**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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| FEDERAL TRADE COMMISSION,<br><br>Petitioner,<br><br>v.<br><br>COMPLETE MERCHANT SOLUTIONS, LLC,<br><br>Respondent. | **REPORT & RECOMMENDATION REGARDING PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMAND**<br><br>Case No. 2:19-cv-00996-HCN-EJF<br><br>Judge Howard C. Nielson, Jr.<br><br>Magistrate Judge Evelyn J. Furse |

On December 23, 2019, Petitioner Federal Trade Commission ("FTC") initiated this action against Respondent Complete Merchant Solutions, LLC ("CMS"). The FTC's Petition to Enforce Civil Investigative Demand ("CID") asks the Court to enforce the CID it issued to CMS on November 5, 2019 ("2019 CID") (Pet., ECF No. 2). The FTC issued the 2019 CID in connection with an investigation it is conducting to determine whether CMS and its current and former officers and managers engaged in deceptive or unfair practices by providing payment processing services to merchants engaged in fraud, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a), and/or the Telemarketing Sales Rule, 16 C.F.R. § 310 et seq.

On January 13, 2020, the undersigned[1] issued an Order requiring CMS to show cause why an Order compelling compliance with CID should not be granted in accordance with the FTC's Petition. (Order to Show Cause, ECF No. 11.) The Order

[1] The District Judge referred this case to the undersigned Magistrate Judge under 28 U.S.C. § 636(b)(1)(B). (ECF No. 40.)

indicated that the file in this case reflects a prima facie showing that the FTC's investigation is being conducted for a legitimate purpose, that the information sought is reasonably relevant to the investigation, that the demand is not too indefinite, and that the FTC met all administrative prerequisites. (Id.) The Order further stated that the burden of coming forward to oppose enforcement of the CID therefore shifted to CMS and set the show cause hearing for March 5, 2020. (Id.)

Having considered the parties' briefing and arguments at the March 5 hearing, the undersigned RECOMMENDS that the District Judge GRANT the FTC's Petition and ORDER CMS to comply fully with the 2019 CID. As addressed below, the 2019 CID satisfies all the necessary elements to compel enforcement. CMS failed to follow the administrative procedures required to object to a CID; in particular, it did not file a petition to limit or quash the CID in the timeframe required under the FTC's regulations. By failing to exhaust administrative remedies, CMS waived any objections to the 2019 CID. Even if the District Judge chose to reach the merits of the dispute, CMS has not met its burden of showing why the Court should not compel it to comply with the CID.

## LEGAL STANDARD

The FTC, like other agencies, has broad powers to investigate "probable violation[s] of the law[s]" it is charged with enforcing. United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950). Congress empowered the FTC to prevent persons and entities from engaging in "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). To this end, Congress authorized the FTC "[t]o gather and compile information

concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce. . . ." 15 U.S.C. § 46(a). Among other things, the FTC may use CIDs—a type of administrative subpoena—to gather such information. 15 U.S.C. § 57b-1.

To obtain judicial enforcement of a CID, the FTC "must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met." Sec. & Exch. Comm'n v. Blackfoot Bituminous, Inc., 622 F.2d 512, 514 (10th Cir. 1980). If the FTC satisfies this initial burden of proof, the burden shifts to the respondent "to show cause why it should not be compelled to comply with the subpoena." Solis v. CSG Workforce Partners LLC, No. 2:11-CV-903-TC, 2012 WL 1379310, at *2 (D. Utah Apr. 20, 2012) (unpublished); see also Blackfoot Bituminous, 622 F.2d at 515 ("The burden of showing abuse is upon respondents.").

## FACTUAL BACKGROUND

CMS provides payment processing services for merchants, which involve helping merchants obtain and maintain merchant accounts so that the merchants can accept consumers' payments by credit and debit card. (Pet. 6, ¶ 10, ECF No. 2; Decl. of Dotan Weinman ("Weinman Decl.") ¶ 7, Ex. 1 to Pet., ECF No. 2-2.) Financial institutions, referred to as acquiring banks, that are members of the card networks (e.g., Mastercard and Visa) offer merchant accounts; without access to a merchant account through an acquiring bank, merchants cannot accept consumer credit or debit card payments.

(Pet. 6, ¶ 11, ECF No. 2; Weinman Decl. ¶ 8, Ex. 1 to Pet., ECF No. 2-2.) Thus, CMS is not an acquiring bank but rather facilitates the relationship with the acquiring bank and assists in maintenance of the account with that bank.

The FTC started investigating CMS after discovering it provided payment processing services for a number of FTC defendants engaged in unfair and deceptive practices, allowing those defendants the ability to accept consumers' credit and debit card payments. (Pet. 6, ¶ 12, ECF No. 2; Weinman Decl. ¶ 9, Ex. 1 to Pet., ECF No. 2-2.) The FTC indicates that the purpose of the investigation is to determine whether CMS, and its current and former officers and managers, engaged in deceptive or unfair acts or practices themselves by providing payment processing services to merchants engaged in fraud. (Pet. 6, ¶ 13, ECF No. 2; Weinman Decl. ¶ 2, Ex. 1 to Pet., ECF No. 2-2.) According to the FTC, if CMS assisted or facilitated these merchants by processing payments from consumers that were either unauthorized or otherwise obtained illegally, this could violate the Telemarketing Sales Rule, 16 C.F.R. Part 310, or Section 5 of the FTC Act, 15 U.S.C. § 45. (Id.)

The FTC has promulgated three Resolutions pertinent to this case: (1) the first resolution (File No. 012 3145) authorizes the use of compulsory process to investigate whether telemarketers, sellers, or others assisting them have engaged in or are engaging in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and/or deceptive or abusive telemarketing acts or practices in violation of the Telemarketing Sales Rule, 16 C.F.R. pt. 310; (2) the second resolution (File No. 992 3259) authorizes the use of compulsory process "[t]o determine whether unnamed

persons, partnerships or corporations have been or are engaged in the deceptive or unfair use of e-mail, metatags, computer code or programs, or deceptive or unfair practices involving Internet-related goods or services[]"; and (3) the third resolution (File No. 082 3247) authorizes the use of compulsory process "[t]o determine whether unnamed persons, partnerships, corporations, or others have engaged in, or are engaging in deceptive or unfair acts or practices in or affecting commerce, in connection with making unauthorized charges or debits to consumers' accounts, including unauthorized charges or debits to credit card accounts, bank accounts, investment accounts, or any other accounts used by consumers to pay for goods and services[.]" (Pet. 4–5, ¶¶ 4–6, ECF No. 2; Weinman Decl. ¶ 41 & n. 4, Ex. 1 to Pet., ECF No. 2-2; Resolutions, Ex. 7 to Pet. at 21–23, ECF No. 2-8.)

Pursuant to the third Resolution, in August 2017, the FTC issued a CID to CMS seeking documents and other information. (Pet. 7, ¶ 14, ECF No. 2; Weinman Decl. ¶ 14, Ex. 1 to Pet., ECF No. 2-2; 2017 CID, Ex. 2 to Pet., ECF No. 2-3.) Among other things, the 2017 CID sought information and documents related to merchant accounts that CMS opened on behalf of defendants in FTC and other law enforcement actions. (Pet. 7, ¶ 15, ECF No. 2; Weinman Decl. ¶ 15, Ex. 1 to Pet., ECF No. 2-2; 2017 CID, Ex. 2 to Pet., ECF No. 2-3.) The parties met and conferred on the 2017 CID and CMS ultimately produced documents and responded to the interrogatories by August 2018. (Pet. 8, ¶¶ 20–22, ECF No. 2; Weinman Decl. ¶¶ 20–22, Ex. 1 to Pet., ECF No. 2-2.) The FTC does not challenge CMS's response to the 2017 CID, and it is not at issue in this case.

On February 4, 2019, the FTC sent a draft complaint against CMS and proposed consent order to CMS's counsel. (Opp'n to Pet. 8, ECF No. 26; Decl. of Tim Muris, ¶ 22, ECF No. 28.) To date, the FTC has not filed that complaint.

Beginning in August 2019, the FTC participated in and learned about additional investigations and actions concerning CMS and other targets for which CMS had provided merchant accounts. (Pet. 8–10, ¶¶ 24, 27–28, 31, ECF No. 2; Weinman Decl. ¶¶ 24–25, 28–30, 34, Ex. 1 to Pet., ECF No. 2-2.) The FTC requested that CMS supplement its response to the 2017 CID, but CMS did not. (Pet. 9, ¶¶ 25–26, ECF No. 2; Weinman Decl. ¶¶ 26–27, Ex. 1 to Pet., ECF No. 2-2; Letter, Ex. 3 to Pet., ECF No. 2-4.)

Rather than pursue CMS's obligations under the 2017 CID, the FTC issued a second CID on November 5, 2019 pursuant to the three above noted Resolutions. (Pet. 10, ¶ 32, ECF No. 2; Weinman Decl. ¶ 35, Ex. 1 to Pet., ECF No. 2-2; 2019 CID, Ex. 7 to Pet., ECF No. 2-8.) The CID seeks documents and information concerning CMS's provision of payment processing services to certain defendants in legal actions and other targets of FTC investigations. (Pet. 10, ¶ 33, ECF No. 2; Weinman Decl. ¶ 36, Ex. 1 to Pet., ECF No. 2-2; 2019 CID, Ex. 7 to Pet., ECF No. 2-8.) The CID indicates that the FTC is investigating whether CMS and any affiliated entities and individuals

> have engaged in deceptive or unfair acts or practices by providing payment processing services to merchants while they knew or should have known that charges to consumers' accounts were either unauthorized or otherwise obtained illegally, or by assisting or facilitating violations of the Telemarketing Sales Rule, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and 16 C.F.R. Part 310, and whether Commission action to obtain monetary relief would be in the public interest.

(2019 CID 6, Ex. 7 to Pet., ECF No. 2-8.) The CID required CMS to respond to the document requests and interrogatories on or before November 19, 2019. (Pet. 10, ¶ 32, ECF No. 2; Weinman Decl. ¶ 43, Ex. 1 to Pet., ECF No. 2-2; 2019 CID 6, Ex. 7 to Pet., ECF No. 2-8.)

After service of the 2019 CID on November 8, 2019, the FTC and CMS engaged in various communications concerning the CID. (Pet. 9, 11–12, ¶¶ 37, 39–44, ECF No. 2; Weinman Decl. ¶¶ 42, 45–50, Ex. 1 to Pet., ECF No. 2-2.) However, prior to the November 19, 2019 return date, CMS did not seek an extension of time to respond to the CID or file a petition to quash or modify the subpoena. (Pet. 11, ¶ 40, ECF No. 2; Weinman Decl. ¶ 46, Ex. 1 to Pet., ECF No. 2-2.) Then on December 5, 2019, without providing notice to the FTC, CMS filed a declaratory judgment action in the District of Utah seeking to obtain a judicial finding that CMS did not violate Sections 45(a) and 53(b) of the FTC Act. (Pet. 12, ¶ 45, ECF No. 2; Weinman Decl. ¶ 51, Ex. 1 to Pet., ECF No. 2-2; Complete Merchant Solutions v. Fed. Trade Comm'n, 2:19cv963-HCN-EJF (D. Utah).) Also, on December 13, 2019, CMS's counsel sent a letter to the FTC indicating that CMS would not comply with the 2019 CID. (Pet. 12, ¶ 46, ECF No. 2; Weinman Decl., ¶ 52, Ex. 1 to Pet., ECF No. 2-2; Letter, Ex. 14 to Pet., ECF No. 2-15.) On December 23, 2019, the FTC initiated the present action against CMS seeking an order from the Court requiring CMS to comply with the 2019 CID.

## DISCUSSION

### A. The 2019 CID Satisfies the Elements Necessary to Compel Enforcement

The FTC argues in its Petition that the 2019 CID satisfies the elements required to obtain judicial enforcement of a CID, see Blackfoot Bituminous, 622 F.2d at 514, namely that the (1) demand is not too indefinite; (2) the inquiry is reasonably relevant to an investigation the FTC has authority to conduct; and (3) that it has met all administrative prerequisites. (Pet. 15–18, ECF No. 2.) First, CMS does not contend that the 2019 CID is too indefinite. Having reviewed the 2019 CID, the undersigned concludes that the FTC satisfies this element because the CID clearly identifies the information and documents sought. See Resolution Tr. Corp. v. Greif, 906 F. Supp. 1446, 1452 (D. Kan. 1995) (stating that an administrative subpoena is "sufficiently definite" where it contains a description of the documents sought "so that a person can in good faith understand which documents must be produced"). Second, CMS does not dispute that the FTC has met all administrative prerequisites, and the undersigned finds this element satisfied. (See Pet. 11, ¶ 37, ECF No. 2 (indicating that the FTC followed all the procedures and requirements of the FTC Act and its Rules of Practice and Procedure)). CMS does, however, dispute that the 2019 CID satisfies the second element, claiming that the FTC lacked the authority to issue the 2019 CID.

In its Petition, the FTC argues that it issued the 2019 CID "as part of an investigation into whether CMS and associated entities and individuals have violated the FTC Act" and that its "authority to investigate and proceed against payment processors such as CMS for unfair or deceptive acts or practices is well-established." (Pet. 16,

ECF No. 2 (citing Fed. Trade Comm'n v. WV Universal Mgmt., LLC, 877 F.3d 1234, 1236 (11th Cir. 2017) (affirming district court order holding payment processor jointly and severally liable in scheme)).) CMS counters that the 2019 CID exceeds the FTC's authority because (1) "[t]he FTC cannot attempt an end-run around Congress' express limitation on the FTC's authority and regulate banks under the guise of regulating the banks' [Independent Sales Organizations], like CMS[,]" (2) the FTC cannot hold organizations like "CMS liable for alleged frauds committed by merchants, where there is no possible allegation that CMS assisted in any misrepresentation[,]" and (3) recent case law has curtailed the types of remedies the FTC may obtain. (Opp'n to Pet. 15, ECF No. 26.) CMS points out that the Complaint it filed in Complete Merchant Solutions v. Fed. Trade Comm'n, 2:19cv963-HCN-EJF, seeks a declaration that the FTC lacks the authority to bring an action against it. (Id.)

On reply, the FTC, citing case law, contends that "[t]he law is well settled that a CID enforcement action is not the proper forum to raise jurisdictional challenges unless there is a patent lack of jurisdiction." (Reply in Supp. of Pet. 4, ECF No. 38.) Further, the FTC claims that CMS's jurisdictional challenge lacks merit. (Id. at 5.) Notably, the FTC indicates that Congress exempted "banks" from the FTC's jurisdiction, "not entities that provide services to banks" and that the Gramm-Leach-Bliley Act ("GLBA") reaffirmed the FTC's jurisdiction over entities that are not themselves banks but are controlled directly or indirectly by banks. (Id.)

The case law supports the FTC's argument that a CID enforcement action is not the proper place to raise jurisdictional challenges unless jurisdiction is plainly lacking.

See Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509–10 (1943) (finding argument that subpoenaed party is not subject to the jurisdiction of the Department of Labor appropriate in a substantive lawsuit but not as a "defense against [a] subpoena," and affirming decision enforcing subpoena because "[t]he evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose"); CSG Workforce Partners, LLC v. Watson, 512 F. App'x 830, 836–37 (10th Cir. 2013) (unpublished) (rejecting jurisdictional challenge to an administrative subpoena and noting it was not "facially obvious" that the Department of Labor lacked authority to obtain certain information from party); Fed. Trade Comm'n v. Ken Roberts Co., 276 F.3d 583, 587 (D.C. Cir. 2001) (holding that "enforcement of an agency's investigatory subpoena will be denied only when there is 'a patent lack of jurisdiction' in an agency to regulate or to investigate" (quoting CAB v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951, 952 (D.C. Cir. 1979))).

Even though CMS asserts various jurisdictional arguments, those arguments fail to offer a defense to enforcement of the 2019 CID. The FTC does not plainly lack jurisdiction or authority to seek the information and documents sought in the 2019 CID. While the undersigned does not make any definitive conclusions concerning CMS's jurisdictional arguments, the plain language of the FTC Act and GLBA support the FTC's position that it has jurisdiction over entities other than actual banks, and CMS is not a bank. See 15 U.S.C. 57a(f)(2) (defining "bank" as a national bank, member bank of the Federal Reserve System, or bank insured by the FDIC); GLBA, PL 106–102 (Nov. 12, 1999), 113 Stat 1338 ("Any person that directly or indirectly controls, is

controlled directly or indirectly by, or is directly or indirectly under common control with, any bank . . . and is not itself a bank . . . shall not be deemed to be a bank . . . for purposes of any provisions applied by the Federal Trade Commission under the Federal Trade Commission Act."). Additionally, the FTC has successfully prosecuted cases against other payment processors for engaging in unfair or deceptive acts and practices in violation of the FTC Act and Telemarketing Sales Rule. See WV Universal Mgmt., 877 F.3d at 1236.

Finally, the undersigned must consider whether the information and documents sought in the 2019 CID are reasonably relevant to the FTC's investigation.

> The standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one. At 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. [] The requested material . . . 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.

Fed. Trade Comm'n v. Invention Submission Corp., 965 F.2d 1086, 1090 (D.C. Cir. 1992) (emphasis in original). Here, the 2019 CID seeks information and documents concerning CMS's provision of payment processing services to certain defendants in legal actions and to other targets of FTC investigations. Under the relaxed standard for judging relevancy, the information and documents requested in the 2019 CID bear reasonable relevance to the FTC's investigation into whether CMS and any affiliated entities and individuals engaged in deceptive or unfair acts or practices in violation of the FTC Act and/or Telemarketing Sales Rule by providing payment processing services to merchants engaged in fraud.

Thus, the undersigned concludes that the second element of the test for enforcement of an administrative subpoena—that the inquiry is reasonably relevant to an investigation the FTC has authority to conduct— is satisfied. Given that the FTC satisfied all elements necessary to enforce the 2019 CID, CMS bears the burden of showing why the Court should not compel it to comply with the 2019 CID. See Solis, 2012 WL 1379310, at *2; Blackfoot Bituminous, 622 F.2d at 515.

**B. CMS Waived Any Objections to the 2019 CID by Failing to Exhaust Administrative Remedies**

The FTC argues that CMS waived any objections to the 2019 CID because it failed to exhaust administrative remedies. (Pet. 18–19, ECF No. 2.) Specifically, the FTC points out that "Congress and the FTC have provided CID recipients with an administrative remedy to quash or narrow the request, see 15 U.S.C. § 57b-1(f); 16 C.F.R. § 2.10" and that "CMS has never petitioned the FTC to limit or quash the 2019 CID." (Id. at 19.) Given that CMS failed to utilize this administrative process, the FTC claims CMS cannot assert any objections to the 2019 CID. (Id.)

In response, and without citing any authority, CMS claims that the FTC, after threatening to sue CMS imminently cannot now claim that "CMS is bound to seek relief only through the FTC's own administrative procedures." (Opp'n to Pet. 20-21, ECF No. 26.) CMS further points out that during the window of time it had to file a petition to limit or quash the 2019 CID—between November 8, 2019 and November 19, 2019—the parties were meeting and conferring, the FTC recognized additional time would be needed to respond, and the FTC had not even provided it a list of search terms. (Id. at 21.) Given this course of conduct, CMS claims that "[i]t is therefore disingenuous for the

FTC to suggest that CMS's failure to produce all information responsive to the 2019 CID within the six business days afforded was in any way a waiver of CMS's right to object." (Id.) CMS also asserts that the fundamental purpose of the exhaustion requirement—to prevent parties from "sandbagging" agencies with new arguments in court—is not implicated in this case because CMS has made its challenges to the 2019 CID clear in written correspondence, during multiple meet and confer calls, and in its declaratory judgment complaint. (Id.) Finally, CMS claims that an exception to the exhaustion doctrine applies where, as in this case, the question posed to the court is solely one of statutory interpretation. (Id. at 22.) CMS argues that it already raised in its declaratory judgment complaint "a gating legal question regarding the FTC's ability under controlling statutes to regulate [Independent Sales Organizations] like CMS," which the Court should consider before deciding whether to enforce the 2019 CID. (Id.)

On reply, the FTC indicates that CMS's contention that it made all its objections known to the FTC is factually incorrect. (Reply in Supp. 3, ECF No. 38.) The FTC claims that CMS never argued to the FTC that it believes the FTC lacks authority to regulate Independent Sales Organizations like CMS and that CMS did not adequately raise the overbreadth and burden objections it made in its Opposition. (Id.) The FTC points out that CMS did not file its declaratory judgment action until after the 2019 CID's return date and deadline to file a petition to limit or quash the 2019 CID had already passed. (Id.) Further, the FTC asserts that even if CMS had raised such objections, "that would not exhaust CMS's administrative remedies because the FTC's rules require a party seeking to limit a CID to file a formal petition with the FTC's Secretary to be

considered by the Commission itself." (Id.) Finally, the FTC states that CMS's argument that it should not have to exhaust administrative remedies because it filed a separate action challenging the FTC's authority lacks merit and notes that "CMS cites no case where a party's preemptive litigation excused its failure to exhaust administrative remedies." (Id. at 4.) The FTC warns that permitting CMS to rely on its declaratory judgment action "to avoid exhausting its administrative remedies would incentivize other parties seeking to delay government investigations to file lawsuits, however baseless, challenging the FTC's jurisdiction." (Id.)

The FTC has detailed administrative procedures setting forth how a recipient may challenge a CID. 15 U.S.C. § 57b-1(f) provides that a recipient may challenge the CID by filing with the FTC a petition to quash or limit the CID within twenty (20) days after service or before the return date, whichever period is shorter, unless extended by the FTC:

> (f) Petition for order modifying or setting aside demand
>
> (1) Not later than 20 days after the service of any civil investigative demand upon any person under subsection (c), or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding 20 days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any Commission investigator named in the demand, such person may file with the Commission a petition for an order by the Commission modifying or setting aside the demand.
>
> (2) The time permitted for compliance with the demand in whole or in part, as deemed proper and ordered by the Commission, shall not run during the pendency of such petition at the Commission, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of the

> demand to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of such person.

The implementing regulations provide additional detail, including the required contents of the petition:

> Such petition shall set forth all assertions of protected status or other factual and legal objections to the Commission compulsory process, including all appropriate arguments, affidavits, and other supporting documentation. Such petition shall not exceed 5,000 words, including all headings, footnotes, and quotations, but excluding the cover, table of contents, table of authorities, glossaries, copies of the compulsory process order or excerpts thereof, appendices containing only sections of statutes or regulations, the statement required by paragraph (a)(2) of this section, and affidavits and other supporting documentation. Petitions to limit or quash that fail to comply with these provisions shall be rejected by the Secretary pursuant to § 4.2(g) of this chapter.

16 C.F.R. § 2.10(a)(1). The regulations also require a recipient to meet and confer with the FTC prior to filing a petition to limit or quash a CID:

> [A] recipient of Commission compulsory process shall meet and confer with Commission staff within 14 days after receipt of process or before the deadline for filing a petition to quash, whichever is first, to discuss compliance and to address and attempt to resolve all issues, including issues relating to protected status and the form and manner in which claims of protected status will be asserted . . . . The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process.

16 C.F.R. § 2.7(k); see also 16 C.F.R. § 2.10(a)(2) ("Each petition filed pursuant to paragraph (a)(1) of this section shall be accompanied by a signed separate statement representing that counsel for the petitioner has conferred with Commission staff pursuant to § 2.7(k) of this part in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement.") Further, the regulations indicate that the "[t]he Commission will issue an order ruling on

a petition to limit or quash within 40 days after the petition is filed with the Secretary." 16 C.F.R. § 2.10(a)(1). Lastly, a number of people within the FTC have the authority to rule upon requests for extension of time to file petitions to limit or quash CIDs. 16 C.F.R. § 2.10(a)(5).

The 2019 CID also provided CMS notice of its right to file a petition to limit or quash the CID, and the deadlines and requirements for doing so:

> 1.1. **Petitions to Limit or Quash:** You must file any petition to limit or quash this CID with the Secretary of the FTC prior to the return date. Such petition must set forth all assertions of protected status or other factual and legal objections to the CID and comply with the requirements set forth in 16 C.F.R. § 2.10(a)(1) – (2). **The FTC will not consider petitions to quash or limit if You have not previously met and conferred with FTC staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process.** 16 C.F.R. § 2.7(k); see also § 2.11(b). **If you file a petition to limit or quash, You must still timely respond to all requests that You do not seek to modify or set aside in Your petition.** 15 U.S.C. § 57b-1(f); 16 C.F.R. § 2.10(b).

(2019 CID 15, Ex. 7 to Pet., ECF No. 2-8 (emphasis in original)).

As the FTC points out, CMS failed to follow these procedures at all, let alone within the required timeframes. CMS did not file a petition to limit or quash the 2019 CID with the FTC or seek an extension of time to do so. Undoubtedly, the timeline for CMS to file a petition to limit or quash the subpoena was tight given that the FTC served CMS with the 2019 CID on November 8, 2019 and the return date—and date to file the petition—was November 19, 2019. However, CMS could have requested an extension of time to file a petition but never did so. That CMS was engaging in a meet and confer with the FTC during this timeframe does not excuse CMS's failure to follow the required administrative procedures. Given that CMS unquestionably failed to comply with the

FTC's required administrative procedures, the question turns to whether this results in waiver of CMS's objections to the subpoena. The undersigned concludes that it does.

As a general matter, a party must exhaust administrative remedies before seeking relief in federal court. See McKart v. United States, 395 U.S. 185, 193 (1969) ("The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law . . . The doctrine provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' " (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938)); Forest Guardians v. U.S. Forest Serv., 641 F.3d 423, 430 (10th Cir. 2011) ("Plaintiffs must exhaust available administrative remedies before the [relevant agency] prior to bringing their grievances to federal court."). "Claims not properly raised before an agency are waived, unless the problems underlying the claim are 'obvious' or otherwise brought to the agency's attention." Forest Guardians v. U.S. Forest Serv., 641 F.3d 423, 430 (10th Cir. 2011) (quoting Forest Guardians v. U.S. Forest Serv., 495 F.3d 1162, 1170 (10th Cir. 2007)).

The exhaustion requirement promotes administrative autonomy and efficiency, as well as judicial efficiency:

> The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. . . .

> Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

McKart, 395 U.S. at 193–95; see also Forest Guardians, 641 F.3d at 431 (noting that the exhaustion requirement " 'greatly minimizes the threat of sandbagging'—i.e., the concern that plaintiffs will 'shirk their duty' to raise claims before the agency, 'only to present new evidence at trial that undermines' the agency's decision" (quoting Susannah T. French, Judicial Review of the Administrative Record in NEPA Litigation, 81 Calif. L. Rev. 929, 972–73 (1993))).

This exhaustion requirement applies to FTC investigatory proceedings. See Morton Salt, 338 U.S. at 653–54 (applying exhaustion principles in context of FTC proceedings); Am. Motors Corp. v. Fed. Trade Comm'n, 601 F.2d 1329, 1332–37, 1339–40 (6th Cir. 1979) (applying exhaustion principles to FTC's compulsory process); Fed. Trade Comm'n v. O'Connell Assocs., Inc., 828 F. Supp. 165, 168 (E.D.N.Y. 1993) ("It is also well settled that this exhaustion requirement applies to FTC investigatory proceedings."); XYZ Law Firm v. Fed. Trade Comm'n, 525 F. Supp. 1235, 1237 (N.D. Ga. 1981) ("The exhaustion requirement is applicable to FTC investigatory proceedings."). Accordingly, if a party fails to exhaust the FTC's administrative

remedies, it waives any objections it could have raised during the administrative process. See O'Connell Assocs, 828 F. Supp. at 168 (E.D.N.Y. 1993) ("[A] respondent to a CID may not object to CID specifications . . . without first availing himself of a potential administrative remedy."); Fed. Trade Comm'n v. Tracers Info. Specialists, Inc., No. 8:16-MC-18TGW, 2016 WL 3896840, at *4 (M.D. Fla. June 10, 2016) (unpublished) (finding respondent's "failure to comply with the administrative procedure provided by the statute and the implementing regulations bars its assertion of substantive objections to the CID in court").

While the exhaustion requirement would otherwise apply to the 2019 CID, CMS argues that the Court should not apply the doctrine here for a number of reasons. CMS's first argument—that CMS cannot be bound to seek relief only through administrative procedures after the FTC threatened to sue it imminently —lacks any merit. CMS does not point to any authority to support this argument. As addressed below, a party cannot file an ancillary proceeding to challenge an administrative subpoena or CID. Therefore, even if CMS elected to pursue its declaratory judgment action seeking a declaration that it did not violate the FTC Act, that lawsuit does not provide a method to challenge the 2019 CID and does not relieve CMS of its obligation to pursue administrative remedies to narrow or quash the CID.

CMS's argument that the applicable deadlines do not apply because the parties were engaging in a meet and confer during the timeframe it had to file a petition to limit or quash the 2019 CID also lacks any basis. The FTC statute and regulations require a meet and confer to take place prior to filing a petition to limit or quash a CID. While the

meet and confer is a prerequisite to filing a petition, engaging in a meet and confer does not alter the deadlines to file a petition to limit or quash. The FTC statute and regulations relating to CIDs are clear—a receiving party must file a petition to limit or quash a CID withing twenty (20) days or by the return date, whichever is sooner, unless the FTC extends the deadline. Here, the FTC never extended the deadline for CMS to file a petition. Therefore, CMS had to file a petition to limit or quash by November 19, 2019.

CMS's argument that this case does not implicate the fundamental purpose of the exhaustion requirement—to prevent parties from "sandbagging" agencies with new arguments in court—likewise fails. As an initial matter, the fundamental purpose of the exhaustion requirement extends to more than just preventing parties from "sandbagging" agencies in court. As the Supreme Court explained, the exhaustion requirement promotes administrative autonomy and efficiency and judicial efficiency. See McKart, 395 U.S. at 193–95. By failing to exhaust administrative remedies, CMS deprived the FTC of the opportunity to exercise its discretion and apply its expertise or correct any errors or problems with the 2019 CID. Moreover, had CMS's administrative challenge to the 2019 CID been successful, even in part, the courts may never have been required to intervene or may have had to address fewer issues. Finally, if the Court were to proceed despite CMS's failure to exhaust administrative remedies in this case, doing so could lead other parties to pursue the same route and prematurely challenge CIDs in court, increasing the burden on courts and diminishing the FTC's effectiveness. See Tracers Info. Specialists, 2016 WL 3896840, at *6 ("[T]he

Commission's administrative role, and the intent of the statute and implementing regulations, would be minimized, if not rendered meaningless, if a CID recipient could circumvent the rigorous requirements and time limitations set forth in the petition to quash or limit.").

As to the "sandbagging" argument, the fact that CMS raised its objections to the 2019 CID in its declaratory judgment complaint is irrelevant. CMS filed the declaratory judgment complaint on December 5, 2019, well after the timeframe it had to file a petition to limit or quash the CID. Further, CMS does not point to any correspondence or other materials from November 8, 2019 through November 19, 2019 showing that CMS raised with the FTC the specific arguments it makes now concerning jurisdiction, overbreadth, and burden.

Finally, CMS's claim that an exception to the exhaustion doctrine applies also fails. "The general rule requiring exhaustion of remedies before an administrative agency is subject to an exception where the question is solely one of statutory interpretation." Frontier Airlines, Inc. v. Civil Aeronautics Bd., 621 F.2d 369, 371 (10th Cir. 1980). The question posed to the Court here is not one "solely" of statutory interpretation. In addition to its argument concerning the FTC's authority, CMS also asserts that the 2019 CID is overbroad and unduly burdensome, which is not a question of statutory interpretation.

Given that CMS failed to exhaust the applicable administrative remedies by raising its objections to the 2019 CID in a petition to limit or quash, CMS has waived any objections to the CID. CMS claims that "[t]o the extent the Court is inclined to grant any

relief to the FTC now, CMS is willing to meet and confer with the FTC staff regarding a reasonable scope of production." (Opp'n to Pet. 3, ECF No. 26.) CMS, however, waived any rights it had to meet and confer on the scope of the production by failing to follow the required administrative procedures. Therefore, the undersigned RECOMMENDS the District Judge require CMS to comply with the 2019 CID in its entirety. See Tracers Info. Specialists, 2016 WL 3896840, at *4 & *8 (ordering respondent to comply with CID fully in thirty days where respondent failed to exhaust administrative remedies).

### C. CMS's Objections to the CID Also Fail on Their Merits.

CMS further argues that the CID is overly broad and unduly burdensome and that the FTC filed its Petition prematurely. Should the District Judge disagree with the undersigned's recommendation that CMS waived its objections to the Petition, the undersigned addresses each objection in turn.

#### 1. Overbreadth/Burden

CMS argues that because the 2019 CID is overly broad and unduly burdensome the Court should not enforce it. (Opp'n to Pet. 17–18, ECF No. 26.) Specifically, CMS argues that the 2019 CID is overly broad because (1) it seeks information relating to merchants for which the FTC knows CMS no longer provides services, (2) it seeks information about new merchants not referenced in a draft complaint the FTC prepared and threated to file, (3) it imposes a continuing obligation to supplement without end, and (4) the FTC has indicated that it expects CMS to search the personal e-mails of one current and one former employee, which "goes beyond the bounds of reasonable

compliance." (Id. at 17–18.) CMS further argues that compliance with the CID would be unduly burdensome because the FTC insists that it run the 124 proposed search terms across the e-mails of all employees. (Id. at 18.) As a result, "CMS has preliminary determined that it would have to review about 400,000 emails to comply with this request, not to mention the many days it would take CMS executives and other employees to collect the other documents requested by the CID and to respond to the written interrogatories." (Id.) CMS concludes that compliance with the 2019 CID would cost millions of dollars and disrupt CMS's normal business operations. (Id.)

On reply, the FTC responds that broadness alone does not supply sufficient justification for refusal to enforce a subpoena and that in any event, the FTC narrowly tailored the 2019 CID and the materials sought to allow the FTC to assess CMS's potential knowledge and support of the merchant-clients subject to ongoing enforcement actions and investigations. (Reply in Supp. of Pet. 7, ECF No. 38.) In response to CMS's specific arguments on overbreadth, the FTC argues that even if CMS no longer provides services for certain merchants named in the 2019 CID this does not make the CID overly broad because the timing and reasons for termination are directly relevant to the FTC's investigation and may shed light on CMS's knowledge and involvement in potentially unlawful activities. (Id. at 8.) The FTC also asserts that its draft complaint does not limit its ability to seek documents and information because it has broad powers of investigation and that the 2019 CID supplies a sufficiently definite period—from November 1, 2016 until full compliance with the CID. (Id.) The FTC also notes that CMS cites no case law to support its position that requiring searches of

personal e-mail accounts renders a subpoena overly broad. (Id. at 8–9.) As to the undue burden argument, the FTC argues that CMS's vague and conclusory statements concerning the number of days required to respond to the CID and resulting disruption to CMS's business does not establish that compliance with the CID would hinder its normal operations. (Id. at 9.) Finally, the FTC argues that where, as here, a responding party failed to make reasonable efforts to reach an agreement on a scope of an administrative subpoena with the relevant agency, the Tenth Circuit refuses to find an administrative subpoena overly burdensome. (Id.)

As the FTC points out, overbreadth does not constitute a sufficient reason for a court to decline to enforce an administrative subpoena.

> We emphasize that the question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. 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 and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena.

Fed. Trade Comm'n v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977). The undersigned finds that CMS has not met its heavy burden of showing that the 2019 CID is unreasonably broad. That the 2019 CID seeks information for merchants to which CMS no longer provides services does not make the requests for information and documents concerning those merchants overly broad. The timing and reasons for the termination of those relationships are relevant to the FTC's investigation and may shed light on CMS's knowledge of and involvement in potentially unlawful activities. Further, CMS does not cite any applicable authority for the proposition that the FTC's draft

complaint against CMS limits the FTC's investigative powers. The case CMS cites in support of its argument relates to an Equal Employment Opportunity Commission ("EEOC") investigation to which different standards apply. See EEOC v. United Air Lines, Inc., 287 F.3d 643, 650 (7th Cir. 2002) (" '[U]nlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence relevant to the charge under investigation.' " (quoting Equal Employ. Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54, 64 (1984))). As addressed previously, the FTC has broad investigatory powers and may seek information relevant to an investigation. See Invention Submission, 965 F.2d at 1090.

The undersigned also finds no merit to CMS's argument that the 2019 CID imposes continuing production obligations without end. The CID indicates that the applicable period for the requests is "from November 1, 2016 until the date of full and complete compliance with this CID." (Ex. 7 to Pet. 6, ECF No. 2-8.) The 2019 CID also indicates that a knowledgeable person must certify that the responses are complete by signing the attached "Certification of Compliance." (Id.); see also 15 U.S.C. §§ 57b-1(c)(11), (c)(13) (noting requirement of responding party to submit a "sworn certificate, in such form as the demand designates" certifying that it has provided all materials and information). Submission of the Certification of Compliance would end CMS's obligations under the CID. CMS's experience with the 2017 CID does not suggest otherwise. As the FTC notes CMS did not submit the required Certification of

Compliance in response to the 2017 CID.[2] (Pet. 8, ¶ 23, ECF No. 2; Weinman Decl., ¶ 23, ECF No. 2-2.) Thus, the FTC's demand that CMS produce additional documents pursuant to the 2017 CID in 2019 was plausible as CMS failed to certify that its responses were complete. Further, CMS cites no case law to support its assertion that the FTC's indication that it would need to search the personal e-mails of one current and one former employee "goes beyond the bounds of reasonable compliance."

The undersigned also finds that CMS has not met its burden of showing that the 2019 CID imposed an unreasonable burden. To show that a CID imposes an unreasonable burden, the respondent must show compliance "threatens to unduly disrupt or seriously hinder normal operations of a business." Texaco, 555 F.2d at 882. CMS submitted a declaration from Bryant Blanchard, the Chief Financial Officer, to satisfy this standard. Mr. Blanchard avers that responding to the 2017 CID "cost CMS millions of dollars" and "required significant time" from many employees "and was thus disruptive to the normal operations of CMS's business." (Decl. of Bryant Blanchard, ¶ 3, ECF No. 30.) He further indicates that CMS's preliminary search in response to the 2019 CID "has yielded approximately 400,000 emails that would need to be reviewed for production" and that responding to the interrogatories would require days of his time and that of other employees, which "would be disruptive to the normal operation of

[2] CMS attempts to justify its failure to provide the Certification by claiming that the FTC "did not complain that CMS had not provided a certification of compliance." (Opp'n to Pet. 7 n. 1, ECF No. 26.) The FTC does not have the obligation to remind CMS to comply with statutory requirements. See 15 U.S.C. §§ 57b-1(c)(11), (c)(13). The 2017 CID plainly indicates that CMS must provide a Certification of Compliance "certify[ing] that [its] responses are complete." (2017 CID 5, ECF No. 2-3.)

CMS' s business." (Id., ¶ 4.) These conclusory statements do not sufficiently show that responding to the CID would unduly disrupt or seriously hinder CMS's operations. See Fed. Deposit Ins. Corp. v. Garner, 126 F.3d 1138, 1145–46 (9th Cir. 1997) (assertion that subpoenas required individuals to provide thousands of financial documents and an entity to provide one million documents insufficient to establish undue burden). The 2019 CID's requests are extensive and will no doubt impose some burden on CMS. However, CMS has not met its heavy burden of showing that any such burden is unreasonable, particularly given the relevance of the requested information and documents to the FTC's investigation. See Texaco, 555 F.2d at 882.

**2. Timeliness of FTC's Petition**

CMS also argues that the FTC prematurely filed its Petition because, prior to the FTC filing this action, CMS filed a declaratory judgment action against the FTC in this district that "directly challenges the FTC's authority to bring or threaten to bring any action against CMS," which is the "conduct the FTC is investigating with the 2019 CID." (Opp'n to Pet. 19, ECF No. 26). Accordingly, CMS claims that "the Court should refrain from ruling on the FTC's Petition until CMS's challenges to the FTC's regulatory authority are resolved." (Id.) The FTC responds that CMS cites no case law "supporting its position that a respondent can sidestep an agency's validly-issued administrative subpoena by filing an affirmative suit against the agency." (Reply in Supp. of Pet. 10, ECF No. 38.) Further, citing cases, the FTC asserts that the law prohibits CMS from avoiding its obligation to respond to the CID "by challenging the underlying statutory basis for the FTC's authority in a collateral action." (Id.)

The FTC has the better argument. CMS cannot use the declaratory judgment action to challenge the 2019 CID. Case law demonstrates that a party cannot file an ancillary proceeding to challenge an administrative subpoena or CID. See, e.g., Blue Ribbon Quality Meats, Inc. v. Fed. Trade Comm'n, 560 F.2d 874, 876–77 (8th Cir. 1977) (upholding district court's dismissal of action seeking declaratory judgment that subpoenaed parties fell beyond the FTC's jurisdiction and order enjoining enforcement of investigative subpoenas because appellants could challenge alleged overbreadth, burden, and unconstitutionality in a subpoena enforcement proceeding brought by the FTC and jurisdiction either at that time or in later enforcement proceedings brought by the FTC); Reisman v. Caplin, 375 U.S. 440, 443–46 (1964) (holding that a pre-enforcement challenge to IRS summons through declaratory judgment action was "subject to dismissal" because petitioner could challenge subpoena in a subpoena enforcement action); Belle Fourche Pipeline Co. v. United States, 751 F.2d 332, 334–35 (10th Cir.1984) (finding lack of subject-matter jurisdiction over pre-enforcement challenge to investigative subpoena and citing Reisman as "announc[ing] a rule strongly disfavoring any pre-enforcement review of investigative subpoenas"); Wearly v. Fed. Trade Comm'n, 616 F.2d 662, 665 (3d Cir. 1980) ("Resort to a court by recipients of investigative subpoenas before an action for enforcement has commenced is generally disfavored.").

As addressed above, if CMS sought to either narrow or quash the 2019 CID it should have filed a petition with the FTC pursuant to the FTC's administrative procedures. See 15 U.S.C. § 57b-1(f); 116 C.F.R. § 2.10. Having preserved its

objections, to the extent CMS continued to resist production, it could then raise its challenges to the CID in its to defense to a subpoena enforcement proceeding, such as this one, brought by the FTC. See 15 U.S.C. §§ 57b-1(e), (h) (stating that FTC may file petition in district court to enforce CID). CMS could also assert arguments relating to the FTC's authority and jurisdiction in any enforcement proceeding ultimately brought by the FTC. But challenging the propriety of a CID through a declaratory judgment action will not achieve CMS's desired goals. Therefore, the undersigned rejects CMS's argument that the FTC prematurely filed its Petition to enforce the 2019 CID.

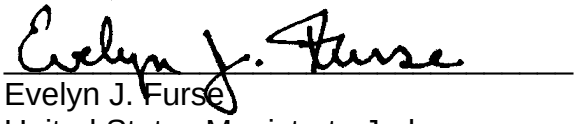
## RECOMMENDATION

As set forth above, the FTC satisfied all the elements necessary to enforce the CID. Moreover, CMS failed to provide any justifiable reason why the Court should excuse its compliance with the CID. Therefore, the undersigned RECOMMENDS the District Judge GRANT FTC's Petition and ORDER CMS to comply fully with the 2019 CID. Specifically, the undersigned RECOMMENDS that the District Judge ORDER CMS to comply with the 2019 CID within thirty (30) days of the issuance of its Order on the Petition, or on a date selected by the FTC, whichever occurs later.

The Court will send copies of this Report and Recommendation to the parties and hereby notifies them of their right to object to the same. The Court further notifies the parties that they must file any objection to this Report and Recommendation with the clerk of the district court, pursuant to 28 U.S.C § 636(b) and Fed. R. Civ. P. 72(b), within fourteen (14) days of service. Failure to file objections may constitute waiver of objections upon subsequent review.

DATED this 28th day of April, 2020.

BY THE COURT:



Evelyn J. Furse
United States Magistrate Judge