

**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)	
)	PUBLIC
)	
FEBRUARY 13, 2013 CIVIL INVESTIGATIVE DEMAND ISSUED TO JERK, LLC)	File No. 122 3141 April 17, 2013
)	
)	

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

By OHLHAUSEN, Commissioner:

Jerk, LLC has filed a petition to quash a civil investigative demand (“CID”) issued by the Federal Trade Commission (“FTC” or “Commission”) on February 13, 2013. For the reasons stated below, the petition is denied.

I. BACKGROUND

Jerk, LLC (“Jerk”) operates Jerk.com, a social networking website that contains millions of unique profiles. Information collected and displayed in profiles includes photographs, names, ages, email and physical addresses, telephone numbers, and opinions. Information on the website includes, among other things, information that is publicly available on other Internet sites and newly created user-generated content. Jerk.com encourages users to add personal information to profiles and to rate the profiled individuals as either “jerks” or “saints.”

Jerk offers consumers the opportunity to bid or vote for “Jerk” or “Saint of the Day” for \$1.00. According to Jerk’s petition, a consumer who wants his or her profile removed from Jerk.com may pay a \$25 fee for customer support, which is offered on the website. The petition also claims that Jerk receives requests to remove a profile by email and through its Digital Millennium Copyright Act (“DMCA”)¹ agent. In its petition, Jerk also claims that it removes children’s profiles regardless of the source of the removal request.

¹ 17 U.S.C. § 512(C)(2). The DMCA, *inter alia*, implements two World Intellectual Property Organization treaties that provide copyright protection to certain works among member countries. The DMCA also limits liability of online service providers for copyright infringement

In April 2012, after receiving hundreds of complaints about Jerk, FTC staff opened an investigation. The investigation focused initially on whether Jerk.com was collecting information from children in violation of the Children’s Online Privacy Protection Act (“COPPA”).² On July 27, 2012, the Commission issued a CID for documents and interrogatories for information relating to Jerk.com’s data collection practices and its profiles of children. The CID was issued pursuant to a Commission Resolution Directing the Use of Compulsory Process in a Non-Public Investigation Into Violations of COPPA and Rule, or Section 5 of the FTC Act, in Connection With the Online Collection, Use, and/or Disclosure of Children’s Personal Information, File No. P994504.

After reviewing Jerk’s responses to the CID and information from other sources, including consumer complaints, staff determined that it was necessary to expand the focus of the investigation also to inquire into the source of information appearing on Jerk.com – in particular, whether Jerk may have created profiles on its website by harvesting photos from the Internet. In various fora, consumers have complained that Jerk.com contains private photos from Facebook. On February 13, 2013, as part of the broader inquiry, the Commission issued a CID to Jerk seeking testimony on ten subjects relating to Jerk’s responses to the prior CID; Jerk’s operations; Jerk’s interactions with other social media sites, including Facebook and Twitter; and Jerk’s communications with consumers. The CID was issued pursuant to a different resolution that reflects the broader investigation, Commission Resolution Directing the Use of Compulsory Process in a Non-Public Investigation of Acts and Practices Related to Consumer Privacy and/or Data Security, File No. P954807. The CID asked Jerk to designate and make available one or more officers, directors, or others to testify on Jerk’s behalf at an investigational hearing on April 3, 2013 at the FTC’s San Francisco office.

On March 15, 2013, Jerk submitted the instant petition seeking to quash the CID seeking its testimony on the topics enumerated above.³

when the service provider has met several conditions, including the designation of an agent to receive notifications of claimed infringement and, upon receiving proper notification of claimed infringement, the provider takes down or blocks access to the material. *See* The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary (Dec. 1998), available at <http://www.copyright.gov/legislation/dmca.pdf>.

² 15 U.S.C. §§ 6501-6506.

³ At a meet-and-confer conference on March 14, 2013, Jerk’s counsel stated that the only individuals knowledgeable about Jerk reside in Romania. Although Jerk’s petition to quash does not object on this basis, we note that “[t]he burden of showing that the request is unreasonable is on the subpoenaed party.” *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*). Moreover, the Commission has previously recognized that CIDs that call for testimony are less likely to be unduly burdensome than CIDs that call for large-scale document productions. *See LabMD, Inc.*, No. 102-3099, at 7 (Apr. 20, 2012), *aff’d*, *LabMD, Inc.*, No. 102-3099 (June 21, 2012) (enforced). This is especially true in this case because FTC staff have offered to mitigate any burden that may be imposed by this CID by arranging for a teleconference and a translator for any witness who resides abroad.

II. ANALYSIS

A. The Applicable Legal Standards

Agency compulsory process 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 that inquiry is defined in the investigatory resolution.⁴ It is well established that agencies have wide latitude to determine what information is relevant to their law enforcement investigations and are not required to have “a justifiable belief that wrongdoing has actually occurred.”⁵

Jerk contends that the CID seeking the testimony of a corporate representative does not satisfy these standards. First, Jerk claims that the Commission resolution authorizing the CID does not provide adequate notice of the nature and scope of the investigation. Second, Jerk argues that the ten subjects listed in the CID are not relevant to an investigation of acts and practices related to consumer privacy and/or data security.

B. The CID is Supported by a Specific and Valid Resolution

The resolution authorizing the process provides the requisite statement of the purpose and scope of the investigation.⁶ A resolution may define the investigation generally, and need not state the purpose with specificity, or tie it to any particular theory of violation.⁷ In issuing the instant CID, the Commission relied on the omnibus Resolution Directing Use of Compulsory Process in Nonpublic Investigation of Acts and Practices Related to Consumer Privacy and/or Data Security, File No. P954807 (Jan. 24, 2013). That resolution authorizes the use of compulsory process:

⁴ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977).

⁵ *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.”).

⁶ *Invention Submission*, 965 F.2d at 1091-92; *accord, Texaco*, 555 F.2d at 874; *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979).

⁷ *Invention Submission*, 965 F.2d at 1090; *Texaco*, 555 F.2d at 874 & n.26; *FTC v. Nat’l Claims Serv., Inc.*, No. S 98-283 FCD DAD, 1999 WL 819640, at *2 (E.D. Cal. Feb. 9, 1999) (citing *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 477 (9th Cir. 1988)).

To determine whether unnamed persons, partnerships, corporations, or others are engaged in, or may have engaged in, deceptive or unfair acts or practices related to consumer privacy and/or data security, including but not limited to the collection, acquisition, use, disclosure, security, storage, retention, or disposition of consumer information, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such investigation shall, in addition, determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

Jerk contends that the Resolution is “so broad” that “[t]here is no way to determine whether the information identified in the CID as the subjects of the testimony bears any relation to a lawful investigation.”⁸ A general statement of the purpose and scope of the investigation is sufficient, however, and courts have enforced compulsory process issued under similarly broad resolutions.⁹ We note, moreover, that Resolution No. P954807 is more specific in its description of the purpose and scope of the investigation than its predecessor, which both the Commission and reviewing courts found sufficiently specific.¹⁰

Jerk’s reliance on the decision in *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980), is misplaced. Although *Carter* held that a bare reference to Section 5 of the FTC Act, without more, “would not serve very specific notice of purpose,” the Court approved the resolution at issue, noting that it also referred to specific statutory provisions of the Cigarette Labeling and Advertising Act, and further related it to the subject matter of the investigation.¹¹ With this additional information, the Court felt “comfortably 0Wt,sted of th

substantially more information than the bare text of Section 5, and thus adequately notifies Jerk of both the nature and scope of the investigation.

Similarly, *FTC v. Foremost-McKesson, Inc.*, 1981 WL 2029, at *4 (S.D.N.Y. 1981), does not support Jerk's argument. Jerk cites this case for its discussion of the legislative history underpinning Section 20 of the FTC Act, which requires that CIDs be signed by a Commissioner acting pursuant to a resolution. But it is plain that the CID here meets the requirements of Section 20 because the CID and its authorizing resolution "state the nature of the conduct constituting the alleged violation . . . and the provision of law applicable to such violation[.]" *i.e.*, unfair or deceptive acts or practices involving consumer privacy and/or data security in a variety of contexts, and Section 5.¹³ No more specific notice need be given.

Jerk's argument also fails in light of the history of communications between the company and the FTC. The purpose of an authorizing resolution is to notify a CID recipient of the nature and scope of the investigation.¹⁴ Given the dialogue between staff and counsel for Jerk, there is no doubt that the company is aware of the nature of staff's investigation, particularly in light of Jerk's response to the earlier CID and the meet-and-confer discussion. The Commission has previously found that such interactions may be considered along with the resolution in evaluating the notice provided to Petitioners: "[T]he notice provided in the compulsory process resolutions, CIDs, and other communications with Petitioner more than meets the Commission's obligation of providing notice of the conduct and the potential statutory violations under investigation."¹⁵

C. Jerk's Objections to Providing Testimony on Each of the Specifications Listed in the CID are Without Merit.

Jerk raises various challenges to each of the ten specific subjects for which the Commission seeks testimony. The ten subjects identified in the CID are listed as specifications III.A. to III.J.:

- D. The Company's relationship with ten named entities and individuals.
- E. Applications on the Facebook platform that the Company currently operates, has operated, or has paid a third party to operate.
- F. Information and photos that the Company obtained from Facebook and Twitter that have been displayed on Jerk.com.
- G. The number of unique monthly visitors to Jerk.com.
- H. Technical information about how Jerk.com operates, including the Company's current and former data hosts.
- I. The Company's policies, procedures, and practices relating to consumer requests to remove information from Jerk.com, including requests to remove copyrighted material and profiles about children.
- J. The Company's policies, procedures, and practices relating to consumer complaints.

The first three subjects identified in the CID's Specifications (III.A. to III.C.) seek testimony regarding the topics covered by the interrogatories and document requests in the earlier CID and procedures used by Jerk to produce its responses to the earlier inquiry. Jerk challenges these specifications on the grounds that the July 27, 2012, CID was issued pursuant to a different resolution, one that related to protecting children's privacy. But it cannot be unexpected that an investigation that initially focused on possible violations of COPPA or the FTC Act to protect children's privacy may uncover conduct or practices that might raise additional privacy concerns. Thus, the fact that the direction of the investigation has changed or expanded since the initial CID was issued in July 2012 has no bearing on our disposition of the instant petition to quash. Indeed, in *FTC v. Texaco, Inc.*, the D.C. Circuit recognized that investigating agencies need not be locked into a single theory of violation when it explained that "in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case. . . . The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue."¹⁶ As the D.C. Circuit acknowledged, "a wide range of investigation is necessary and appropriate where . . . multifaceted activities are involved, and the precise character of possible violations cannot be known in advance."¹⁷ The

¹⁶ *Texaco*, 555 F.2d at 874. This holding from *Texaco* has been repeatedly reaffirmed, most recently in *FTC v. Church & Dwight Co.*, 747 F. Supp.2d 3, 6, *aff'd*, 665 F.3d 1312 (D.C. Cir. 2011).

¹⁷ *Texaco*, 555 F.2d at 877. Jerk has not directly challenged specifications III.A.-III.C. on relevancy grounds. In any event, these specifications seek relevant material because assessing a CID recipient's compliance with and response to compulsory process is a legitimate part of a law enforcement investigation.

only question is whether the February 13, 2013, CID was issued pursuant to a valid Commission resolution that describes the current purpose and scope of the investigation. For the reasons discussed above, we conclude it was.¹⁸

Jerk also challenges Specification III.D., which calls for information on Jerk's relationship with ten individuals, because "it is entirely unclear what that subject matter has to do with the investigation of deceptive or unfair acts or practices related to consumer privacy and/or data security." Thus, Jerk appears to be claiming that this specification is not relevant to the investigatory purpose expressed in the resolution. But, in the context of an administrative CID, "relevance" is defined broadly and with deference to an administrative agency's determination.¹⁹ An administrative agency is to be accorded "extreme breadth" in conducting an investigation.²⁰ As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is "more relaxed" than in an adjudicatory proceeding.²¹ As a result, the agency is entitled to testimony or documents unless the CID recipient can show that the agency's determination is "obviously wrong," or that the testimony or documents are "plainly irrelevant" to the investigation's purpose.²² It is the petitioner's burden to demonstrate that the Commission has exceeded this standard.²³ We find that Jerk has failed to do so. The relationship between Jerk and the named individuals and entities is relevant to identifying those who control, or provide services to, the company, and thus, is relevant to the investigation.²⁴

Jerk further challenges the relevance of Specifications III.E. and III.F, provisions that call for testimony on Jerk's use of the Facebook platform and photos obtained from Facebook and Twitter, on the grounds that "[t]he subject matter expressly relates to publicly available information, [which is] the exact opposite of the Resolution" that addresses consumer privacy

¹⁸ See *CVS Caremark Corp.*, No. 0723119, at 4 (Dec. 3, 2008) ("While those incidents were the initial impetus for the investigation, nothing in the CID resolution limits the scope of the investigation to [the initial focus] --- the resolution authorizes the investigation of all of [the company's] consumer privacy and data security practices.").

¹⁹ *FTC v. Church & Dwight Co., Inc.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

²⁰ *Linde Thomsen Langworthy Kohn & Van Dyke, P.C. v. RTC*

