UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

March 9, 2010

VIA E-MAIL AND EXPRESS MAIL

D. R. Horton, Inc.
Lennar Corp.
c/o Mitchel H. Kider, Esquire
Weiner Brodsky Sidman Kider PC
1300 19th Street, N.W., 5th Floor
Washington, DC 20036

Re: *Petitions to Limit or Quash Civil Investigative Demands Issued to D. R. Horton, Inc. ("DRH") and Lennar Corp. ("LC"), File Nos. 102-3050 & 102-3051*

Dear Mr. Kider:

The Commission is investigating whether DRH and LC, both builders and sellers of homes, have engaged, or are engaging, in unfair acts or practices or have violated, or are violating, the Consumer Credit Protection Act, in their marketing and sales of homes, and their related sales mortgage lending acts and practices. The use of compulsory process for the conduct of these investigations was authorized by the Commission based on two separate Commission resolutions which provide detailed statements of the scope and purpose of these investigations; a copy of each resolution was attached to the Civil Investigative Demands ("CIDs") that were separately served on DRH and LC. *See* DRH and LH Petitions at 2.[1] On

[1] FTC Resolution Directing Use of Compulsory Process In Nonpublic Investigation: Unnamed Violators of the Equal Credit Opportunity Act (Aug. 1, 1994) describes the nature and scope of investigation authorized as follows:

> To determine whether certain unnamed persons, partnerships, corporations, associations or other entities have been or may be engaged in acts or practices in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* and Regulation B, 12 C.F.R. § 202 *et seq.*, and to determine whether these persons, partnerships, corporations, associations or other entities have been or are engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such acts and practices may include, but are not limited to, discriminating in the extension of credit on the basis of national origin, color, age, religion, receipt of public assistance income, or because an applicant in good faith exercised any right under the

December 11, 2009, DRH and LC timely filed substantially similar petitions to limit or quash the CIDs served upon them on the grounds that the CIDs: (1) seek information that is beyond the scope of the investigation authorized by the resolutions,[2] (2) request information that is too indefinite because the CIDs do "not identify any specific actions or business practices [sic] it believes [DRH and LC] may have pursued . . .;"[3]; (3) require the production of information and materials that are unduly burdensome to produce; and (4) command the production of privileged

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> Consumer Credit Protection Act. This investigation is also to determine whether Commission Action to obtain redress of injury to consumers, or others would be in the public interest.

Id. at 1.

FTC Resolution Directing Use of Compulsory Process In Non-Public Investigations of Various Unnamed Loan Brokers, Lenders, Loan Servicers, and Other Marketers of Loans (Dec. 15, 2008) describes the nature and scope of investigation authorized as follows:

> 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 advertisement, marketing, sale, or servicing of loans and related products 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 various unnamed loan brokers, lenders, loan servicers, and other marketers of loans have engaged or are engaging in acts or practices in violation of the Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq., as amended. The investigation is also to determine whether Commission action to obtain monetary relief, including consumer redress, disgorgement, or civil penalties, would be in the public interest."

Id. at 1. Taken together, those resolutions provide the basis against which the relevance and scope of materials or information being sought from DRH and LC will be determined. *Fed. Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) (". . . we have previously made clear that 'the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.' [*Fed. Trade Comm'n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)].").

[2] DRH Petition at 9 ("Neither of these resolutions is designed to inquire into homebuilding or the practices related to the sale of [sic] home, nor could they reasonably be construed to do so."); LC Petition at 8 ("Neither of these resolutions is designed to inquire into homebuilding or the practices related to the sale of homes, nor could they reasonably be construed to do so.").

[3] DRH Petition at 6; LC Petition at 5 ("The CID does not identify any specific actions or business practices [that the Commission] believes [LC] may have pursued . . . .").

information.[4] As discussed below, Petitioners have not provided adequate legal or factual support for the relief requested. Accordingly, their Petitions shall be denied, and the CIDs will be returnable on March 24, 2010.

This letter advises you of the Commission's disposition of the Petitions. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[5]

I. Preliminary Matters and Standard of Review

Petitioners are substantial, multi-state builders of homes. DRH "is a Fortune 500 company and, during the time period at issue here, was ranked as the largest homebuilder by units sold in the United States since 2003. The company employs approximately 3,000 workers nationwide. [DRH] builds single-family homes in 83 markets in 27 states. . . . The company has four homebuilding segments: North, South, East, and West, which consist of 33 geographical divisions."[6] LC "is a Fortune 500 company that was ranked as the nation's third largest homebuilder in 2008. Currently [LC] builds single-family homes in 41 markets in 16 states. . . . . The Company has four homebuilding segments: East, Central, West, and Houston. These segments have homebuilding operations in . . . 14 states."[7] Each company appears to have a large number offices and facilities spread over a substantial portion of this country, and the managers of each office and facility have some degree of discretion regarding local operations.[8] Each Petitioner has a subsidiary or affiliated company that provides mortgage loans and other

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[4] DRH Petition at 13 and 33; LC Petition at 12, n.4 and 29.

[5] This letter ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

[6] DRH Petition at 3.

[7] LC Petition at 2.

[8] *See, e.g.,* DRH Petition at 16 (". . . a full response to this interrogatory [regarding compliance training of employees] will require the Company to retrieve information from every office that was in existence at any time [during the relevant time period"); LC Petition at 42 (". . . due to the decentralized nature of its homebuilding operations, this specification [the performance evaluation process] presents an undue burden because each office has responsibilities for the supervision of its employees and overall operation.").

loan-related services to Petitioners and buyers of Petitioners' homes.[9] Many of the objections expressed in the Petitions appear at bottom to be problems created by the business organization and management philosophies of the companies, not by the CIDs. The Commission is aware of no authority that would excuse a company from complying with law enforcement process because that company elected to create an unwieldly array of facilities and/or[10] adopted a decentralized management style.

These Petitions raise a recurrent law enforcement problem: the attempt "to get information from those who best can give it and who are most interested in not doing so." *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). In *Morton Salt*, the Court recognized that investigatory process should be enforced "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id*. at 369. Subsequent court decisions have provided a more fulsome understanding of what it means to be "reasonably relevant" to the investigation. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) ("It is well established that a district court must enforce a federal agency's investigative subpoena if the information is reasonably relevant . . . or, put differently, not plainly incompetent or irrelevant to any lawful purpose. . . and not unduly burdensome to produce.") (citations and internal quotation marks omitted). The Courts recognize 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 is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus, courts have refused to modify subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of the business. . . . There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one and must be so to serve its purposes.

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[9] DRH Petition, Declaration of Jennifer Hedgepeth (Dec. 11, 2009) at ¶¶ 1-5 (DHI Mortgage Co., Ltd is an indirect subsidiary of DRH) ("Hedgepeth Decl."); LC Petition, Declaration of Becky L. Moore (Dec. 11, 2009) at ¶¶ 1-3 (Universal American Mortgage Co. ("UAMC") is a subsidiary of LC) ("Moore Decl.").

[10] Petitioners object to the CID instruction that requires the words "and" and "or" to be construed both conjunctively and disjunctively, as necessary, in order to insure completeness of responses. DRH Petition at 9-10; LC Petition at 8-9. The Commission prefers to write CID specifications in relatively simple language. Sentences using "and/or" tend to become more cumbersome and/or more difficult to follow and understand. Rather than increasing either burden or uncertainty, the challenged instruction both eliminates uncertainty, and, more importantly, limits the opportunities for semantic obfuscation or evasions on the part of CID respondents and counsel. Almost a century's experience in process enforcement has taught the Commission that law enforcement benefits from limiting such latter opportunities.

> Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations.[11]

II. The CIDs Request Information That Is Reasonably Relevant to the Investigation.

"The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution." *Texaco,* 555 F.2d at 874. Petitioners' claims that the CIDs seek information that is irrelevant to the investigation are based on a mistaken assumption of law and a semantic evasion. Petitioners contend that "[t]he CID does not identify any specific actions or business practices [sic] it believes [DRH or LC] may have pursued."[12] Unlike complaints or indictments, CIDs are not charging documents.[13] CIDs, and the resolutions authorizing them, do not identify suspected unlawful conduct; rather, CIDs identify the subject matters that are being investigated. At this stage of the inquiry the FTC "is under no obligation to propound a narrowly focused theory of a possible future case." *Texaco*, 555 F.2d at 874. "Certainly a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance." *Id.* at 877.

Petitioners' claims that the resolutions are not "designed to inquire into homebuilding or the practices related to the sale of [homes]" are simply wrong.[14] Almost every residential real estate transaction involves at a minimum a purchase-money mortgage–that is to say, a loan product. Typically, the home being purchased is the collateral that secures the purchase-money mortgage, i.e., a loan related product. Each Petitioner concedes that the resolutions extend at least to "loans and related products."[15] Further, each resolution directs an inquiry to determine if monetary relief would be in the public interest. This latter inquiry would, at a minimum, include an inquiry into the fiscal integrity of the parties being investigated.

Neither the general objections of DRH and LC nor their particularized objections directed to individual specifications of the CIDs establish that any of the information or materials being sought by the CIDs are irrelevant to the investigation measured by the purposes set forth in the resolutions authorizing the use of process. Stated differently, all of the information sought by

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[11] *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (footnotes omitted).

[12] DRH Petition at 6; LC Petition 5.

[13] Likewise, Petitions to Limit or Quash are not discovery devices in the nature of a more particularized statement of the subject under investigation.

[14] DRH Petition at 9; LC Petition at 8.

[15] DRH Petition at 9; LC Petition at 8.

the CIDs is reasonably relevant to purposes of the inquiry determined by reference to the resolutions. The law requires nothing more.[16]

III. DRH and LC Have Provided Insufficient Evidence To Support Their Undue Burden Claim.

"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)." *Nat'l Claims Service, Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998). DRH and LC made no reasonable attempt to show factually that their responses to the CIDs would "unduly disrupt or seriously hinder normal operations of [their] business[es]."[17] To the extent that DRH and LC have identified the records and the assumptions on which their claims of undue burden rest, those claims of burden lack credibility because they rest on their own misreadings of the specifications, instructions, and definitions of the CIDs. The assertions that the CIDs require the production of virtually every document generated by them in the last four years, DRH Petition at 9, LC Petition at 6, are based on erroneous constructions of the CIDs that fail to admit that many of the challenged specifications are specifically limited in scope to marketing, sales, or mortgage lending activity. Moreover, as to many specifications, Petitioners' asserted burden results in large part from their own decentralized management style and document storage. Burden caused by Petitioners' own organizational design cannot excuse them from compliance with the CIDs. Further, many of the additional claims of burden, *e.g.*, having to interview every current and former employee, or review every loan file, appear to be overblown. To the extent Petitioners have specific concerns of burden as to certain specifications, those concerns should be addressed to counsel and staff, who in appropriate circumstances and through good-faith negotiations can adjust production schedules, provide additional guidance as to specifications, and even modify certain specifications.[18]

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[16] Claims that the CIDs are too indefinite in their description of the information and materials to be produced are simply without merit. The Petitions viewed in their entirety actually demonstrate an overarching concern by DRH and LC that the specifications are so definite and inclusive as to preclude substantial room for credible avoidance of production.

[17] *Texaco*, 555 F.2d at 882 ("Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.").

[18] In fact, as LC acknowledged in its correspondence with staff dated February 22, 2010, staff has already "provide[d] a prioritization" of the specifications in the CID to LC, and asked that LC "make specific requests for relief" to avoid unnecessary burden on the company. Letter from David M. Souders, counsel for LC, to Rebecca J.K. Gelfond, counsel for FTC, at 3 (Feb. 22, 2010).

The production burdens quantified by DRH and LC appear to include unrealistically high estimates of the number of staff hours required to comply because, as discussed above, the companies' estimates are based on erroneous, overblown constructions of the CIDs. Moreover, even if those quantified estimates of burden-hours had any credibility, they seem relatively insignificant when measured against the size of the companies. DRH claims that it would take 960 staff hours to review every document it has generated over the last four years. Hedgepeth Decl. ¶ 17. However, 960 work hours amounts to less than a week's work for 20 people. LC initially claimed that it would take it 1360 hours to conduct document review. Moore Decl. ¶ 13. Similarly, 1360 work hours is about 8½ days' work for 20 people. In *Texaco*, the company claimed that it would have to review over four million documents at a cost of approximately 62 work years and $4 million. *Texaco*, 555. F.2d at 922 (Wilkey, J. and MacKinnon, J., dissenting). The suggestion that compliance by DRH and LC, Fortune 500 companies, would "unduly disrupt or seriously hinder [their] normal operations" is unsupported by the record.[19]

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[19] On February 22, 2010, LC filed a Supplemental Submission in Support of Its Petition to Limit or Quash Civil Investigative Demand ("LC Supplemental Petition"), in which LC states that it has "reevaluated the burden" of complying with the CID and provides two additional declarations supporting its claims of burden. LC now asserts that it will take approximately 8,700 hours for LC and 19,742 hours for its mortgage subsidiary to comply with the CID. Howard Decl. ¶ 13; Moore Supp. Decl. ¶ 39. The Rules do not address the possibility of filing supplemental materials. Nor did LC file a Motion with the Secretary seeking leave to file these supplemental materials. As a matter of discretion, the Commission will accept this new evidence into the record for what it is worth.

In this instance, the new evidence possesses very little probative value. First, LC does not and cannot reconcile its new assertion that its over 20-times increase in the expected hours of compliance is due to a "more complete understanding of the scope and breadth" of the CID, LC Supp. Petition at 1, with the fact that its original estimate was already based on its overbroad reading of the CID as requiring review of "every document it has produced in the last four years." LC Petition at 6. Accordingly, LC has not adequately explained how any information newly available to it justifies its revised estimates, and instead repeats in its Supplemental Petition many of the same objections from its original Petition. *Compare, e.g.*, LC Petition at 17 (objecting to Specification R-11 because of purported difficulty in obtaining information on the "[t]housands of [LC's] employees . . . involved in marketing and sales"), *with* Howard Decl. ¶ 17 (basing estimated time required for compliance on purported difficulty in obtaining information on the "more than two thousand employees who were in direct contact with customers or potential customers"). Additionally, similar to LC's initial estimate, its revised estimate continues to be based on misreadings of the scope of the CID's specifications, duplicate compliance efforts, questionable search methodologies, LC's own decentralized organization, and overstatements of the likely time required for compliance. Thus, particularly in view of the size of LC and the resoureces available to it, LC has still failed to meet its burden of demonstrating that the CID would "unduly disrupt or seriously hinder [its] normal operations."

IV. The CIDs Do Not Require the Production of Privileged Materials.

The CIDs expressly do not require the production of privileged materials. The instructions contained within each CID direct that any material responsive to the CID which is being withheld based on a claim of privilege shall be described in a privilege log that must be served on the Commission in compliance with Commission Rule 2.8A, 16 C.F.R. § 2.8A. It should also be noted that each Petition recites some dubious claims of "privilege." For example, DRH's Petition at page 33 (LC's Petition at page 29) asserts a claim of privilege regarding the production of information "relating to any non-public investigations or 'proceedings' by any other 'governmental and/or law enforcement [entity].'" The Commission is familiar with rules of law that prohibit a public agency conducting a law enforcement investigation from publicly disclosing details of the investigation–the rule protecting the secrecy of grand jury proceedings is one such rule. The Commission is not, however, familiar with rules of law that prohibit the recipient of FTC process from disclosing the fact that such process has been received or the nature of his/her/its responses thereto.

Second, each of these new declarations has internal inconsistencies and redundancies that deprive it of substantial reliability. For instance, Moore's supplemental declaration claims that the subsidiary will need 19,742 hours, exclusive of redactions, to comply; however, an itemized listing of the hours claimed paragraph-by-paragraph for compliance with those specifications actually adds up to 21,194 hours. The discrepancy between claimed total hours and actual total hours is less striking in the declaration from Howard; that declaration claims 8,700 hours, but the actual total is 8,580. The itemizations in each of these declarations claim that LC will make redundant, seriatim, separate requests for information from each relevant employee in order to comply with the various specifications of the CID. LC's Petition makes no showing that such redundancy is required.

Third, all of the numbers in the Howard declaration appear to be the product of some type of reverse engineering. Each estimate of the hours to comply with a specification is a multiple of 130 hours. Comparing the hours claimed for compliance with the number of LC's proposed calendar days for that compliance indicates that it would take a single employee working 5 hours each week on compliance exactly 6 months in order to devote 130 hours to compliance. *See* Howard Decl. ¶ 14. This relationship appears to be constant for the Howard declaration, except for the compliance estimates found in paragraph 22–those employees appear to be twice as productive as other employees since those two employees will complete 1040 hours of work in one year (not two). Fourth, LC has provided no explanation of the time estimating methodology being used to generate these estimates; nor has it provided any evidence demonstrating the reasonableness of these estimates. That said, however, neither these declarations nor the Petition, as supplemented, clearly demonstrate any understanding by LC that a CID recipient is required to comply in a timely manner. *Texaco*, 555 F.2d at 882 ("Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest.").

Additionally, both Petitions claim protection from disclosure of confidential business and proprietary information, trade secrets, and the privacy rights of third parties (including the Petitioners' own current and former employees). DRH Petition at 13; CL Petition at 12, n.4. Petitioners have provided no legal authority that supports either claims of privilege for any such materials or the standing of the companies to raise such claims on behalf of third parties. Indeed, the putative assertion of the privacy rights of third parties, especially those of their own employees, could easily be supposed to be little more than a thinly-veiled pretext for the corporations to seek to obtain privacy rights to which they were not otherwise entitled. Further, Petitioners have made no showing that the confidentiality provisions of 15 U.S.C. § 57b-2 and Commission Rule 4.10, 16 C.F.R. § 4.10, would be inadequate to protect anyone's legitimate interests in avoiding public disclosure of confidential or sensitive information.

Finally, Petitioners claim that the records of their voluntary compliance programs are protected from disclosure by the "self-evaluative reports privilege" (DRH Petition at 44, LC Petition at 42); however, those claims are not even supported by their own cited authority. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5431 (General Rule–Other Novel Privileges) at 716 (Supp. 2009):

> In recent years there has been some recognition by federal courts of a privilege for certain corporate records under the rubric of 'self-evaluative reports.' . . . [It] is generally used to refer to records required to be kept by some administrative regulation and that may contain admissions or statistics of use to an opposing litigant in a suit arising under the regulatory scheme of which the report is a part. The decisions are divided, and there seems little justification for creating a new privilege if the matter sought to be protected falls outside of the required reports privilege. (footnotes omitted).

Id. The Petitioners offer no facts or law that would support the conclusion that their voluntary monitoring of compliance with their own sales and marketing policies would, or should, be entitled to protection under the required records privilege.[20]

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[20] These Petitions contain a substantial number of other objections that are wholly without merit. Many of those claims turn upon unreasonable constructions of the specifications or instructions of the CIDs, including various definitions. For instance, there is an instruction advising DRH and LC to consult with staff prior to compliance, if their responses were likely to contain sensitive, personal information. That instruction was not a direction to redact information. Presumably, during that consultation, there would have been a discussion of whether redaction or encryption would be the appropriate manner of dealing with the problem.

V. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** DRH's and LC's Petitions be, and they hereby are, **DENIED**.

IT IS FURTHER ORDERED THAT DRH and LC shall comply with the CIDs at issue on March 24, 2010.

By direction of the Commission.

Donald S. Clark
Secretary