seeking information concerning TCN's advertising, marketing, and sales of educational products and services. Pet. Exh. 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 overbroad and vague, and that it could lead to undue burden of compliance. TCN also opposes production of certain information because it claims the information is proprietary. Finally, TCN challenges various requests for information as an improper "fishing expedition."

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 advertising, marketing, or sale of secondary or postsecondary educational products or services, or educational accreditation products or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

Resolution File No. P138402 (Nov. 14, 2013).

[2] Pet. at 1-3. On March 19, 2014, FTC staff modified the CID by limiting the scope of particular definitions and extending the date for compliance. *See* Pet. at 3; Pet. Exh. G (March 19, 2014 Letter from Thomas N. Dahdouh to Jeanne M. Cors). FTC staff further modified the CID after the Petition was filed. Because these modifications mooted some of Petitioner's objections, we do not address them in detail in this order. Specifically, staff struck Interrogatory 40; modified Document Specification 15(c) to accept TCN's proposal to produce customer files for certain listed customers; and modified Interrogatories 37a and 39 to clarify that they apply only to natural persons, businesses, or organizations.

II. ANALYSIS

A. The Definitions and Specifications in the CID Clearly Identify Responsive Materials and Do Not Impose Undue Burden

TCN challenges numerous definitions and specifications in the CID, claiming variously that they are overly broad, oppressive, unreasonable, vague and ambiguous, and unduly burdensome. These challenges lack merit.

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 unrelated 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] It must show the "measure of their grievance rather than [asking the court] to assume it."[7] Of course, balanced against this required

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[3] *See, e.g., United States v. Fitch Oil Co.*, 676 F.2d 673, 679 (Temp. Emer. Ct. App. 1982); *United States v. Wyatt*, 637 F.2d 293, 302 n.16 (5th Cir. 1981); *United States v. Cox*, 73 F. Supp. 2d 751, 766 (S.D. Tex. 1999); *United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989).

[4] *Wyatt*, 637 F.2d at 302 (quoting, among others, *United States v. Morton Salt Co.*, 338, U.S. 632, 652 (1950)).

[5] *See FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *In re Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998).

[6] *See EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 475-76 (4th Cir. 1986); *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *Texaco*, 555 F.2d at 882.

[7] *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962).

showing is the understanding that "any subpoena places a burden on the person to whom it is directed."[8]

We address each challenge of particular specifications 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.

The Defined Word "Company." The CID, as issued, defined the term "Company" to mean "The College Network, Inc. and its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, including College Network Inc. and The College Network Inc., and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing." The phrase "and affiliates" was later deleted after discussions between TCN and staff.[9] TCN seeks to limit that definition further.[10] It argues that the description of "other persons working for or on behalf of" TCN is vague, overly broad, and could include unrelated entities like lead vendors or independent contractors over whose documents TCN lacks custody or control. Pet. at 4-5.

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. In fact, TCN's argument recognizes that lead vendors and independent contractors who sell or market to prospective customers fall within the definition.

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[8] *Shaffner*, 626 F.2d at 38.

[9] *See* Pet. Exh. F (March 17, 2014 Letter from Yan Fang to Jeanne M. Cors), at 1-2, 6-7. The definition of "Company" that strikes "and affiliates" is a "provisional" definition.

[10] Petitioner also objects to the particular Interrogatories and Document Specifications that use or reference the word "Company." Petitioner objects to Interrogatories 1-8, 10-24, 26-37, and 39, and Document Specifications 1-2, 4, 7, 18-31, and 35-36. Pet. at 3-4.

TCN's real claim seems to be not that it cannot understand what information is called for, but that it cannot produce that information because it is in the hands of third parties – vendors and independent contractors who sell or market to prospective customers (and therefore fall within the definition of "Company"). That contention is without merit. The CID imposes no obligation on TCN to produce materials over which it lacks possession, custody or control – which in this context means the legal or practical ability to obtain the responsive documents.[11] A party can be said to control documents if, for example, they are available through a contractual right of access,[12] or are in the possession of a party's agents.[13] Thus, under the Instructions of the CID, if TCN does not control the documents of its vendors and contractors, the definition of "Company" imposes no obligation on TCN to produce them. We now address TCN's factual claims.

To support its contention that TCN lacks possession, custody or control over the documents of lead vendors and independent contractors, TCN relies on the Affidavit of Cory Eyler, who states that he is "unaware of any ability of TCN to demand production of those types of documents from independent contractors or lead vendors." Pet. Exh. H (Eyler Affidavit) ¶ 5. However, Mr. Eyler's affidavit does not indicate whether TCN has in its possession any documents from the contractors or whether it has

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[11] *See, e.g., In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (applying Fed. R. Civ. P. 34) (citing *Bank of NY v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146-47 (S.D.N.Y. 1997)). *See also, e.g., In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 236 F.R.D. 177, 180 (S.D.N.Y. 2006); *Dietrich v. Bauer*, 2000 WL 1171132 at *3 (S.D.N.Y. 2000) ("'Control' has been construed broadly by the courts as the legal right, authority or practical ability to obtain the materials sought upon demand.").

[12] *Flagg v. City of Detroit*, 252 F.R.D. 346, 353 (E.D. Mich. 2008) (citing *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 928-29 (1st Cir. 1988); *Golden Trade, S.r.L. v. Lee Apparel Co*., 143 F.R.D. 514, 525 (S.D.N.Y. 1992)).

[13] *Flagg*, 252 F.R.D. at 353 (citing *Commercial Credit Corp. v. Repper*, 309 F.2d 97, 98 (6th Cir. 1962); *Am. Soc. for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 233 F.R.D. 209, 212 (D.D.C. 2006); *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984)).

ready access to such documents. If it does, it must produce that material. Nor does the affidavit provide any other detail regarding Mr. Eyler's review of any relevant contract terms, or other facts that might clarify whether TCN has a right to access the requested materials. The tentative and conclusory statement in the affidavit does not allow us to determine whether relevant documents and material fall beyond TCN's possession, custody, or control.

Petitioner also has failed to establish that producing the requested materials would be unduly burdensome (assuming it has them, or has a right to retrieve them). As explained above, a CID recipient bears the responsibility of establishing that the burden of compliance is undue. "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 (*e.g.*, the person-hours and cost of meeting the particular specifications at issue)."[14] But TCN's affidavit provides no details regarding the burden associated with searching and retrieving documents and materials from its lead vendors and independent contractors. Pet. at 4-5. 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. Exh. 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

[14] *Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (1998).

20, which is discussed below, TCN has not made a sufficient showing that compliance is unduly burdensome.

The Defined Word "Identify." 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 6-8. TCN also objects that a telephone number must be provided in addition to the name and business address for these 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 it for only a limited number of persons or organizations. Consequently, we decline Petitioner's proposal to limit the definition further.

Interrogatory 3. Interrogatory 3 asks TCN to identify current and former officers, employees, independent contractors,

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[15] Letter from Thomas N. Dahdouh to Jeanne M. Cors (Apr. 1, 2014). The modified definition states: "'Identify' or 'the Identity of' shall be construed to require identification of (a) natural persons, by stating the person's 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 address; and (b) businesses or other organizations, by stating the business's or organization's name and address, and the name and contact telephone number of TCN's contacts at the organization, where applicable."

affiliates, and agents with responsibility or knowledge about four topics. TCN argues that this Interrogatory is overbroad and oppressive because "virtually all TCN personnel have some knowledge" about the particular issues. Pet. at 10. That is not a valid objection. Indeed, the phrasing of the interrogatory is no broader than Federal Rule of Civil Procedure 26(a)(1)(A)(i), which mandates disclosure in litigation of "each individual likely to have discoverable information."

Even if the Interrogatory asked TCN to identify all its employees, it is not unduly burdensome because TCN has approximately 150 employees,[16] 125 lead vendors, and 140 independent contractors. Listing those persons and entities imposes no great burden. Under the modified definition of "Identify" discussed above, TCN must provide a "person's name, title, and department" for current employees of The College Network, Inc. For businesses such as the 125 lead vendors, TCN must provide the business or organization name and address, and the name and telephone number of TCN's contact(s). For individuals such as TCN's 140 independent contractors, TCN must provide a person's name, title, business affiliation, business address and telephone number. To the extent that former employees, lead vendors, or independent contractors must be identified, the CID covers a limited time period that begins in 2011, so the number of persons or entities should be limited. This information should be readily available and easily assembled by TCN, and is relevant for the investigation.

Interrogatories 19 and 32. TCN asks the Commission to strike Interrogatories 19 and 32 on the grounds that they are so overbroad, unduly burdensome, unreasonable, and oppressive that TCN would not be able to certify that its responses are complete. Interrogatory 19 seeks TCN's customer information, including name, contact information, products purchased, payments, complaints and cancellations, exam passage, and college enrollment. TCN objects to Interrogatory 19 because it "demands that TCN identify all of its customers during the responsive period." Pet. at 10. In addition, Petitioner objects to

[16] In discussions with FTC staff, TCN estimated that it has 100 to 150 employees.

Interrogatory 19 because the demand to identify complaints "would require a manual review of over 200,000 customer files, which would likely consist of millions of pages of documents." Pet. Exh. I (Fair Affidavit) ¶ 5.

Interrogatory 32 seeks information about the number of customers who, among other things, enrolled at degree-granting institutions, obtained degrees, or withdrew before earning a degree. TCN claims that this specification would also require a manual review of customer records, which "would be impossible for the company to undertake without ceasing normal operations, or would require . . . months or years to complete, depending on the manpower devoted to the project." Pet. Exh. A (Ivory Affidavit) ¶ 8.

These Interrogatories are not overly burdensome because, by their own terms, they can be satisfied either by "a narrative response" *or* by production of materials "in an electronic database format." TCN thus need not compile a new list of all of its customers or conduct the manual review of which it complains. Its electronic customer database likely contains all the responsive information and materials. Indeed, the petition indicates that it contains the 200,000 customer files. *See* Pet. Exh. J (Sallee Affidavit) ¶ 7. If TCN produces the databases, it need not manually review the files in the databases to address the interrogatories. We now address TCN's objection to producing the databases.

Document Specifications 10, 11, 12, 13, 22, and 27. TCN seeks to strike the word "databases" from Document Specifications 10, 11, 12, 13, 22 and 27 on the grounds that the word renders the specifications overbroad, unreasonable, oppressive, vague, ambiguous, unduly burdensome, and that TCN would be unable to certify that its response was complete. *See* Pet. at 15. Document Specifications 10, 11, and 12 seek accounting data; Document Specification 22 seeks documents that summarize advertising dissemination schedules; and Document Specifications 13 and 27 call for databases (such as the customer database) used to respond to Interrogatories 19 and 32.

There is nothing vague or ambiguous about those specifications. They are not rendered vague or ambiguous merely because the CID does not provide a definition of the term "database." That term is commonly used and has a generally accepted meaning. TCN should easily be able to identify responsive materials. In fact, in objecting to the burden of producing them, TCN appears already to have identified that material.

To support its claim of unreasonable burden, TCN estimates that producing a copy of TCN's accounting database would cost $10,000-$15,000 to purchase a server, software and licenses and that it would need a vendor to install and configure the database and provide access at an addition $2,000-$5,000 cost. *See* Pet. Exhibit J (Sallee Affidavit) ¶ 9. Additionally, TCN asserts that production of the customer database would cost approximately $30,000 and take weeks to complete because TCN would need new servers to house the database and a vendor to create a mirror image of the database and application. *See id.* ¶ 7.

Petitioner's claimed burden of responding to the document specifications for accounting data is overstated. The CID provides TCN with a number of options for providing the requested accounting data. A database is one of several types of responsive documents that TCN may provide to satisfy the specifications. Document Specifications 10, 11, and 12 also allow TCN to respond by providing "spreadsheets, statements, memoranda, reports, or any summarizing document." *See* Pet. Exh. A, CID attached as Exh. 1.

Even if the Commission were to accept TCN's claims regarding the process for and cost of producing the accounting and customer databases,[17] Petitioner has not established that this

[17] FTC experience in other investigations suggests reason to question TCN's estimated cost and burden. First, accounting databases are typically located in programs specifically designed for accounting, and prior investigations have shown that extracting files from Peach Tree Accounting, the common accounting program that TCN uses, is neither difficult nor costly. Second, businesses typically store data within an industry standard database system and most businesses create regular backups of their databases to ensure there is another copy in case the original is corrupted or accidentally deleted. In discussions with FTC staff, TCN indicated that it uses an Onyx SQL database,

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; the burden of that cost must be evaluated in relation to the size and complexity of a recipient's business operations. Here, TCN's estimated $50,000 cost for equipment and vendor services to provide the two databases is evaluated in light of gross sales revenue that exceeded $73 million in 2012 and $48 million in 2013. In similar circumstances, courts have found that far greater compliance costs – ranging from $392,000 to $4,000,000 – did not impose unreasonable burden.[19] In sum, Petitioner has not shown that its costs are excessive.

Document Specification 7. Document Specification 7 seeks documents sufficient to show TCN's policies, practices, and procedures for creating and revising substantive CLM content. Petitioner contends that this document specification (which relates to Interrogatory Specification 8) requires TCN to produce or review documents it does not control because the underlying interrogatory specification asks for the number of independent contractors, affiliates, and others involved in developing CLMs. Pet. at 17. This argument is untenable. Document Specification 7 seeks information that plainly belongs to TCN. If it put that responsibility for developing CLMs information in the hands of its vendors, it can get that information back in order to respond to the CID.

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with a third-party cloud service. If TCN has a recent backup copy of its database, it could easily make a copy of this backup to an external hard drive, which the FTC could provide. If TCN has not recently run a backup, it could create a backup manually using the database's backup function, which is normally not costly and might be completed in one day, depending on the quantity of data. Finally, in other investigations, FTC technical support personnel have copied materials themselves if they are provided access to a petitioner's facilities. This alternative is also available to Petitioner to copy the database at FTC expense.

[18] *See Texaco*, 555 F.2d at 882.

[19] *See FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) (citing *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974) ($392,000 cost for a bank with net income of $178 million); *Texaco*, 555 F.2d at 922 ($4,000,000)).

In any event, TCN has offered no factual support for its assertion that it would be unduly burdensome to obtain documents in the hands of its independent contractors and lead vendors. TCN does not provide a reason to believe that its contractors and lead vendors, who solicit customers or buy advertising space, would have responsive documents related to the creation or revision of substantive CLM content. In addition, to the extent there is any burden, it is minor, because TCN is required to produce only documents "sufficient to show" TCN's policies, practices and procedures for creating and revising substantive content for CLMs (rather than all documents relating to the creation or revision of CLMs). Thus, TCN has some flexibility in assembling its response. We conclude that Petitioner has not demonstrated that Document Specification 7 is unduly burdensome.

Document Specification 16. TCN objects to Document Specification 16, which seeks communications, including internal email and responses to customers, that refer or relate to issues raised in customer complaints. TCN contends that the specification is "overbroad, oppressive, unreasonable, unduly burdensome, and not subject to certification." Pet. at 16. TCN argues that the specification is overbroad because TCN receives at least five categories of complaints that do not have "anything to do with the company."[20] *See* Pet. Exh. I (Fair 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 types 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.

[20] The affidavit explains that TCN has received complaints that "(a) the location where a particular end-of-course equivalency examination is being offered by a third party testing agency is too far away from the customer's home; (b) the subject matter of a particular CLM is 'too hard'; (c) the customer's spouse has left them and therefore they cannot afford the materials they have purchased; (d) the customer has moved to another state; [and] (e) the customer has taken ill[.]" Pet. Exh. I (Fair Affidavit) ¶ 3.

Regarding the burden of Document Specification 16, the Fair affidavit states that compliance would require a manual review of customer files. *Id.* 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. Fair's affidavit states that he oversees the "department within the company which receives, responds to, and if possible, resolves various customer complaints or issues." *Id.* at ¶ 2. A search for responsive documents can reasonably be focused on one department.

Document Specifications 20, 21, 22, and 28. TCN objects to the burden created by Document Specification 20, which seeks "all disseminated advertisements" relating to products and services offered by TCN to individual consumers. TCN also objects to the burden created by other document specifications that seek information about the ads demanded by Document Specification 20.[21] As support for its claimed burden of review and production, Petitioner states that approximately 3,000 to 6,000 links[22] or advertisements are generated daily when TCN's lead vendors and independent contractors are included and the ads "appear on an unknowable number of websites and webpages." *See* Pet. Exh. H (Eyler Affidavit) ¶ 5. In his affidavit, Mr. Eyler states that the production of all websites and webpages, including screenshots, archived versions, source code programs, log files, scripts, and dissemination schedules that include dates and times for the 3,000 to 6,000 daily links "is simply impossible." *Id.*

It appears that TCN has misconstrued the specifications. Document Specification 20 directs TCN to produce copies of all ads. An ad is the "written or verbal statement, illustration, or

[21] Document Specification 21 seeks all documents relating to the creation and development of the advertising. Document Specification 22 seeks documents about dissemination schedules and visitor volume for each ad. Document Specification 28 seeks documents relating to consumers' interpretations and perceptions of the ads.

[22] Website links are often distributed via Internet search, keyword, sponsored, pop-up, and banner ads.

depiction . . . that is designed to effect a sale or create interest in the purchasing of goods or service." *See* Pet. Exh. A, CID attached as Exh. 1, at Definition B (Advertisement). The definition includes ads that are "displayed or accessible as Web pages." *Id.* Each link that is generated is not a separate advertisement that must be produced. If two consumers who click on links that they found at two different places (*e.g.*, two different third-party websites) arrive at the same webpage or otherwise see the same ad copy, TCN need only to 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]

Document Specification 17. 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 16-17, but 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

[23] The analysis is similar to other advertising; TCN needs to produce print advertising only once even if it has been distributed to 1000 households.

[24] An April 1, 2014 letter from Thomas N. Dahdouh to Jeanne M. Cors modified the specifications. The modification to Specification 20 eliminates the need for TCN to produce source code, programs, log files, scripts, and past or archived versions of websites and webpages for websites and webpages not operated by TCN. Document Specification 22 was modified to reduce the burden regarding dissemination schedules for Internet advertising; Specification 22, as modified, seeks only summarizing documents sufficient to show dates and numbers of dissemination, visitor volume, and click-through rates for Internet ads. *Id.* at 2-3.

[25] *See* Pet. Exh. H (Eyler Affidavit) ¶¶ 5-6.

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.

Document Specification 29. TCN objects to Document Specification 29, 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.

FTC staff modified this specification after the Petition was filed.[26] The modified text provides TCN with flexibility to determine how it can best produce the requested materials and ameliorate any burden by reducing the number of responsive documents.

Document Specification 35. TCN petitions to strike this specification, which seeks complaints, inquiries, and communications from third-party organizations such as the Better Business Bureau, state attorneys general, universities, and nursing organizations. Although it contends that this request imposes undue burden, TCN provides no factual support for this claims. 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. Exh. I (Fair Affidavit) ¶¶ 5, 7. Thus, it appears that Petitioner can comply with the specification by producing its customer database and, as we previously explained, production of the customer database is not an

[26] As modified by an April 1, 2014 letter from Thomas N. Dahdouh to Jeanne M. Cors, Document Specification 29 requires the production of all documents, including consumer research, media research analysis, and relevant portions of media plans "sufficient to show" the target audience for each TCN ad produced pursuant to Document Specification 20.

unreasonable burden. We therefore deny Petitioner's request that we strike this specification.

Email and Document Specifications 2-4, 15-18, 20-23, 29-31, and 35. Petitioner seeks leave to file a future petition to quash regarding email if it encounters additional objections after it reviews its emails. 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 factual and legal objections to the Commission's compulsory process") (emphasis added). As we have explained, "[t]he rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID."[27]

Petitioner has not sufficiently availed itself of the meet-and-confer process required by the FTC's Rules of Practice and the CID itself.[28] The meet-and-confer requirement "provides a mechanism for discussing adjustment and scheduling issues and resolving disputes in an efficient manner."[29] Here, Petitioner did not engage in an exchange with staff to resolve the issues surrounding email and limits on custodians whose files would be retrieved and searched. Petitioner received the CID on January 21, 2014, Pet. Exh. A (Ivory Affidavit) ¶ 3, but as late as March 17, Petitioner had not yet provided FTC staff with a list of

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[27] *Wellness Support Network*, File No. 072-3179 at 2 (FTC Apr. 24, 2008) (letter ruling dismissing appeal from denial of petition to quash CID).

[28] 16 C.F.R. § 2.7(k); Pet. Exh. A, CID attached as Exh. 1, at Instruction B.

[29] *Firefighters Charitable Found., Inc.*, FTC File No. 102-3023, at 3 (Sept. 23, 2010).

relevant custodians.[30] Given 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."

B. TCN's Claim that Particular Information is Proprietary is Not a Reason to Limit the CID or Avoid Production

Petitioner objects to Interrogatory 12 to the extent that it seeks the number and percentage of TCN customers in default, because "the identity of TCN's present and past customers is proprietary . . . [and] contact [with these customers could] adversely affect TCN's business." Pet. at 7. With respect to Interrogatory 12, Petitioner's concern is misplaced because the modified definition of "identify," does not require personal or contact information to the extent that the specification seeks numerical information. *See* discussion at note 2, *supra*.

Because Petitioner's argument that disclosure of TCN's customers also arises with respect to the production of TCN's customer database and materials demanded by other specifications,[31] we address the substance of Petitioner's claim. Concerns about customer reactions to a Commission investigation do not excuse an obligation to comply with investigative process unless "compliance threatens to unduly disrupt or seriously hinder normal operations of a business."[32] The same allegations were

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[30] *See* Pet Exh. F (March 17, 2014 letter from Yan Fang to Jeanne M. Cors) at 8 ("TCN proposes to forward a list of relevant custodians this week."); Pet. Exh. D (March 13, 2014 letter from Yan Fang to Jeanne M. Cors) at 2 ("We are generally amenable to custodian limits and search terms [to retrieve and search e-mail], but before we can agree to any limits, TCN would first need to provide us sufficient information to identify those custodians likely to possess responsive documents.").

[31] *See* Interrogatories 3, 19, and 32 and Document Specifications 13, 16, 27, and 29.

[32] *Texaco*, 555 F.2d at 882.

made in *Invention Submission Corp.*, 965 F.2d 1086 (D.C. Cir. 1992), but were not accepted by the D.C. Circuit as a basis for excusing noncompliance with a CID. The D.C. Circuit did not lighten or change the standard just because disclosing the identity of clients might place the respondent under a "cloud of suspicion and speculation" if the potential witnesses were contacted.[33] If the mere creation of a cloud of suspicion were sufficient to quash a CID or excuse a failure to comply, then, as the D.C. Circuit recognized, "it could be made with respect to almost any investigation."[34]

C. The CID Specifications Seek Information that is Reasonably Related to the Investigation

Finally, TCN objects to Interrogatories 12 and 19 and Document Specification 29 on the ground that the requests constitute improper "fishing expeditions." Pet. at 7, 11, 14. Interrogatory 19 seeks TCN's customer information, including names, contact information, products purchased, payments, refunds, and complaints. Interrogatory 12 seeks information about customers in default. TCN argues that Document Specification 15 already identifies 29 individuals who are customers of TCN so the "only reason for the FTC requiring the names of other TCN's customers can be for the FTC to contact those customers as the FTC sees fit." Pet. at 11. The Petition also objects to Document Specification 29, which demands documents relating to the targeted audience of TCN's ads.

The information responsive to these specifications is highly relevant to the investigation.[35] Indeed, Petitioner does not argue

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[33] *See FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992).

[34] *Id.*

[35] *See, e.g.*, *id.* at 1089 (D.C. Cir. 1992) ("The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one. . .. The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally"); *FTC v. Church & Dwight Co., Inc.*, 747 F. Supp. 2d 3, 9 (D.D.C. 2010) (rejecting claim that "FTC [must show] like any litigant, that the document demanded will lead to reasonably relevant and ultimately admissible evidence" as mischaracterizing

that the information is irrelevant, but instead objects to the Commission using that information to contact those customers. As we discussed above, this concern does not provide a basis to excuse Petitioner's obligation to comply with the CID. The challenged specifications seek information that is relevant to the purpose of the investigation and we deny Petitioner's request that we strike the specifications.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition of The College Network, Inc. to Strike or Limit the Civil Investigative Demand be, and it hereby is, DENIED; and

IT IS FURTHER ORDERED THAT all responses to the specifications in the Civil Investigative Demand to The College Network, Inc. must now be produced on or before May 19, 2014.

By the Commission.

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the nature of the FTC's investigative authority) (citing *Morton Salt*, 338 U.S. at 642, and *Texaco*, 555 F.2d at 874).

Responses to Petitions to Quash

POLICE PROTECTIVE FUND, INC.

FTC File No. 132 3239 – Decision, May 22, 2014

RESPONSE TO POLICE PROTECTIVE FUND, INC.'S PETITION TO QUASH CIVIL INVESTIGATIVE DEMAND DATED MARCH 19, 2014

By WRIGHT, Commissioner:

Police Protective Fund ("PPF") has filed a petition to quash a Civil Investigative Demand ("CID") issued by the Commission on March 19, 2014.[1] For the reasons stated below, the petition is denied.

I. INTRODUCTION

PPF is organized as a not-for-profit corporation under state law and is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code.[2] In its 2012 IRS Form 990, PPF states that its mission is to "promote the safety and well being of law enforcement officers through educational programs and public awareness campaigns."[3] In recent years, PPF has been the subject of various state and federal investigations and, in 2007, received a letter from the IRS pointing out deficiencies in its operations that, if not corrected, could threaten its status as a 501(c)(3) organization.[4] Additionally, the Commission has received numerous consumer complaints relating primarily to PPF's telephone solicitations.

The Commission is conducting an investigation to determine whether PPF is engaged in "unfair or deceptive acts or practices"

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[1] "Pet." refers to PPF's Petition to Quash; "Pet. Ex." refers to the exhibit attached to PPF's petition; "Int." refers to specific interrogatories from the CID; "Doc. Req." refers to specific document requests from the CID.

[2] *See* Pet. Ex. G, I-K.

[3] *See* Pet. Ex. B.

[4] *See* Pet. Ex. L.