

Interlocutory Orders, etc.

IN THE MATTER OF
RAMBUS INCORPORATED

Docket No. 9302 – Order, June 14, 2007

**LETTER APPROVING AN ESCROW AGENT AND ESCROW
AGREEMENT**

Dear Mr. Stone and Mr. Melamed:

This letter responds to *Respondent's Proposal Regarding Escrow Agent and Manner of Collection Pursuant to March 16, 2007 Order* dated April 11, 2007, and to the *Supplemental Submission by Rambus Inc. Regarding Escrow Issues* (“Supplemental Submission”) dated May 22, 2007, which were both filed in accordance with Paragraph 1.a.(1) of the *Commission’s Order Granting in Part and Denying in Part Respondent’s Motion for Stay of Final Order Pending Appeal* (March 16, 2007) in the above matter. In these filings respondent Rambus Inc. has sought approval of an escrow agent and an escrow agreement.

After consideration of those filings, the Commission has determined (a) to approve Wells Fargo & Company as an escrow agent and (b) to approve the escrow agreement attached as Attachment A to the Supplemental Submission dated May 22, 2007. In according its approval, the Commission has relied upon the information submitted and representations made in connection with the filings and has assumed them to be accurate and complete.

By direction of the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

COMMONWEALTH MARKETING GROUP, INC.

FTC File No. 912 3352 Decision, March 28, 2007

COMPULSORY PROCESS COMMISSIONER'S RESPONSE TO COMMONWEALTH MARKETING GROUP, INC.'S ("CMG") PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Hicks:

This letter advises you of the disposition of CMG's Petition to quash or limit various specifications of the Civil Investigative Demand ("CID") issued to it on December 13, 2006. For the reasons stated herein, the Commission denies CMG's Petition. Pursuant to 16 C.F.R. § 2.7(e), CMG is ordered to comply with the CID on or before April 9, 2007 at 5:00 p.m. E.S.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4). 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.¹

I. Background and Summary

On December 13, 2006, the Commission issued a CID to CMG as part of an investigation of the sales and marketing activities of CMG. CMG's Petition was timely filed on January 3, 2007. CMG's Petition contends that the CID seeks: (1)

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received 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 by this decision.

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information that is outside the scope of the resolution authorizing the investigation, CMG's Petition at 3; (2) documents that are not adequately identified, *id.* at 4; and (3) information regarding CMG's financial status that Ais entirely unlawful and an abuse of the FTC's powers." *Id.*

The resolution authorizing the CID defines the scope of this investigation as follows:

To determine whether unnamed accessors of consumers' bank accounts are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act. . . by accessing consumers' bank accounts. . . through unfair or deceptive acts or practices. The investigation is also to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

Resolution Directing Use of Compulsory Process in Nonpublic Investigation, Unnamed Accessors of Consumers' Bank Accounts, File No. 912-3552 (Aug. 6, 1991).

II. The Information Requested Is Relevant to the Commission's Investigation

CMG claims there is no nexus between the information requested in interrogatory specifications III.A.1.,2., and 4.-6. and document production specifications III.B.5.-11. and the law enforcement purpose of the investigation as stated in the Resolution authorizing the use of compulsory process.² We disagree. The information sought by each of the enumerated specifications is sufficiently related to the investigation.

² CMG's Petition at 5-7.

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The Commission is entitled to require respondents to provide any information that is “not plainly incompetent or irrelevant to any lawful purpose of the [agency] . . . and not unduly burdensome to produce[.]” *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (internal quotations and citations omitted). Further, “the agency’s own appraisal of relevancy must be accepted so long as it is not obviously wrong.” *Id.* (internal quotations and citations omitted).

“[T]he Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation.” *Id.* at 1090 (citing *Federal Trade Commission v. Texaco, Inc.* 555 F.2d 862, 877 (D.C. Cir. 1977)). Determination of relevancy “in an investigatory proceeding is more relaxed than in an adjudicatory one.” *Id.* The material requested “need only be relevant to the *investigation* — the boundary of which may be defined quite generally, . . . as it was in the Commission’s resolution here. *Id.* (emphasis in original). With these principles in mind, we turn now to the determination of whether the information sought by the challenged specifications is relevant to the scope of the investigation authorized by the Commission’s Resolution of August 6, 1991.

Information sought by CID is relevant to an investigation so long as it is likely to be of some assistance to the Commission in deciding whether there is reason to believe that Section 5 has been violated and whether an enforcement action should be commenced. *Invention Submission Corp.*, 965 F.2d at 1090. The information sought by each of the challenged specifications is clearly relevant to this investigation.

Interrogatory specifications 1 and 2 and document specifications 6 and 7 seek the identification of each person who obtained a credit card from CMG or who CMG enrolled in a particular membership class. The Commission seeks to determine whether CMG may have improperly accessed the bank accounts

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of its customers. Thus, the information requested by these specifications is clearly relevant to identify both witnesses who can provide evidence regarding CMG's marketing practices over time, and persons who might also be victims in the event evidence of a violation is uncovered.

Interrogatory specification 4 and document specification 8 seek the identification of each CMG customer who requested cancellation of either a credit card or membership. Identification of witnesses and potential victims is directly relevant to the investigation.

Interrogatory specification 5 and document specification 11 seek information relating to products and services associated with a membership classification, and the number and identity of persons using such products and services. Information regarding the identity of witnesses/victims as well as the scope and frequency of particular purchases are relevant to this investigation of CMG's marketing practices, and to determine whether CMG had authority to access consumers' bank accounts.

Interrogatory specifications 6 and 7 and document specifications 9 and 10 seek information relating to all merchandise offered for sale by CMG and whether consumers could or could not purchase that merchandise using the credit card issued by CMG. Identification of merchandise that was actually being sold and the conditions of such sales are relevant to whether those sales, terms and conditions were in fact consistent or inconsistent to CMG's sales and promotional representations to consumers. It will also assist the Commission in assessing whether CMG had authority to access consumers' bank accounts.

Finally, document specification 5 requests copies of any performance bond or escrow agreement that might have been obtained by CMG's principal (Frederick Zeigler) in accordance with the terms of a Stipulated Settlement Agreement Containing Order for Permanent Injunction and Monetary Relief with

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Defendants Commonwealth Marketing Group, Inc., Great Escape Vacations & Tours, Inc. and Frederick F. Zeigler, III entered in *Federal Trade Commission v. Commonwealth Marketing Group, Inc., et al.*, Case No. 98-918 (W.D. PA Mar. 6, 2000).³ That Order requires Mr. Zeigler, *inter alia*, to obtain bonding if he engages in telemarketing. Staff has reason to believe that some portion of CMG's current marketing activity has been conduct by way of telemarketing. The existence of such bonding is relevant to the identification of parties from whom consumer redress might be sought under certain circumstances. Accordingly, it is relevant to the current investigation. The fact that it might also be relevant to issues of compliance with an Order of the United States District Court for the Western District of Pennsylvania does not some how make it any less relevant to the current investigation.

III. The Word "Unique" Is Not Vague and Undefined

CMG objects to document specifications III.B.1.-3. on the ground that the adjective "unique" is impermissibly "vague and undefined," CMG's Petition at 8-9,⁴ when used to describe, *inter alia*, telemarketing scripts, Internet websites, and commercial email messages. CMG cites no authority supporting a claim that a word of common usage and understanding is vague simply because it is not separately defined by the CID. Further, CMG has offered no explanation of the manner in which it was confused by the usage of the adjective "unique."

³ CMG notes that staff made virtually identical information requests by way of discovery requests permitted by that Order prior to the issuance of the CID. See CMG's Petition at 2-3. Staff withdrew those discovery requests after CMG objected on the grounds that much of the information being requested was outside of the scope of that Order. CMG's Petition at 2-3.

⁴ CMG further argues that use of the word "every," to define certain classes of individuals, constitutes a form of vagueness because it fails to differentiate between alleged authorized and unauthorized accesses to bank accounts. *Id.* CMG would have the Commission put the horse in front of the cart. Under the standard advocated by CMG, the Commission would be obliged to divine in advance all transactions that might violate the law before seeking information limited only to those identified transactions. This standard fails for

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The Commission used the adjective “unique” in these specifications to avoid burdening CMG with the redundant production of multiple copies of the same documents.⁵ The Commission finds CMG’s objection to the use of the word “unique” in these specifications to be wholly without merit.

IV. This Investigation Is Not An Unlawful Fishing Expedition⁶

Use of the “fishing expedition” metaphor, even when accompanied by a citation to some court’s usage of the term, *see* CMG’s Petition at 8, frequently fails to provide any illumination regarding the issues being raised. This is particularly true of FTC investigations where the Supreme Court has clearly stated that the Commission may conduct an investigation even if it does so merely to satisfy an “official curiosity.” *United States v. Morton Salt Co.*, 338 U.S. 632, 639 (1950). The *Morton Salt* Court further advised,

two reasons. First, “[a]t the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint.” *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d at 1090 (citations omitted). Second, evaluation of the differences between authorized and unauthorized transactions might well provide evidence of a violation. *See Federal Trade Commission v. Texaco, Inc.*, 555 F.2d at 876 (“We agree with the FTC that comparative information of this sort is ‘reasonably relevant’ to its investigation.”). Thus, the distinction between authorized and unauthorized transactions advocated by CMG does not represent any difference in the potential evidentiary value of any transaction records in the context of this investigation. The application of that standard would likely impede rather than advance the Commission’s investigation, and is, therefore, rejected.

⁵ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1288 (10th ed. 2002) defines the adjective “unique” to mean “being the only one; sole. . . being without like or equal.”

⁶ CMG’s Petition at 9.

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We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan *Ano fishing expeditions*.” . . . [However,] [t]he only power that is involved here is the power to get information from those who can best give it and who are most interested in not doing so. . . . [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 assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Id. at 642-43.

CMG has provided the Commission with no factual or legal basis for its claim that the present CID is beyond the FTC’s power to inquire, or that the Commission has no reason to believe that an investigation is in the public interest. That being the case, invocation of the fishing expedition metaphor, by itself, is inadequate to call the present investigation, and this CID, into question.

V. CMG Has Not Established That the CID Seeks Irrelevant Financial Information

CMG claims the present CID was issued as part of a prohibited inquiry “to assess the financial status of CMG before the FTC undertakes [] an investigation,” CMG’s Petition at 4, and

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relies on the unexplained *dictum* found in *Federal Trade Commission v. Turner*, 609 F.2d 743, 745 (5th Cir. 1980), to the effect that the amount of a person's assets are "not relevant to an inquiry into whether a violation of the law exists." Such reliance is unavailing. Unlike in *Turner*, this is an inquiry to determine whether CMG has violated the law and not an inquiry into whether it would be cost effective to seek enforcement of an existing cease and desist order. *See id.* at 744. In similar investigative circumstances, the D.C. Circuit Court of Appeals declined to follow *Turner* and found that "[f]inancial data, including evidence of relative profitability, could facilitate the Commission's investigation of [a respondent] in different ways, not all of which may yet be apparent." *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d at 1090.

In addition, the terms of the CID itself do not appear to support CMG's claim. Many types of records which would normally be sought in order to assess a company's financial status simply do not appear in this CID. Journals, ledgers, financial statements, tax returns, inventories of assets and liabilities are all classes of financial records particularly relevant to an inquiry into a company's financial status; however, the CID seeks none of those records. Indeed, CMG only claims that information responsive to "the CID will directly reflect on the number of sales made by the company, [and, further, that] CMG has valid reason to believe that the FTC is really seeking to ascertain nothing more than the financial status of this company." CMG's Petition at 11. Neither the fact that CID responses might show gross sales figures nor the fact that such figures might provide some incomplete insights regarding CMG's financial condition would make such sales information either irrelevant to the investigation or beyond the ambit of legitimate inquiry by the FTC or evidence of an improper motive for this investigation of CMG.

"The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose

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and the requested documents are relevant to the purpose.” *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d at 882; *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d at 1090. CMG has offered neither factual nor legal support for its claim that the “FTC has engaged in an unlawful investigation.” CMG’s Petition at 11. It has, thus, failed to carry its burden of establishing its right to have the CID limited or quashed on that ground.

VI. Conclusion and Order

For all of the foregoing reasons **IT IS ORDERED** that CMG’s Petition should be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED that CMG shall respond to the CID on or before April 9, 2007 at 5:00 p.m. E.S.T.

By direction of the Commission.

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COMMONWEALTH MARKETING GROUP, INC.*FTC File No. 912 3352 Decision, April 17, 2007***FULL COMMISSION RESPONSE TO COMMONWEALTH
MARKETING GROUP, INC.'S ("CMG") REQUEST FOR REVIEW
OF DENIAL OF PETITION TO QUASH OR LIMIT CIVIL
INVESTIGATIVE DEMAND**

Dear Mr. Hicks:

This letter advises you of the Commission's disposition of CMG's Request for Review of the Ruling on March 28, 2007 Denying CMG's Petition to Quash or Limit the Civil Investigative Demand ("CID") issued in conjunction with an investigation of CMG by the Federal Trade Commission (hereinafter "FTC" or "Commission"). The Request for Review is denied for the reasons stated below.

The Commission issued a CID to CMG on December 13, 2006. On January 3, 2007, counsel for CMG timely filed the Petition to Quash. On March 28, 2007, Commissioner Harbour, acting as the Commission's delegate, *see* 16 C.F.R. § 2.7(d)(2), directed the issuance of the decision denying CMG's Petition to Quash or Limit CID because CMG had not shown that:

- (1) the information sought by the CID was irrelevant to the investigation authorized by the Commission's resolution;¹
or

¹ Petitioner mischaracterizes the scope of the investigation by attempting to claim it is "limited to unauthorized access to consumer bank accounts," Req. for Review at 10. In so doing, Petitioner excises from the authorizing resolution any inquiry into whether CMG has gained access to consumer bank accounts "through unfair or deceptive acts or practices." Petitioner provides no reason why this inquiry should be thus constricted, and the Commission declines to do so.

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- (2) the CID requested the production of documents without designating them with sufficient definiteness; or
- (3) the investigation was being conducted for an unlawful or improper purpose.

The Request for Review was timely filed on April 5, 2007. The Request for Review did not include a request to stay the April 9th return date for the CID, and the filing of the Request for Review does not itself stay the return date. 16 C.F.R. § 2.7(f).

The Petition to Quash or Limit was not accompanied by any affidavits or other materials under oath.² The Request for Review does nothing more than repeat the claims in the Petition without any additional facts or legal arguments.

The Commission has reviewed the record created by CMG in support of its Petition to Quash or Limit CID and its Request for Review. That record does not support any of the claims for relief advanced by CMG. Accordingly, Petitioner has not carried its burden of proof establishing its entitlement to relief from the CID. *See Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974) (holding that the petitioner has “the burden of showing that an agency subpoena is unreasonable. . . and, where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met.”)

For the reasons set forth in the Commission’s ruling of March 28, 2007 denying CMG’s Petition to Quash, **IT IS ORDERED** that such ruling should be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

² Indeed, the only bases for relief in that Petition were counsel’s conclusions of fact provided without any citations to facts that would necessarily lead one to the proffered conclusions.

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NEW SEASONS MARKET*File No. 071 0114 Decision, June 26, 2007***COMPULSORY PROCESS COMMISSIONER’S RESPONSE TO NEW
SEASON MARKET’S (“NSM”) PETITION TO QUASH OR LIMIT
CIVIL INVESTIGATIVE DEMAND**

Dear Mr. Newell:

This letter advises you of the disposition of NSM’s Petition to quash or limit specifications of the Civil Investigative Demand (“CID”) issued to it on April 24, 2007. Because NSM’s Petition was filed after the deadline by which it had to be filed, the Commission denies NSM’s Petition.¹ Pursuant to 16 C.F.R. § 2.7(e), NSM is ordered to comply with the CID on or before July 3, 2007 at 5:00 p.m. E.D.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. See 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the

¹ Reaching the merits of NSM’s Petition would not change this result. NSM provided no factual basis for its claims of burden. See *Federal Trade Commission v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979) (Petitioner must show that compliance would “unduly disrupt or seriously hinder” its daily operations). Further, NSM’s claim that information regarding the facts of its grocery store operations in one overlap market are beyond the scope of this investigation of a retail grocery store merger is simply frivolous. *Federal Trade Commission v. Whole Foods Market, Inc., et al.*, Docket No. 1:07-cv-01021 (D. D.C. June 6, 2007), Complaint at ¶35, available at: <http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf> (alleging geographic markets defined by a six mile circle around each store). Finally, NSM offers no authority to support its request that the Commission agree to pay “damages” in the event of an inadvertent public disclosure of confidential business information, and the mere possibility of such disclosure provides no ground for quashing the CID.

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Secretary of the Commission within three days after service of this letter.²

The CID at issue was signed and issued to NSM on April 24, 2007, returnable on April 30, 2007, Petition at 1, and was served on NSM on April 25, 2007. NSM states that "The FTC has granted multiple extensions, ultimately extending the time to respond to June 15, 2007." *Id.* NSM did not seek, nor was it granted, however, an extension of time within which to file a petition to quash or limit a CID. The time for filing a petition to quash, absent an extension of time granted pursuant to and in conformity with 16 C.F.R. § 2.7(d)(3), is the earlier of the date for compliance with the CID or 20 days after service. In the case of this CID, a petition to quash should have been filed no later than the earlier of April 30th (initial compliance date) or May 15th (twenty days after service).. NSM claims to have received extensions of the return date for its CID until June 15th.³

² This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received 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 by this decision.

³ The CID expressly provides that all modifications "must be agreed to in writing by the Commission representative." CID at 3. Further, pursuant to 16 C.F.R. § 2.7(c), all such amendments regarding the manner and timing of compliance for this CID required approval by at least an Assistant Director of the Bureau of Competition. The last written approval of an extension of the time within which to comply that was signed by an Assistant Director only extended the return date to May 29, 2007. The Commission has reason to believe that two additional extensions of the deadline for compliance were approved by an Assistant Director. However, while the next to the last request for an extension, until June 5th, was addressed by an email message, the final request for an extension, until June 15th, was addressed only orally. The CID by its own terms does not permit oral modifications. Accordingly, the last arguably cognizable extension only extended the time for compliance until June 5th, not until June 15th. Thus, even if the Commission assumes, contrary to the evidence, that each extension validly approved included both an extension pursuant to 16 C.F.R. §§ 2.7(c) (extension of compliance date) and

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Extending only the return date, however, still would make May 15th the latest permissible date for filing a petition to quash. An extension of the time to comply does not automatically extend the time within which a petition to quash must be filed. *Compare* 16 C.F.R. § 2.7(c) *with* 16 C.F.R. § 2.7(d)(3). Linking the two extensions together might provide both the means and the incentive to delay investigations unnecessarily. NSM has offered no reason for filing its petition out of time, nor did it seek leave to file its petition out of time.

Accordingly,

IT IS ORDERED that NSM's Petition be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED that NSM shall respond to the CID on or before July 3, 2007 at 5:00 p.m. E.D.T.

By direction of the Commission.

an extension pursuant to 16 C.F.R. § 2.7(d)(3) (extension of time within which to file a petition to quash), NSM's Petition was due on or before June 5, 2007.