

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

Office of the Secretary

March 9, 2010

VIA E-MAIL AND EXPRESS MAIL

D. R. Horton, Inc.
Lennar Corp.
c/o Mitchel H. Kider, Esquire
Weiner Brodsky Sidman Kider PC
1300 19th Street, N.W., 5 Floor
Washington, DC 20036

Re: Petitions to limit or Quash Civil Investigative Demands Issued to D. R. Horton, Inc. ("DRH") and Lennar Corp. ("LC"), File Nos. 102-3050 & 102-3051

Dear Mr. Kider:

The Commission is investigating whether DRH and LC, both builders and sellers of homes, have engaged, or are engaging, in unfair acts or practices or have violated, or are violating, the Consumer Credit Protection Act, in their marketing and sales of homes, and their related sales mortgage lending acts and practices. The use of compulsory process for the conduct of these investigations was authorized by the Commission based on two separate Commission resolutions which provide detailed statements of the scope and purpose of these investigations; a copy of each resolution was attached to the Civil Investigative Demands ("CIDs") that were separately served on DRH and LC. See DRH and LH Petitions at 2. On

¹ FTC Resolution Directing Use of Compulsory Process in Nonpublic Investigation: Unnamed Violators of the Equal Credit Opportunity Act (Aug. 1, 1994) describes the nature and scope of investigation authorized as follows:

To determine whether certain unnamed persons, partnerships, corporations, associations or other entities have been or may be engaged in acts or practices in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq. and Regulation B, 12 C.F.R. § 202 et seq. and to determine whether these persons, partnerships, corporations, associations or other entities have been or are engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such acts and practices may include, but are not limited to, discriminating in the extension of credit on the basis of racial origin, color, age, religion, receipt of public assistance income, or because an applicant in good faith exercised a right under the

Consumer Credit Protection Act. This investigation is also to determine whether
Commission Action to obtain redress of injury to consumers, or otherwise would be
in the public interest.

Id. at 1.

FTC Resolution Regarding Use of Compulsory Process in Non-Public Investigations of
Various Unnamed Loan Brokers, Lenders, Loan Servicers, and Other Marketers of Loans (Dec.
15, 2008) describes the nature and scope of investigation authorized as follows:

To determine whether unnamed persons, partnerships, corporations, or others
have engaged or are engaging in deceptive or unfair acts or practices in or
affecting commerce in the above

information.⁴ As discussed below, Petitioners have not provided adequate legal or factual support for the relief requested. Accordingly, their Petitions shall be denied, and the CIDs will be returnable on March 24, 2010.

This letter advises you of the Commission's disposition of the Petitions. This ruling was made by Commissioner Pamela Jones Harbouring as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.⁵

I. Preliminary Matters and Standard of Review

Petitioners are substantial, multistate builders of homes. DRH "is a Fortune 500 company and, during the time period in issue here, was ranked as the largest homebuilder by units sold in the United States since 2003. The Company employs approximately 8,000 workers nationwide. [DRH] builds single-family homes in 83 markets in 27 states. . . . The company has four homebuilding segments: North, South, East, and West, which consist of six geographical divisions."⁶ LC "is a Fortune 500 company that was ranked as the nation's third largest homebuilder in 2008. Currently [LC] builds single-family homes in 41 markets in 16 states. . . . The Company has four homebuilding segments: East, Central, West, and Houston. These segments have homebuilding operations in . . . 14 states." Each company appears to have a large number of offices and facilities spread over a substantial portion of this country, and the managers of each office and facility have some degree of discretion regarding local operations.⁸ Each Petitioner has a subsidiary or affiliated company that provides mortgage loans and other

⁴ DRH Petition at 13 and 33; LC Petition at 12, n.4 and 29.

⁵ This letter ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

⁶ DRH Petition at 3.

⁷ LC Petition at 2.

⁸ See, e.g., DRH Petition at 16 (" . . . a full response to this interagency [regarding compliance training of employees] will require the Company to retrieve information from every office that was in existence at any time [during the relevant time period]"); LC Petition at 42 (" . . . due to the decentralized nature of its homebuilding operations, this specification [the performance evaluation process] presents an undue burden because each office has responsibilities for the supervision of its employees and overall operation.")

⁹ DRH Petition, Declaration of Jennifer Hedgepeth (Dec. 11, 2009) at ¶¶ 1-5 (DH Mortgage Co., Ltd is an indirect subsidiary of DRH) (“Hedgepeth De

FTC v. Texaco, Inc., 555 F.2d 862, 882 (

Additionally, both Petitions claim protection from disclosure of confidential business and proprietary information, trade secrets, and the privacy rights of third parties (including the Petitioners' own current and former employees) DRH Petition at 13; LC Petition at 12, n.4. Petitioners have provided no legal authority that supports either claims of privilege for any such materials or the standing of the companies to raise such claims on behalf of third parties. Indeed, the putative assertion of the privacy rights of third parties, especially those of their own employees, could easily be supposed to be little more than a thinly-veiled pretext for the corporations to seek to obtain privacy rights to which they were not otherwise entitled. Further, Petitioners have made no showing that the confidentiality provisions of 15 U.S.C. § 57b-2 and Commission Rule 4.10, 16 C.F.R. § 4.10, would be inadequate to protect anyone's legitimate interests in avoiding public disclosure of confidential or sensitive information.

Finally, Petitioners claim that the records of their voluntary compliance programs are protected from disclosure by the "self-evaluative reports privilege" (DRH Petition at 44, LC Petition at 42); however, those claims are not even supported by their own cited authority 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5431 (General Rule—Other Non-Privileges) at 716 (Supp. 2009):

In recent years there has been some recognition by federal courts of a privilege for certain corporate records under the rubric of 'self-evaluative reports.' . . . [It] is generally used to refer to records required to be kept by some administrative regulation and that may contain admissions or statistics of use to an opposing litigant in a suit arising under the regulatory scheme of which there is a part. The decisions are divided, and there seems little justification for creating a new privilege if the matter sought to be protected falls outside of the required reports privilege. (footnotes omitted).

Id. The Petitioners offer no facts or law that would support the conclusion that their voluntary monitoring of compliance with their own sales and marketing policies would, or should, be entitled to protection under the required records privilege.²⁰

²⁰ These Petitions contain a substantial number of other objections that are wholly without merit. Many of those claims turn upon unreasonable constructions of the specifications or instructions of the CIs, including various definitions. For instance, there is an instruction advising DRH and LC to consult with staff prior to compliance, if their responses were likely to contain sensitive, personal information. That instruction was not a direction to redact information. Presumably during that consultation, there would have been a discussion of whether redaction or encryption would be the appropriate manner of dealing with the problem.

V. CONCLUSION AND ORDER

For all the foregoing reasons, IT IS ORDERED THAT DRH's and IC's Petitions be, and they hereby are, DENIED.

IT IS FURTHER ORDERED THAT DRH and IC shall comply with the CDs at issue on March 24, 2010.

By direction of the Court, the Court hereby orders that the Court shall be bound by the Court's order.