarketing business. As petitioners note, Ellsworth was the subject of a previous investigation and FTC enforcement action for substantially similar conduct involving the telemarketing of magazines. There is nothing unusual or improper about an investigation of a company where the subject matter of the inquiry may be similar to the subject matter of an earlier enforcement action against the same individual or entity and a related company.²⁷ Indeed, it is entirely proper for the Commission to conduct investigations into compliance with the 2009 Order to which Ellsworth is subject. Nor does the fact that the 2009 Order was a stipulated order alter the FTC's authority to investigate compliance. A stipulated order is not an endorsement of the defendants' conduct or an agreement that the FTC will refrain from further investigations. To the contrary, the Order in question plainly contemplates the potential for future violations by

²⁵ *Invention Submission Corp.*, 965 F.2d at 1091 (quoting *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980)).

²⁶ *Oklahoma Press*, 327 U.S. at 216.

²⁷ While there are some superficial overlaps with the 2009 case, the 2009 Order expressly provides that the FTC may issue compulsory process to YMP and Ellsworth. Pet. Exh. 1, at 18-19. Far from being oppressive or punitive, this CID is precisely what YMP and Ellsworth agreed to.

giving the FTC tools to augment those provided by the FTC Act to investigate and assess Ellsworth's compliance. In addition, whether or not the business practices of CWP are the same as those of its sister company, YMP, the Commission acts well within the bounds of its statutory authority in conducting an investigation of CWP's practices for purposes of determining whether they adhere to the requirements of Section 5 of the FTC Act and the Commission's Telemarketing Sales Rule. Accordingly, we conclude that the investigation has not been conducted in bad faith.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of Countrywide Periodicals, LLC to Quash the Civil Investigative Demand be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to Countrywide Periodicals, LLC must now be produced on or before July 19, 2013.

By the Commission.

April J. Tabor
Acting Secretary

EXHIBIT 1



CIVIL INVESTIGATIVE DEMAND

1. TO

Countrywide Periodicals, LLC
 Attn: Jason W. Ellsworth
 737 U.S. Highway 93 North
 Hamilton, MT 59840

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED

You are required to appear and testify.

LOCATION OF HEARING

YOUR APPEARANCE WILL BE BEFORE

DATE AND TIME OF HEARING OR DEPOSITION

You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.

You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS MUST BE AVAILABLE

JUN 03 2013

3. SUBJECT OF INVESTIGATION

See attached resolution.

4. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN

Ronald Lewis/Megan Bartley
 Federal Trade Commission
 600 Pennsylvania Ave., NW, Mail Stop M-8102B
 Washington, DC 20580
 (202) 326-2985

5. COMMISSION COUNSEL

Megan Bartley
 Federal Trade Commission
 600 Pennsylvania Ave., NW, Mail Stop M-8102B
 Washington, DC 20580
 (202) 326-3424

DATE ISSUED

5/16/13

COMMISSIONER'S SIGNATURE

INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documents or the submission of answers and report in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responsible for answering each interrogatory or report question. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

Form of Certificate of Compliance*

I/We do certify that all of the documents and information required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objections to such interrogatory or uncompleted portion and the reasons for the objections have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

*In the event that more than one person is responsible for complying with this demand, the certificate shall identify the documents for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 28 U.S.C. § 1746.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN A NONPUBLIC
INVESTIGATION OF TELEMARKETERS, SELLERS, SUPPLIERS, OR OTHERS

File No. 0123145

Nature and Scope of Investigation:

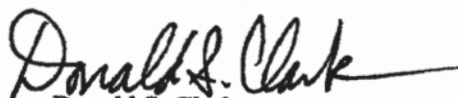
To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive 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.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed five years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, 57b-1 (as amended); and FTC Procedures and Rules of Practice, 16 C.F.R. §§ 1.1 *et seq.* and supplements thereto.

By direction of the Commission.


Donald S. Clark
Secretary

Issued: April 11, 2011

**CIVIL INVESTIGATIVE DEMAND
SCHEDULE FOR PRODUCTION OF DOCUMENTS AND WRITTEN REQUESTS TO
INTERROGATORIES**

I. DEFINITIONS

As used in this Civil Investigative Demand, the following definitions shall apply:

- A. **“And,”** as well as **“or,”** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any specification in this Schedule all information that otherwise might be construed to be outside the scope of the specification.
- B. **“Any”** shall be construed to include **“all,”** and **“all”** shall be construed to include the word **“any.”**
- C. **“CID”** shall mean the Civil Investigative Demand, including the attached Resolution and this Schedule, and including the Definitions, Instructions, and Specifications.
- D. **“Document”** shall mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, transcript of audio or video recording, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, or label. **“Document” shall also include all documents, materials, and information, including Electronically Stored Information, within the meaning of the Federal Rules of Civil Procedure.**
- E. **“Each”** shall be construed to include **“every,”** and **“every”** shall be construed to include **“each.”**
- F. **“Electronically Stored Information” or “ESI”** shall mean the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by you into a reasonably usable form. This includes, but is not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards; magnetic or electronic tapes; disks; computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media.

- G. **"FTC"** or **"Commission"** shall mean the Federal Trade Commission.
- H. **"Identify"** or **"the identity of"** shall be construed to require identification of (a) natural persons by name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home addresses; and (b) businesses or other organizations by name, address, identities of natural persons who are officers, directors or managers of the business or organization, and contact persons, where applicable.
- I. **"Magazine Clearinghouse"** shall mean any entity that directly or indirectly clears, processes, or fulfills magazine subscriptions on behalf of any **Telemarketing Entity** including but not limited to a magazine clearinghouse or magazine fulfillment house.
- J. **"Magazine Sales"** shall mean any activity in any way related to the marketing, telemarketing, or sale of magazines, magazine subscriptions, magazine services or magazine subscription services, or the purchasing or servicing of magazine subscription orders.
- K. **"Relating to"** shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.
- L. **"Telemarketing Entity"** shall mean:
- (a) Countrywide Periodicals, Inc.; Countrywide Periodicals, LLC; Customer Service, Inc.; JBS Enterprises LLC; Periodicals; Lavell Enterprises; Magazine Services, Inc.; Old West Publications; Romp Inc.; U.S. Magazine Service; or Your Magazine Provider; their wholly or partially owned subsidiaries, incorporated and unincorporated divisions, joint ventures, operations under assumed names, and affiliates; and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of any of the foregoing;
 - (b) Any entity involved in **Magazine Sales** that is owned, operated, controlled, managed, or directed, in whole or in part, by Jason W. Ellsworth, Elizabeth J. Hartman, Louis J. Laverne, Wayne Shiever; or
 - (c) Any entity involved in **Magazine Sales** using any of the following addresses for any purpose: 737 Highway 93 N, Hamilton, MT; 11300 Highway 93 N, Suite K, Lolo, MT; 1073 Golf Course Rd, Hamilton, MT; P.O. Box 750, Lolo, MT; or P.O. Box 770, Lolo, MT.
- M. **"Training Materials"** shall mean any handbooks, guidelines, outlines, presentations, memos, notes, or related documents that describe any policy, procedure, or practice of any **Telemarketing Entity**, including but not limited to **Magazine Sales**, billing, customer service, sales techniques, and compliance with the Stipulated Final Judgment and Order in *FTC v. Your Magazine Provider, Inc.*, No. 08-64 (D. Mont, Oct. 7, 2009), the Telemarketing Sales Rule (16 C.F.R. Part 310), and the FTC Act (15 U.S.C. § 45)

N. **“You” and “Your”** shall mean the person or entity to whom this CID is issued.

II. INSTRUCTIONS

A. **Sharing of Information:** The Commission often makes its files available to other civil and criminal federal, state, local, or foreign law enforcement agencies. The Commission may make information supplied by you available to such agencies where appropriate pursuant to the Federal Trade Commission Act and 16 C.F.R. § 4.11 (c) and (j). Information you provide may be used in any federal, state, or foreign civil or criminal proceeding by the Commission or other agencies.

B. **Meet and Confer:** You must contact **Megan Bartley at (202) 326-3424** as soon as possible to schedule a meeting (telephonic or in person) to be held **within fourteen (14) days after receipt of this CID**, or before the deadline for filing a petition to quash, whichever is first, in order to discuss compliance and to address and attempt to resolve all issues, including issues relating to protected status and the form and manner in which claims of protected status will be asserted, and the submission of ESI and other electronic productions as described in these Instructions. Pursuant to 16 C.F.R. § 2.7(k), you must make available personnel with the knowledge necessary for resolution of the issues relevant to compliance with this CID, including but not limited to personnel with knowledge about your information or records management systems, relevant materials such as organizational charts, and samples of material required to be produced. If any issues relate to ESI, you must make available a person familiar with your ESI systems and methods of retrieval.

C. **Applicable time period:** Unless otherwise directed in the specifications, the applicable time period for the request shall be from **January 1, 2009 until the date of full and complete compliance with this CID**.

D. **Claims of Privilege:** If any material called for by this CID is withheld based on a claim of privilege, work product protection, or statutory exemption, or any similar claim (*see* 16 C.F.R. § 2.7(a)(4)), the claim must be asserted no later than the return date of this CID. In addition, pursuant to 16 C.F.R. § 2.11(a)(1), submit, together with the claim, a detailed log of the items withheld. The information in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. Submit the log in a searchable electronic format, and, for each document, including attachments, provide:

1. Document control number(s);
2. The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);
3. A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;
4. The date the material was created;

5. The date the material was sent to each recipient (if different from the date the material was created);
6. The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;
7. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors;
8. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;
9. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;
10. The factual basis supporting the claim that the material is protected; and
11. Any other pertinent information necessary to support the assertion of protected status by operation of law.

16 C.F.R. § 2.11(a)(1)(i)-(xi).

In the log, identify by an asterisk each attorney who is an author, recipient, or person copied on the material. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, provide in the log the information required by Instruction D.6. 16 C.F.R. § 2.11(a)(2). The lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim of protected status must attest to the log. 16 C.F.R. § 2.11(a)(1).

If only some portion of any responsive material is privileged, all non-privileged portions of the material must be submitted. Otherwise, produce all responsive information and material without redaction. 16 C.F.R. § 2.11(c). The failure to provide information sufficient to support a claim of protected status may result in denial of the claim. 16 C.F.R. § 2.11(a)(1).

- E. **Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this CID. The Commission may require the submission of additional documents at a later time during this investigation. Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this investigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise. See 15 U.S.C. § 50; see also 18 U.S.C. §§ 1505, 1519.
- F. **Petitions to Limit or Quash:** Any petition to limit or quash this CID must be filed with

the Secretary of the Commission no later than twenty (20) days after service of the CID, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of protected status or other factual and legal objections to the CID, including all appropriate arguments, affidavits, and other supporting documentation. 16 C.F.R. § 2.10(a)(1). Such petition shall not exceed 5,000 words as set forth in 16 C.F.R. § 2.10(a)(1) and must include the signed separate statement of counsel required by 16 C.F.R. § 2.10(a)(2). **The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process. 16 C.F.R. § 2.7(k); see also § 2.11(b).**

- G. **Modification of Specifications:** If you believe that the scope of the required search or response for any specification can be narrowed consistent with the Commission's need for documents or information, you are encouraged to discuss such possible modifications, including any modifications of definitions and instructions, with **Megan Bartley** at **(202) 326-3424**. All such modifications must be agreed to in writing by the Bureau Director, or a Deputy Bureau Director, Associate Director, Regional Director, or Assistant Regional Director. 16 C.F.R. § 2.7(l).
- H. **Certification:** A responsible corporate official shall certify that the response to this CID is complete. This certification shall be made in the form set out on the back of the CID form, or by a declaration under penalty of perjury as provided by 28 U.S.C. § 1746.
- I. **Scope of Search:** This CID covers documents and information in your possession or under your actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, and other agents and consultants, whether or not such documents and information were received from or disseminated to any person or entity.
- J. **Document Production:** You shall produce the documentary material by making all responsive documents available for inspection and copying at your principal place of business. Alternatively, you may elect to send all responsive documents to **Ron Lewis, Federal Trade Commission, 600 Pennsylvania Ave., NW, Mailstop M-8102B, Washington, DC 20580**. Because postal delivery to the Commission is subject to delay due to heightened security precautions, please use a courier service such as Federal Express or UPS. Notice of your intended method of production shall be given by email or telephone to **Megan Bartley** at **mbartley@ftc.gov, (202) 326-3424** at least five days prior to the return date.
- K. **Document Identification:** Documents that may be responsive to more than one specification of this CID need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission. Documents should be produced in the order in which they appear in your files or as electronically stored and without being

manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.

- L. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this CID. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to Commission staff upon request. Copies of marketing materials and advertisements shall be produced in color, and copies of other materials shall be produced in color if necessary to interpret them or render them intelligible.
- M. **Electronic Submission of Documents:** The following guidelines refer to the production of any Electronically Stored Information (“ESI”) or digitally imaged hard copy documents. Before submitting any electronic production, You must confirm with the Commission counsel named above that the proposed formats and media types will be acceptable to the Commission. The FTC requests Concordance load-ready electronic productions, including DAT and OPT load files.
- (1) **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to the FTC as follows:
- (a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;
 - (b) All ESI other than those documents described in (1)(a) above must be provided in native electronic format with extracted text or Optical

Character Recognition (OCR) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (TIFF) or as color JPEG images (where color is necessary to interpret the contents); and

- (c) Each electronic file should be assigned a unique document identifier (“DocID”) or Bates reference.
- (2) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:
- (a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number);
 - (b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and
 - (c) Documents shall be produced in color where necessary to interpret them or render them intelligible.
- (3) For each document electronically submitted to the FTC, You should include the following metadata fields in a standard ASCII delimited Concordance DAT file:
- (a) **For electronic mail:** begin Bates or unique document identification number (“DocID”), end Bates or DocID, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DocID of the attachments (AttachIDs) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;
 - (b) **For email attachments:** begin Bates or DocID, end Bates or DocID, parent email ID (Bates or DocID), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;
 - (c) **For loose electronic documents (as retrieved directly from network file stores, hard drives, etc.):** begin Bates or DocID, end Bates or DocID, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;

- (d) **For imaged hard copy documents:** begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.
- (4) If You intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in Your computer systems or electronic storage media, or if Your computer systems contain or utilize such software, You must contact the Commission counsel named above to determine whether and in what manner You may use such software or services when producing materials in response to this Request.
- (5) Submit electronic productions as follows:
 - (a) With passwords or other document-level encryption removed or otherwise provided to the FTC;
 - (b) As uncompressed electronic volumes on size-appropriate, Windows-compatible, media;
 - (c) All electronic media shall be scanned for and free of viruses;
 - (d) Data encryption tools may be employed to protect privileged or other personal or private information. The FTC accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by the FTC.
 - (e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

**MAGNETIC MEDIA – DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.**

- (6) All electronic files and images shall be accompanied by a production transmittal letter which includes:
 - (a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and
 - (b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the

index both as a printed hard copy and in machine-readable form (provided that the Commission counsel named above determines prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission counsel named above will provide a sample index upon request.

A Bureau of Consumer Protection Production Guide is available upon request from the Commission counsel named above. This guide provides detailed directions on how to fully comply with this instruction.

- N. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information or sensitive health information of any individual, please contact us before sending those materials to discuss whether it would be appropriate to redact the sensitive information. If that information will not be redacted, contact us to discuss encrypting any electronic copies of such material with encryption software such as SecureZip and provide the encryption key in a separate communication.

For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number in combination with one or more of the following: date of birth; Social Security number; driver's license number or other state identification number or a foreign country equivalent; passport number; financial account number; credit card number; or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

- O. **Certification of Records of Regularly Conducted Activity:** Attached is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena You to testify at future proceedings in order to establish the admissibility of documents produced in response to this CID. You are asked to execute this Certification and provide it with your response.

III. SPECIFICATIONS

REQUESTS FOR PRODUCTION OF DOCUMENTS AND ANSWERS TO WRITTEN INTERROGATORIES

- (1) Provide all contracts and agreements, regardless of date, between any **Telemarketing Entity** and any **Magazine Clearinghouse**.
- (2) Provide all documents, regardless of date, relating to any relationship or agreement between any **Telemarketing Entity** and: (a) any other entity engaged in **Magazine Sales**; and (b) any other entity that provides a product or service (other than magazine subscriptions) that any **Telemarketing Entity** markets or sells to consumers.
- (3) For each magazine title for which any **Telemarketing Entity** engages in **Magazine Sales**, provide documents sufficient to show all payment arrangements, including remit rates and any other fees paid to any **Magazine Clearinghouse**.
- (4) Provide: (a) all agent and sub-agent applications and authorizations, regardless of date and regardless of whether the application was approved, between any **Telemarketing Entity** and any **Magazine Clearinghouse** or entity that engages in **Magazine Sales**; and (b) documents sufficient to show that any **Telemarketing Entity** is authorized to offer the subscription pricing and terms for the magazine titles any **Telemarketing Entity** offers to customers.
- (5) For all **Databases** any **Telemarketing Entity** maintains containing any information or data relating to customers, provide: (a) the full and complete database in native format with all available fields and data, including but not limited to all fields relating to customer names and contact information, the magazine titles to which the customer subscribed, all customer inquiries and complaints, and all payments made by customers; and (b) any key or list explaining all fields and codes that appear in the **Database**.

Produce all **Databases** in accordance with **Instruction M (Electronic Submission of Documents)**, including a database schema and any other software or interface required to read or access the data. Provide the full and complete **Database** regardless of whether any information is also provided in response to any other Request.
- (6) Provide documents sufficient to show: (a) all requests any **Telemarketing Entity** submitted to any **Magazine Clearinghouse** to switch a customer's subscription from one magazine title to a new magazine title; and (b) all responses to such requests.
- (7) Provide all scripts, rebuttal scripts, outlines, guides, or related documents, used by any **Telemarketing Entity on or after October 7, 2009**, relating to any communication with customers or prospective customers, including but not limited to outbound sales calls, follow up calls, closing calls, "verification" calls, customer inquiries, complaints, cancellation requests, and refund requests.

- (8) Provide all **Training Materials** for all employees of any **Telemarketing Entity** used in any way **on or after October 7, 2009**.
- (9) Provide: (a) documents sufficient to demonstrate any marketing relationship or affiliation between any **Telemarketing Entity** and any credit card company, bank, or financial institution that relates to any representation any **Telemarketing Entity** made to consumers; and (b) documents sufficient to substantiate claim that any **Telemarketing Entity** contacts consumers because of the consumer's relationship or preferred status with a credit card company, bank, or financial institution.
- (10) Provide documents sufficient to establish the source of all lists of prospective customers and any lead lists.
- (11) Provide all audio recordings of: (a) all customers or prospective customers recorded on each day within the date ranges listed in Appendix A (90 days total); and (b) all customers or prospective customers listed in Appendix B.
- (12) Provide all complaints and inquiries received by any **Telemarketing Entity**, including but not limited to those received from consumers directly or indirectly through any other entity, and provide any communications from or on behalf of any **Telemarketing Entity** in response to such complaints and inquiries.
- (13) For each employee, agent, and consultant of any **Telemarketing Entity** provide each person's: (a) full name, address, phone number, and email address; (b) starting and ending dates of employment; (c) position, role, and responsibilities; (d) terms and amount of compensation; and (e) reason for termination, if terminated.
- (14) Provide documents sufficient to show all merchant account numbers, payment processors, and contacts at each payment processor for any merchant account used by any **Telemarketing Entity**.
- (15) Provide documents sufficient to establish the document retention policies employed by any **Telemarketing Entity** during the **Applicable Time Period**.

INTERROGATORIES

- (1) To the extent not produced in a fully accurate and accessible format in response to Request for Production No. 5, for each customer of any **Telemarketing Entity** from **January 1, 2011** through the date of full and complete compliance with this request, provide the following in a sortable spreadsheet (in MS Excel, MS Access, or other format allowable under the **Instructions**):
 - (a) Customer First Name; (b) Customer Last Name; (c) Street Address; (d) Phone Number; (e) Sales Date (date of telemarketing sales call); (f) Total Amount Paid (total amount paid by customer); (g) Monthly Payment Amount (monthly amount paid by customer); (h) Payment Dates (date of first and last payment by customer); (i) Orders Requested (magazine titles and subscription length requested by customer); (j)

Submission Date (date each magazine title was submitted to a **Magazine Clearinghouse** or publisher for fulfillment); (k) Orders Submitted (magazine titles and subscription length submitted to a **Magazine Clearinghouse** or publisher on a customer's behalf); (l) Confirmation Date (date fulfillment of requested title and length was confirmed); (m) Remit Amount (amount any **Telemarketing Entity** remitted to secure the fulfillment); and (n) Remit Date (date any **Telemarketing Entity** paid remit amount).

- (2) Identify all officers, directors, managers, and owners for any **Telemarketing Entity**, and, for each individual or entity, state the corresponding dates and ownership share.

APPENDIX A
Dates for Audio Recording Production (Request for Production 11)

1	3/26/2012 – 3/30/2012
2	6/4/2012 – 6/8/2012
3	6/18/2012 – 6/22/2012
4	7/2/2012 – 7/6/2012
5	8/6/2012 – 8/10/2012
6	8/13/2012 – 8/17/2012
7	9/10/2012 – 9/14/2012
8	11/5/2012 – 11/9/2012
9	11/12/2012 – 11/16/2012
10	12/3/2012 – 12/7/2012
11	12/10/2012 – 12/14/2012
12	12/17/2012 – 12/21/2012
13	12/24/2012 – 12/29/2012
14	1/28/2013 – 2/1/2013
15	2/4/2013 – 2/8/2013
16	2/11/2013 – 2/15/2013
17	2/18/2013 – 2/22/2013
18	2/25/2013 – 2/29/2013

APPENDIX B
Consumers for Audio Recording Production (Request for Production 11)

	LAST NAME	FIRST NAME	CITY	STATE
1	Baughman	Thomas	Anacoco	LA
2	Chung	Dahwa	Morrisville	NC
3	Covarruvas	Jess	Stockton	CA
4	Diehl	Rachelle	Bella Vista	CA
5	DiNapoli	Kate	Concord	NH
6	Eason	Brandon	Norfolk	VA
7	Faulstick	Joseph	Sammamish	WA
8	Franklin	Kevin	Louisville	KY
9	Gilmer	Jeffery	Rome	GA
10	Gluntz	Belinda	Soquel	CA
11	Hefner	Brittany	Tiffin	OH
12	Mackie	Elizabeth	Buxton	ME
13	Mendez	Tracie	Brookings	SD
14	Moua	Gillian	Hickory	NC
15	Nunziata	Gina	West Haven	CT
16	Perryman-Vasquez	Maria	San Bernardino	CA
17	Preseault	Kristen	Bradenton	FL
18	Rodriguez	Norma	Brooklyn	OH
19	Rowland	Jessica	West Windsor	NJ
20	Ruelas	Rabekah	Lancaster	CA
21	Slaton	Christopher	Wolfforth	TX
22	Smith	Emily	Cuyahoga Falls	OH
23	Sorriso	Angela	Cicero	IL
24	Spinelli	Joseph	Old Bridge	NJ
25	Topel	Jessica	Rockville	MD
26	Wood	Aliscia	Buffalo	MN

FEDERAL TRADE COMMISSION v.
COUNTRYWIDE PERIODICALS, LLC.

PETITION EXHIBIT 6

***FTC v. Nat'l Processing Co.*, No. 13-23437-MC-ROSENBAUM (S.D. Fla. Dec. 18, 2013) (unpublished opinion)**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 13-23437-MC-ROSENBAUM

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

NATIONAL PROCESSING CO. and VANTIV,
INC.,

Respondents.

ORDER GRANTING PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA

This matter is before the Court on the Federal Trade Commission's ("FTC") Petition to Enforce Administrative Subpoena [ECF No. 1]. In this action, the FTC seeks to compel compliance with two of its Civil Investigative Demands ("CIDs") that were issued to Respondents in relation to an ongoing FTC enforcement investigation. The Court issued an Order To Show Cause on October 23, 2013, directing Respondents to either comply with the CIDs or to show cause why they are not required to do so. ECF No. 6. Respondents filed a response to the Court's Order, and the Court held a hearing on the matter on November 25, 2013. For the reasons set forth below, the Court grants the FTC's Petition.

The CIDs at issue are related to an FTC enforcement action against A+Financial Center, LLC, brought in this district before Judge Graham. *See FTC v. A+Financial Ctr., LLC*, No. 2:12-CV-14373-DLG, ECF No. 1 (S.D. Fla. Oct. 23, 2012). The FTC's complaint in that case alleged that A+Financial violated Section 5(a) of the Federal Trade Commission Act ("FTC Act") and the Telemarketing and Consumer Fraud and Abuse Prevention Act by deceptively marketing credit-card

interest-rate-reduction services to consumers struggling with high credit-card debt, illegally collecting an advance fee for their purported services, and illegally using prerecorded calls to contact consumers. *See* ECF No. 1 at 4-5. The FTC avers that Respondent National Processing Co. (“NPC”) processed the purportedly illegal advance fees that consumers paid to A+Financial, and NPC is a wholly owned subsidiary of Respondent Vantiv, Inc. As a result, the FTC issued the CIDs to Respondents in order to investigate whether Respondents may have violated the FTC’s Telemarketing Sales Rules by assisting A+Financial’s violations. In the A+Financial action, the FTC subsequently served Respondents with subpoenas under Rule 45, Fed. R. Civ. P., seeking the same information. Respondents have complied with neither the Rule 45 subpoenas nor the FTC CIDs. Respondents contest the FTC’s present Petition on the grounds that the FTC is not permitted to seek the same information through both CIDs and Rule 45 subpoenas.

At the show-cause hearing, the parties acknowledged that the sole issue in this matter is whether the A+Financial litigation constitutes an adjudicatory proceeding as to NPC and Vantiv, such that the FTC lacks authority to enforce the CIDs in this matter. The FTC Act authorizes the FTC to gather information and to investigate “from time to time the organization, business, conduct, practices and management of any person, partnership, or corporation engaged in or whose business affects commerce.” 15 U.S.C. § 46(a). In this regard, the FTC is authorized to issue CIDs in aid of its investigative authority “before the institution of any proceedings.” 15 U.S.C. § 57-b-1(c)(1). What the parties dispute is whether the language “any proceedings” necessarily implies proceedings against the entity or individual subject to the CIDs. The FTC contends that because no enforcement action has yet been commenced against Respondents, the FTC retains its authority to investigate Respondents pursuant to the CIDs. Respondents argue, however, that the Rule 45 subpoenas issued

in the A+Financial litigation are adjudicative in nature and thus foreclose the FTC's ability to enforce the CIDs. Respondents conceded at the show-cause hearing that the Court's determination on this issue is dispositive of whether the Court should grant the FTC's Petition in this matter.

The FTC relies on several cases in support of its position that a "proceeding" with respect to a party does not begin until the filing of a complaint against that particular party. In *Genuine Parts Co. v. FTC*, 445 F.2d 1382 (5th Cir. 1971), the Fifth Circuit distinguished between investigatory and adjudicatory proceedings in determining the point at which due-process rights come to bear in an administrative action. The court noted that the purpose of an investigative proceeding "is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the (agency's) judgment, the facts thus discovered should justify doing so." 445 F.2d at 1388 (quoting *Okla. Press Publishing Co. v. Walling*, 327 U.S. 186, 201 (1946)) (internal quotation marks omitted). While an investigation discovers and produces evidence, an adjudication tests such evidence upon a record in an adversary proceeding. *Id.* With this distinction in mind, the court held that "there is no shift from the investigative to the adjudicative stage until a complaint is filed and served by a Commission on the party charged." *Id.*

In *United States v. Anaconda*, 445 F. Supp. 486 (D.D.C. 1977), the court held that actions of the Consumer Product Safety Commission do not enter the adjudicatory phase until issuance of a Notice of Enforcement. In that case, the respondents contested the Commission's investigatory subpoenas on the grounds that the proceedings had become adjudicative in nature. 445 F. Supp. at 496. Because no administrative complaint had been filed against the respondents, however, the court rejected the respondents' contention on this issue. *Id.* at 497.

Finally, in *In re Horizon*, 88 F.T.C. 208 (1976), the administrative-law judge denied a motion to quash subpoena duces tecum where the purpose of the subpoenas was to determine whether the respondent's lenders had themselves violated section 5 of the FTC Act. In so holding, the court noted that the FTC "may conduct such investigations a[s] it deems necessary even though such investigations may cover ground which is already the subject of an adjudicative proceeding." *Id.* (citing *FTC v. Waltham Watch Co.*, 169 F. Supp. 614, 620 (S.D.N.Y. 1959)).

Respondents are correct that none of these cases precisely addresses the situation at hand, namely, whether the FTC can simultaneously seek both CIDS and Rule 45 subpoenas. Nonetheless, the Court is persuaded that the FTC's authority to issue CIDS is not terminated upon the commencement of litigation against separate, albeit related, parties. The Court has found no support for Respondents' broad definition of "proceeding" under the statute. Logic in this instance dictates that reference to the commencement of a proceeding necessarily implies a proceeding against the party that is the subject of the agency's investigation. To hold otherwise would significantly hinder the FTC's investigative authority under the Act, as it would prevent the FTC from investigating other instances of wrongdoing any time any litigation commenced against a related party. There is simply no basis for Respondents' assertion that a lawsuit to which they are not parties summarily precludes enforcement of administrative CIDs.

Indeed, courts have upheld administrative subpoenas even where litigation had already commenced against the party subject to the subpoena. In *Resolution Trust Corp. v. Grant Thornton*, 41 F.3d 1539 (D.C. Cir. 1994), for example, the District of Columbia Circuit noted that an agency's investigative powers "survive the commencement of litigation where the agency seeks to uncover *additional wrongdoing*." (emphasis in original). Here, that is precisely what the FTC asserts that

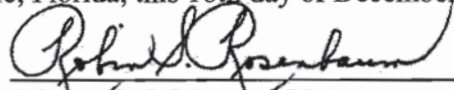
it is doing. Specifically, the FTC seeks to uncover additional wrongdoing by the Vantiv entities, separate and apart from A+Financial's alleged violations.

While the FTC has proceeded against A+Financial, no formal complaint has yet been filed against Respondents, nor has the FTC decided whether it will ultimately pursue legal action against them. The Rule 45 subpoenas do not alter this conclusion. The Court does not agree with Respondents's contention that the subpoenas render the proceeding adjudicatory as to them. Rule 45 is employed for the purpose of obtaining documents from non-parties. *See Palacio v. Citimortgage, Inc.*, No. 12-81058-CIV, 2013 WL 1092839, at *1 (S.D. Fla. Mar. 15, 2013) ("Rule 45 subpoenas are typically employed to obtain documents from non-parties and . . . the Federal Rules of Civil Procedure provide for other methods to obtain discovery documents from parties to a lawsuit."). While the rule is employed in an adjudicatory context insofar as the Federal Rules of Civil Procedure are utilized in civil proceedings, that mere fact does not make the proceeding adjudicatory as to the non-party that is subject to the subpoena. In short, the A+Financial litigation is not a "proceeding" that terminates the FTC's investigatory authority with respect to Respondents, and thus, the FTC retains its authority to issue CIDs to NPC and Vantiv.

Respondents also assert that the Petition should be denied because the FTC's issuance of the Rule 45 subpoenas is "nothing but an attempt to end-run the confidentiality provisions" with respect to the CID materials. ECF No. 7 at 10. In brief, CID materials are accorded certain confidentiality protections by statute that are not present under the Federal Rules of Civil Procedure. While the Court understands Respondents' confidentiality concerns, their dispute lies with the issuance of the Rule 45 subpoenas, which are not before this Court. The Court thus lacks authority to grant Respondents relief in this regard.

Accordingly, it is **ORDERED AND ADJUDGED** that the Petition to Enforce Administrative Subpoena [ECF No. 1] is **GRANTED**. Respondents NPC and Vantiv are ordered to comply with the FTC's CIDs. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in Fort Lauderdale, Florida, this 18th day of December 2013.



ROBIN S. ROSENBAUM
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of record