

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,

Petitioner,

v.

THE WESTERN UNION COMPANY,

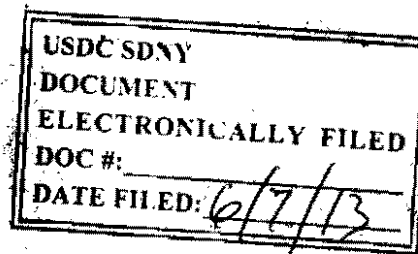
and

LONNIE KEENE, MONITOR, STATE OF
ARIZONA v. WESTERN UNION
FINANCIAL SERVICES, INC., KEENE
CONSULTING ARIZONA, LLC,

Respondents.

Misc. No. 1:13-mc-0131-P1

(Nature of Case M 18-304:
Administrative Subpoena Proceedings)



~~PROPOSED~~ ORDER

1. On April 15, 2013, and pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1(e), Petitioner the Federal Trade Commission (“FTC” or “Commission”) filed a Petition for an Order Enforcing Civil Investigative Demands (the “CIDs”) that it had issued to The Western Union Company (“Western Union”), as well as Keene Consulting Arizona, LLC (the “Former Monitor”), and Greenberg Consulting Arizona, LLC (“Current Monitor,” and collectively with the Former Monitor, the “Monitor”), in *State of Arizona v. Western Union Financial Services, Inc.*, No. CV 2010-5807 (Ariz. Super. Ct. Maricopa Cnty. Feb. 24, 2010). The FTC issued the CIDs in connection with an ongoing law enforcement investigation, as described in FTC Resolution No. 0123145, Resolution Directing Use of Compulsory Process in a

Nonpublic Investigation of Telemarketers, Sellers, Suppliers or Others (the “Resolution”). Pet. Exh. 2 [Dkt. 1].

2. The CID issued to the Monitor requested “[a]ll documents referring or relating to the Periodic Reviews of the Monitor . . . , including, but not limited to, all drafts of any reports, reviews, or correspondence with Western Union” (Monitor’s Specification 1). Pet. Exh. 3 [Dkt. 1]. These Periodic Reviews are referred to herein as the “Monitor Reports.”

3. The CID issued to Western Union requested (1) “[a]ll documents referring or relating to complaints made to Western Union by consumers anywhere in the world, referring or relating to fraud-induced money transfers” (the “Complaint Documents”) (Specification 1); and (2) “[a]ll documents referring or relating to communications with the Monitor . . . including but not limited to all information Western Union provided to the Monitor, and any reports, reviews, or other documents prepared by the Monitor, including any drafts of such documents” (Specification 2). Pet. Exh. 4 [Dkt. 1].

4. After considering the papers of record and the arguments of the parties made before this Court on May 28, 2013, the Court has determined that the Resolution is proper and not overly broad.

	Federal Trade Commission (FTC)	Western Union (WU)
5.	With respect to the “Complaint Documents,” the Court finds that Western Union need not produce any documents arising from or relating to wholly foreign transactions – <i>i.e.</i> , wire transfers transmitted by senders in foreign countries to recipients in foreign countries – because the record does not support the FTC getting these documents	With respect to the “Complaint Documents,” however, the court agrees with Western Union that any documents arising from or relating to wholly foreign transactions – that is, wire transfers by senders in foreign countries made to recipients of the funds in foreign countries – fall plainly outside the FTC’s jurisdiction. Those transactions do not

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	under the U.S. SAFE WEB Act, 15 U.S.C. § 45(a)(4). The Court finds that all other documents responsive to Western Union's Specification 1 must be produced.	"involve material conduct occurring within the United States" and do not cause and are not "likely to cause reasonably foreseeable injury within the United States," within the meaning of the SAFE WEB Act, 15 U.S.C. § 45(a)(4)(A)(i)-(iii).
6.	<p>The Court finds that the Monitor Reports and the other documents requested pursuant to Western Union's Specification 2 and Monitor's Specification 1 are reasonably relevant to the FTC's investigation. Further, in so finding, the Court rejects Western Union's contention that the terms of settlement documents in a state court action in Arizona could control or limit the FTC's ability to use its statutory process authority to obtain documents or information in aid of an FTC investigation or the Court's authority to enforce that process. The authority of an agency of the United States to obtain documents through compulsory process is broad and has been recognized in an unbroken line of cases in the Second Circuit. See, e.g., SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1053 (2d Cir. 1973) (citing, inter alia, United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)). Furthermore, the ability of this Court to enforce the FTC's process is not circumscribed by a state court order. Finally, the Court rejects Western Union's claim that Specification 2 imposes undue burden on Western Union. <u>to the contrary, the Court finds Specification 2 to be reasonable.</u></p> <p><i>add not</i></p>	<p>The court further finds that the Monitor Reports and related documents requested pursuant to Specification No. 2 are reasonably relevant to the Investigation. The court disagrees with Western Union that the Monitor Reports and related documents should not be disclosed because they were created pursuant an order of the court in the Arizona Case on the condition that they would be treated as strictly confidential, except under limited circumstances that Western Union contended had not been demonstrated. Nor does the court agree that production of the documents "referring or relating to" communications with the Monitor would impose an undue burden on Western Union, or that the request for those documents violated the Commission's obligation under 15 U.S.C. § 57b-1(c) that in issuing a CID, it describe the documents sought with enough "definiteness and certainty as to permit such material to be fairly identified."</p>

Documents produced to, not the interest of, a state, or an agency, a state, acts to be produced if response to the CID.

7. Accordingly, it is hereby

8. ORDERED that Petitioner’s request for an order directing Western Union to produce all documents sought pursuant to Specification 1 of the CID is hereby DENIED to the extent the FTC seeks any documents relating to transactions that were neither sent from nor received in the United States. For purposes of this Order, “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States. Western Union is directed to produce to the FTC all other documents requested by Specification 1 to the extent that it has not already done so;

9. IT IS FURTHER ORDERED that Petitioner’s request for an order directing the Monitor to produce documents responsive to Monitor’s Specification 1 is hereby GRANTED;

10. IT IS FURTHER ORDERED that within 14 days of the entry of this Order, or at such later time as may be agreed by the FTC, the Monitor shall produce all documents responsive to Monitor’s Specification 1;

11. IT IS FURTHER ORDERED that the Monitor shall cooperate with any requests from the FTC for clarification or explanation of any materials, information, responses, or documents provided by the Monitor to the FTC pursuant to this Order;

12. IT IS FURTHER ORDERED that, Respondent Western Union shall produce the Monitor Reports responsive to Western Union’s Specification 2 within 14 days of the entry of this Order, or at such later time as may be agreed by the FTC, and shall produce other documents responsive to Specification 2 in accordance with the provisions set forth below;

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13.	IT IS FURTHER ORDERED that, as to the remaining documents responsive to Western Union’s	IT IS FURTHER ORDERED that within 14 days of the receipt of this Order, Western Union shall propose to

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	<p>Specification 2 (<i>i.e.</i>, documents “referring or relating to” all communications with the Monitor) Western Union shall, within 14 days of the entry of this Order, produce a proposed protocol for searching for, identifying, and producing responsive documents “referring or relating to” all communications with the Monitor, which shall include a list of proposed search terms, <i>provided however</i>, that in lieu of producing the proposed protocol, Western Union may produce all responsive documents and the certification required by Paragraph 15, <i>infra</i>;</p>	<p>the FTC search terms that the company shall use to search for relevant and responsive documents “referring or relating to” all communications with the Monitor, as requested by the FTC under CID Specification No. 1. The FTC and Western Union shall negotiate in good faith to reach an agreement with respect to search terms and other search protocols (e.g., number of custodians, files to be searched, etc.) that Western Union would employ to identify and produce such documents, and the parties shall exercise best efforts to reach such an agreement within 20 days of Western Union’s production of the Monitor Reports. If, upon initial review of Western Union’s production, the FTC believes that additional responsive documents should be produced, the parties shall negotiate in good faith to reach agreement with respect to any additional criteria (<i>i.e.</i>, search terms) and/or methodology to be employed. If the parties are unable to reach agreement at any point in their negotiations, they shall advise the Court.</p>
14.	<p>IT IS FURTHER ORDERED that the FTC shall respond in a timely fashion to Western Union’s proposed protocol and may provide additional or alternative search terms or additional or alternative steps for searching for, identifying, and producing documents “referring or relating to” all communications with the Monitor, as required by Specification 2 of the CID. Within 5 days, Western Union shall advise the FTC whether any of the additional or alternative search terms or steps are either overinclusive or underinclusive, with a statement of the</p>	<p>IT IS FURTHER ORDERED that the parties shall negotiate in good faith regarding a timeframe in which Western Union shall produce the Specification 2 documents (other than the Monitor Reports), taking into account the volume of documents retrieved by the agreed-upon searches.</p>

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	<p>specific reasons for its position and supporting data, and the FTC shall promptly respond to Western Union's information. Western Union shall accept the FTC's response and, within 15 days of the FTC's response, or at such later time as may be agreed by the FTC, produce all of the documents identified as a result of its execution of the protocol and the FTC's response;</p>	
15.	<p>IT IS FURTHER ORDERED that the FTC may require reasonable and targeted additional searches for relevant and responsive documents "referring or relating to" all communications with the Monitor, as requested by the FTC under Specification 2, including refining or enlarging the search terms used by Western Union. Upon notice from the FTC, Western Union shall produce any such additional responsive information within 14 days, or at such later time as may be agreed by the FTC; and</p>	<p>See Western Union proposed paragraph 13.</p>
16.	<p>IT IS FURTHER ORDERED that Western Union shall include with its production a certificate in the form prescribed by Fed. R. Civ. P. 26(g), signed by in-house counsel for Western Union and counsel of record in this proceeding. This certificate shall include objective measurements, metrics, or data (e.g., rates of precision and recall) sufficient to describe and enable the FTC to evaluate the quality of the production.</p>	<p>No such language is necessary or warranted for the reasons summarized by Western Union in the parties' joint letter.</p>

SO ORDERED:


JUDGE ALVIN K. HELLERSTEIN
United States District Judge

Dated: June 6, New York, N.Y.