

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

Civil Investigative Demand
dated April 1, 2024 to The Prescription Center

FTC File No. 2410005

PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND

INTRODUCTION

On June 7, 2022, the Federal Trade Commission (“FTC”) announced it was commencing an investigation into the business practices of the nation’s largest three Pharmacy Benefit Managers (“PBMs”), CVS Health Corporation, UnitedHealth Group, and The Cigna Group (the “Big Three PBMs”), and specifically into their unfair, deceptive, anticompetitive, and predatory acts relating to prescription drugs.¹ The FTC said it would look at the PBMs’ use of “complicated and opaque methods to determine pharmacy reimbursement” and steering of patients toward PBM-owned pharmacies.² Both of these PBM practices prey on pharmacies. First, as discussed by Congress and reported in various outlets, PBMs retain fees and spread from drug reimbursement between the payor and the pharmacy such that the pharmacies that dispense prescriptions drugs often make no profit or lose money because reimbursement is below the pharmacy’s acquisition cost. Second, PBM-owned chain pharmacies continue to grow in number and push independent pharmacies out of the market because PBMs are unfairly and unlawfully steering prescriptions and business to their wholly-owned subsidiary pharmacies.

The FTC sought documents and data from the big three PBMs to understand their tactics. However, the PBMs have frustrated the FTC’s investigation by refusing to fully comply with the FTC’s Civil Investigative Demands (“CIDs”).³ Rather than enforce compliance with the demands served on the Big Three PBMs, the FTC has pivoted to ask the victim pharmacies for the data. The CID served on The Prescription Center is one such demand.

¹ FTC Press Release (June 7, 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry>.

² *See id.*

³ Silverman, Ed (February 27, 2024) “FTC says pharmacy benefit managers are stonewalling requests for information” STAT News, <https://www.statnews.com/pharmalot/2024/02/27/ftc-pbm-medicine-drugs-prices-rebates-pharmacies-cvs-cigna-unitedhealth-antitrust/>.

The Prescription Center is a small, independent retail pharmacy with three full-time employees, one of which is the sole owner and full-time pharmacist. *See* Affidavit of Michael P. Ruane, ¶¶ 1-2. The CID requests documents and data that span every facet of the pharmacy's operations and would require months of diligence, requests to third-parties, and gathering of such a vast amount of data that the Prescription Center would need to hire at least one additional employee just to complete the FTC's tasks. *See id.* at ¶ 4. Given that The Prescription Center recently incurred debt to open its doors in 2021, compliance with the CID (and the legal fees associated with compliance) would result in a severe financial burden. *Id.* at ¶¶ 5-6.

Moreover, the majority of the documents and data that the FTC is seeking are not readily available to The Prescription Center. *Id.* at ¶ 7. The Prescription Center works with a pharmacy services administrative organization ("PSAO") to handle the pharmacy's billing support, information technology purchasing and implementation, as well as interfacing and communication with the PBMs. The PSAO essentially performs the many core back-office operations for the pharmacy, as PSAOs often do for independent pharmacies. The Prescription Center would have to request and gather the documents and information from the PSAO. *Id.* at ¶¶ 7-8.

In sum, the FTC – through this CID – asks the victim to be victimized again by saddling it with the undue burden and serious disruption of business activities to produce documents that it should have received from the Big Three PBMs, who are large enough and such that compliance would not even result in a hiccup of business operations. In addition, the FTC's failure to gather the records from the Big Three PBMs further victimizes independent pharmacies by pushing the burden on them and creates a bad precedent by telling CID recipients that it need not comply. Thus, The Prescription Center is one of many independent pharmacies

that has been hurt by the Big Three PBMs and should not be further victimized by the undue burden and disruption of complying with the CID.⁴

ARGUMENT

The FTC’s “[s]ubpoena enforcement power is not limitless.” *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001). As the Supreme Court has cautioned, “governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Compulsory process is proper only if the inquiry is within the Commission’s authority, the demand is not too indefinite, and the information sought is reasonably relevant to the inquiry. *See id.* A demand will not be enforced if it is “unduly burdensome or unreasonably broad,” which occurs where “compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977).

I. Compliance with the CID will be unduly burdensome and will interfere with business operations

The Supreme Court has held that administrative subpoenas must be “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *See v. Seattle*, 387 U.S. 541, 544 (1967); *see also United States v. Harrington*, 388 F.2d 520, 523 (2d Cir. 1968) (directing district court to determine “whether this burden imposed is unreasonably onerous, but also whether the records sought were relevant to the investigation”). Administrative subpoenas are subject to heightened scrutiny where they are directed against a third party, not the target of the investigation. *Harrington*, 388 F.2d at 523

⁴ Representatives from the Prescription Center and the FTC conferred regarding the CID and a conferral statement is attached hereto.

(“judicial protection against the sweeping or irrelevant order is particularly appropriate in matters where the demand for records is directed ... to a third party who may have had some dealing with the person under the investigation”). In *In re McVane*, 44 F.3d 1127, 1138 (2d Cir. 1995), the Second Circuit held that where records are sought from third parties, “an administrative agency is not automatically entitled to obtain all material that may in some way be relevant to a proper investigation. Rather . . . the agency must make some showing of need for the material sought beyond its mere relevance to a proper investigation.”

The FTC’s CID is incredibly wide-ranging in breadth and scope. It essentially seeks every document, communication, and data point ever possessed, created, maintained, or disseminated for over 7 years. The Prescription Center is a single, independent retail pharmacy that has only three full-time employees. Affidavit of Michael Ruane II, at ¶¶ 2-3. Quite frankly, the vast nature of the CID directed to a small 3-person entity makes compliance virtually impossible. It will require that The Prescription Center hire at least one additional employee just to handle requesting, gathering, and producing documents and data. *Id.* at ¶ 4. The hiring process would take approximately two months to accomplish and take many months thereafter to comply with the CID. *Id.* Given PBM DIR fees and underwater pricing for some prescriptions, as well as the new business debt that it is still repaying, The Prescription Center does not have the financial capabilities to take on an additional employee and comply with the FTC’s demands. *Id.* at ¶¶ 5-6. In short, compliance with the CID will impose a severe undue burden both practically and financially.

Moreover, the fact that The Prescription Center is not the target of the FTC’s investigation, rather a victim of the Big Three PBMs, makes the FTC’s demands even more egregious and out-of-place. *See Miscellaneous Docket Matter 1 v. Miscellaneous Docket Matter*

2, 197 F.3d 922, 927 (8th Cir. 1999) (“concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs”) (quoting *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998)); *Convolve, Inc. v. Dell, Inc.*, No. C 10-80071 WHA, 2011 U.S. Dist. LEXIS 53641, at *7 (N.D. Cal. May 9, 2011) (“Nonparties may occasionally have to testify and give evidence for and against litigants, but non-parties should not be burdened in discovery to the same extent as the litigants themselves.”). An innocent third party that has little to do with the subject of the FTC’s investigation should not have to risk financial ruin to try to meet the FTC’s unduly burdensome and disproportionate production requests.

II. The FTC should obtain the documents from the targets first before burdening victims

In the alternative, The Prescription Center requests that the FTC hold this CID in abeyance until after compliance by the Big Three PBMs.⁵ This scenario would ensure that the victimizers bear the burden of production and any CID to the victims is narrowly tailored to ease the pain of compliance. Such a request is not only equitable, but also prevents wrongdoers from passing the burden to victims and further punishing them for assisting law enforcement. If the FTC is getting stonewalled by the Big Three PBMs, it should clamp down harder, otherwise failure to comply with a CID has no consequences and it will embolden recipients to not comply with a CID in the future.

⁵ Compliance with the CID also would result in the Prescription Center violating the confidentiality provisions of the Big Three PBMs’ contracts as well as the contract with its PSAO. Ruane Affidavit ¶¶ 8-9. PBMs and PSAOs require pharmacies to agree that the contract terms and communications are confidential such that disclosing this information would result in a breach of the agreement. Providing information to the FTC would pave the way for the PBMs to retaliate against the pharmacies. *Id.* ¶ 9. This is another compelling reason why the FTC should obtain the information from the Big Three PBMs or the PSAOs, and not the independent pharmacies.

Similarly, the FTC might not understand the complexities of pharmacy claims submission and reimbursement. Most of the time, and as is the case here, a PSAO acts as intermediary between the pharmacy and the PBMs.⁶ The communications, claims submissions, reimbursements, and other data between the pharmacy and the PBM occurs through the PSAO entity and not the pharmacy. The FTC should be seeking documents and information from the PSAOs before burdening the small business owners and their independent pharmacies, who cannot bear the financial cost of compliance.

CONCLUSION

For the reasons set forth above, we respectfully ask the Commission to quash the CID, or in the alternative, hold it in abeyance pending production of the documents and data from the Big Three PBMs.

Dated: April 22, 2024

Respectfully submitted,

Frier Levitt, LLC

/s/ Matthew J. Modafferi

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⁶ See, e.g., <https://www.pcmant.org/pharmacy-services-administrative-organizations-psaos-and-their-little-known-connections-to-independent-pharmacies/> (summarizing core PSAO services, including contract negotiations with PBMs and Plans, contracting with wholesalers, prescription drug billing, and audit services).

CERTIFICATE OF SERVICE

I hereby certify that, on April 22, 2024, the foregoing Petition to Quash or Limit Civil

Investigative Demand was served to the following:

Federal Trade Commission (By Hardcopy and Electronic Mail)
Office of the Secretary
600 Pennsylvania Ave. NW
Washington, D.C. 20580
electronicfilings@ftc.gov

Attn: Nicholas Leefer (By Hardcopy and Electronic Mail)
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Dated: April 22, 2024

Respectfully submitted,

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STATEMENT PURSUANT TO 16 C.F.R. §§ 2.7(k) & 2.10

I, Kimberly D. Borland, Esq., states as follows:

On April 19, 2024, at approximately 3:30 p.m., counsel for the petitioner conferred via Zoom with Commission staff Nicholas Leeper, Esq., *et al.*, and John Dempsey, Esq., counsel to DePietro's Pharmacy, in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement.

Dated: April 22, 2024

/s/ Kimberly D. Borland
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AFFIDAVIT OF MICHAEL P. RUANE II

I, Michael P. Ruane II, being of full age, hereby declare and state the following in support of The Prescription Center’s Petition to Quash the Federal Trade Commission’s Civil Investigate Demand (“CID”).

1. I am the Owner and Pharmacist in Charge of The Prescription Center, the recipient of the April 1, 2024 CID at issue, which is located at 329 Cherry Street, Suite 1A, Scranton, Pennsylvania.
2. The Prescription Center that received the CID is a small, independent retail pharmacy that has been serving the community of Scranton, Pennsylvania since 2021.
3. The Prescription Center has just three full-time employees, including myself as its sole owner and sole full-time pharmacist.
4. Responding to the CID’s numerous and broad requests for documents and data, which encompass every facet of the pharmacy’s operations, would place an extraordinary burden on myself and staff. It is estimated that complying with the productions would take many months of work, and require, at a minimum, the hiring of a fourth employee to assist with the requesting, gathering, reviewing, and production of the requested documents and data, and to help maintain ongoing pharmacy operations while I divert my attention to responding to the CID. The hiring process by itself is expected to take approximately two months.

5. As a small operation, The Prescription Center does not have the revenue and financial leeway to bear additional costs, expenses, and legal fees associated with responding to the CID.

6. The Prescription Center opened the Cherry Street location in 2021, and the pharmacy is still encumbered with significant debt incurred in connection with opening a business.


7. Moreover, the majority of the documents and data requested by the FTC are not readily available to The Prescription Center. The Prescription Center works with a pharmacy services administrative organization (“PSAO”) to handle the pharmacy’s billing support, information technology purchasing and implementation, as well as interfacing and communication with the PBMs. The PSAO possesses much of the documents and data responsive to the CID.

8. Accordingly, to comply with the CID, The Prescription Center would have to first request and gather the documents and information from the PSAO, which would require additional time, labor, and expenses by The Prescription Center making compliance with the CID even more unduly burdensome. I anticipate that the PSAO will not provide documentation in response to The Prescription Center’s requests because it considers the data and information to be confidential.

9. The PBMs also consider the information sought by the FTC as confidential and proprietary. If The Prescription Center were to hypothetically comply with the CID by obtaining and providing documents and information that the PBMs consider confidential and propriety, the PBMs will undoubtedly respond by terminating the Prescription Center’s contracts and effectively shut down the business.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: April 22, 2024

By: 
Michael P. Ruane II
As Owner of The Prescription Center