

After receiving hundreds of complaints, FTC staff opened an investigation of TCN and its practices. As authorized by a Commission approved resolution,¹ the FTC issued a CID to TCN seeking information concerning TCN's advertising, marketing, and sales of educational products and services. Pet. Ex. A, CID attached as Exh. 1. The CID seeks, among other things, information regarding TCN's products and services, and the marketing claims regarding those products and services, including claims regarding the content of its CLMs, TCN's affiliations with universities, cancellation and refund policies, and the nature and terms of loans TCN offers or facilitates to consumers. Counsel for TCN and FTC staff agreed to some limitations of the CID, but could not reach agreement on all issues before the deadline to file this petition. Since TCN filed its petition, staff has further limited the CID.²

As described below, TCN challenges the CID on the ground that it is arbitrary and capricious.³

The standards for evaluating TCN's claims are well established. A CID is impermissibly vague where it lacks reasonable specificity or is too indefinite to enable a responding party to comply.³ A CID is overbroad where it is "out of proportion to the ends sought," and "of such a sweeping nature and so related to the matter properly under inquiry as to exceed the investigatory power."⁴

A CID imposes an undue burden only if compliance threatens to seriously impair or unduly disrupt the normal operations of the recipient's business.⁵ The recipient bears the responsibility of establishing that the burden of compliance is undue.⁶ The recipient must show the "measure of their grievance rather than [asking the court] to assume it."⁷ Of course, balanced against this required showing is the understanding that "any order places a burden on the person to whom it is directed."⁸

We address each challenge particular specification against these standards. We also consider the cumulative effect of Petitioner's challenges and conclude that compliance with the CID does not impose undue burden.

7 K H ' H I L Q H G : R U G ³ 8 P D S D G S U E D , D E F I N E D T H E T E R M " C O M P A N Y " T O M E A N " T H E C O L L E G E N E T W O R K , I N C . A N D I T S W H O L L Y O R P A R T I A L L Y O W N E D S U B S I D I A R I E S , U N I N C O R P O R A T E D D I V I S I O N S , J O I N T V E N T U R E S , O P E R A T I O N S U N D E R A S S U M E D N A M E S , A N D A F F I L I A T E S , I N C L U D I N G C O L L E G E N E T W O R K I N C . A N D T H E C O L L E G E N E T W O R K I N C . , A N D A L L D I R E C T O R S , O F F I C E R S , E M P L O Y E E S , A G E N T S , C O N S U L T A N T S , A N D O T H E R P E R S O N S W O R K I N G F O R O R O N B E H A L F O F T H E F O R E G O I N G . " T H E P H R A S E " A N D A F F I L I A T E S " W A S L A T E R D E L E T E D A F T E R D I S C U S S I O N S B E T W E E N T C N A N D S T A N . T C N S E E K S T O L I M I T T H A T D E F I N I T I O N F U R T H E R . ¹⁰ I T A R G U E S T H A T T H E D E S C R I P T I O N O F " O T H E R P E R S O N S W O R K I N G F O R O R O N B E H A L F O F " T C N I S V A G U E O V E R L Y B R O A D , A N D C O U L D I N C L U D E U N R E L A T E D E N T I T I E S L I K E L E A D V E N D O R S h e P g e n e 4 (e s) - 4 f i n i t i o n

We find that the definition of “Company,” including the challenged phrase, is sufficiently definite. That definition is used routinely in similar FTC CIDs. Nothing about the phrase lacks reasonable specificity or is too indefinite to enable TCN to identify responsive materials.

“At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (the person-hours and cost of meeting the particular specifications at issue).”¹⁴ TCN’s affidavit provides no details regarding the burden associated with searching and retrieving documents and materials from its lead vendors and independent contractors.¹⁵ The affidavit states that TCN has more than 125 lead vendors and 140 independent contractors, Pet. Exh. H (Eyler Affidavit) ¶ 5 but it includes no additional facts to support the conclusion that “[e]ven attempting to obtain information orally [from the independent contractors] would be an expensive, time consuming, and overly burdensome undertaking.” Pet. at 5.

Instead of addressing the burden of searching and retrieving all documents and materials from its lead vendors and independent contractors, Petitioner provides only an example of the number of links or advertisements that are generated by lead vendors and independent contractors demanded by Document Specification 20. Pet. H (Eyler Affidavit) ¶ 5. Petitioner does not identify or provide factual support regarding other types of documents that lead vendors and independent contractors are likely to have, estimate their volume, or provide estimates of the burden of production. Thus, except for Document Specification 20, which is discussed below, TCN has not made a sufficient showing that compliance is unduly burdensome.

TCN asks the Commission to strike Interrogatories 6, 7, 10, 12, 23, 25, 34, and 37c because the word “identify” requires TCN to name the officers, directors, managers, and contact persons of third party businesses or organizations. Pet. at 6. TCN also objects that a telephone number must be provided in addition to the name and business address for the parties. Pet. at 7-8. TCN argues that such demands are oppressive, unreasonable, overbroad and unduly burdensome. As an alternative to its motion to strike the interrogatories, TCN proposes to limit the definition so that TCN would provide only names and job titles or business affiliations for natural persons, and names and addresses for third party businesses or entities.

After TCN filed its petition, FTC staff narrowed the definition of “Identify” to reduce some of TCN’s burden.¹⁵ Although the modified definition is still somewhat broader than the definition TCN proposes in its Petition, we find that it is reasonable. As modified, it asks for business affiliations, business addresses, and telephone numbers for natural persons, and the names and telephone numbers of TCN’s contacts at businesses and organizations. Such information is relevant to the investigation and should be readily available to TCN. In any event, the CID requests for only a limited number of persons or organizations. Consequently, we decline Petitioner’s proposal to limit the definition further.

¹⁴ *Nat’l Claims Serv., Inc.*, 125 F.T.C. 1325, 13289 (1998).

¹⁵ Letter from Thomas N. Dahdouh to Jeanne M. O’Rourke, Apr. 1, 2014). The modified definition states: ‘Identify’ or ‘the Iden 0.77ol2(i)-2(B 0 Tc 0 10(sITJ o)-3(l)-8(ox [65.184 151.836 240 167.604]/i(l)-Tc 0 5J9bITJ o)-3(d-2()-10.(D)-7/

, Q W H U U R J I D W P a l o r y 3 asks TCN to identify

review the files in the databases to address the interrogatories. Now address TCN's objection to producing the databases.

' R F X P H Q W 6 S H F L I L F D W L R Q D Q G TCN seeks to strike the word

production threatens to seriously impair or unduly disrupt the normal operations of TCN's business.¹⁸ Some cost of complying with an investigation is expected

Affidavit) ¶ 3. We disagree with TCN's conclusion about the relevance of some complaints. The affidavit discounts some categories of complaints – such as subject matter that is “too hard” – which may be relevant to the Commission's need to determine whether TCN is providing consumers with the type of test preparation materials that it advertises. While there may be instances where a complaint relates to a customer's personal circumstances, Petitioner does not show these complaints are so prevalent that they present an obstacle to complying with the CID.

Regarding the burden of compliance would require a manual review of customer files at ¶ 5. As noted above, however, in lieu of manual review TCN may produce the customer database. As for the objection to providing email or other documents that discuss complaints and responses to complaints a wide-ranging search throughout the company for responsive documents is unnecessary because Mr. [REDACTED] T3(eces)-54()-10((i)-2(ng5(s)14(C)a 1 T3(eces6(m)(C)a 1 n)-5(

links that they found at two different places (, two different third party websites) arrive at the same webpage or otherwise see the same ad copy, TCN would produce one ad.²³ The same requirement applies to Document Specifications 21, 22, and 28.

In addition, we note that after TCN filed its Petition, FTC staff modified Document Specifications 20 and 22.²⁴

' R F X P H Q W 6 S H F L The Specification seeks all documents relating to TCN's marketing policies, practices, and procedures for consumer phone calls, Internet chats with consumers, email communications with consumers, and in-person communications with consumers. Petitioner contends that Specification 17 imposes undue burden, Pet. at 16 the only facts it provides to support its objection appear to relate to Document Specification 20, which we have already addressed.²⁵ Given the absence of facts to support its claim, it is not possible for us to fully assess Petitioner's proposed limitation to the specification. We note, however, that limiting the production to "any TCN marketing policies and procedures" likely would omit documents relating to the implementation of the policies and procedures, as well as formal and informal "practices" for marketing TCN products and services to consumers. Pet. at 17. Such materials are highly relevant to the purpose of the investigation and TCN, therefore must produce them.

' R F X P H Q W 6 S H F L CNF Dms 18 D Document Specification 20, which seeks documents referring or relating to the target audience of TCN's advertising. TCN argues that a demand for "all documents" "referring or relating to the target audience" would require producing all TCN documents. Pet. at 14-15.

contends that this request imposes undue burden, but TCN provides no factual support for this claim. For example, it has not provided the Commission with an estimate of the number of organizations that have complained, the number of third-party complaints received, or the number of document custodians. In addition, contradicting Petitioner's claimed burden, TCN's Vice President of Call Center Operations has stated that producing certain third-party complaints is "more manageable" because TCN's customer database "contain[s] a field to capture certain types of 'complaints' including those received from a state attorney general, the Better Business Bureau, or even an attorney." Pet. Ex. (Fair Affidavit) ¶¶ 5, 7. Thus, it appears that Petitioner can comply with the specification by producing its customer database as we previously explained, production of the customer database is not an unreasonable burden. We therefore deny Petitioner's request that we strike this specification.

(PD LO D Q G ' R F X P H Q W 6 S H F L I L F D W L R Q D Q G Petitioner seeks leave to file a future petition to quash regarding email if it encounters additional objections after it reviews its email. TCN explains that it "was working with FTC investigators to reach consensus regarding a universe of custodian accounts to retrieve and search and a listing of search terms to apply. That process was necessarily halted by the deadline for the filing of this Petition[.]" Pet.at 12.

As Petitioner has acknowledged, Commission Rule 2.10(a)(1) provides one opportunity for a CID recipient to file a petition to quash. 16 C.F.R. §2.10(a)(1) (petition shall set forth all assertions of protected status or other facts). 16 C.F.R. §2.10(c)(4)(t)-(n)1(a) [(g)(5)(r)40 1 Tf 1d16(y)16o)2]

that Petitioner did not provide the very information that staff needed to properly consider and resolve any lingering issues regarding TCN's obligations to search for emails, we disagree that a refusal to allow another petition to quash is an "arbitrary action" that would "raise[] a question of due process."

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