

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552



IN RE FASTBUCKS HOLDING CORP.,)
)
2018-MISC-FastBucks Holding)
Corporation-0001)

**DECISION AND ORDER ON PETITION BY FASTBUCKS HOLDING CORP.
TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMANDS**

Fastbucks Holding Corp. has petitioned the Consumer Financial Protection Bureau for an order to set aside or modify four civil investigative demands (CIDs) issued to it. For the reasons set forth below, the Petition is denied.

FACTUAL BACKGROUND

On October 14, 2013, the Bureau commenced an on-site examination of Fastbucks's operations, followed by a second examination on October 3, 2016. As described in the Petition, these examinations precipitated the Bureau's current investigation of Fastbucks. Petition at 2-3. The Supervision, Enforcement, and Fair Lending Division made a determination through the Bureau's established Action Review Committee process to address certain issues through the enforcement process. *Id.* The Bureau then opened this investigation into whether small-dollar lenders or other persons violated the Consumer Financial Protection Act (CFPA), the Equal Credit Opportunity Act, and the Fair Credit Reporting Act in connection with the offering or provision of loans, and whether those persons also violated the CFPA by failing properly to maintain records and forthrightly to provide information to Bureau examiners.

On November 8, 2016, and again on November 8, 2017, a Bureau enforcement attorney sent direct messages to Fastbucks's owner via social media. The messages primarily concerned a New Mexico enforcement action against Fastbucks that the enforcement attorney worked on prior to his Bureau employment, when he was employed in the New Mexico Attorney General's Office. The attorney has not been staffed on the Bureau's investigation of Fastbucks. *Id.* at 5. The messages do not reference the CIDs at issue here or any other Bureau action with respect to Fastbucks.

On February 12, 2018, the Bureau issued four CIDs to Fastbucks seeking oral testimony, as well as a limited number of documents, concerning Fastbucks's recordkeeping system. Each CID's "notification of purpose" stated that the CID had been issued:

to determine whether small-dollar lenders or other persons (1) in connection with the advertising, marketing, offering, provision, servicing, documentation or collection of loan applications or loans, have engaged in unfair, deceptive or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010 (12 U.S.C. §§ 5531, 5536), or have violated the Equal Credit Opportunity Act (15 U.S.C. § 1691 et. seq.), or the Fair Credit Reporting Act (15 U.S.C. § 1681 et. seq.); or (2) in connection with maintaining records or providing information for a Bureau examination, have violated § 1036(a)(2) of the Consumer Financial Protection Act of 2010 (12 U.S.C. § 5536(a)(2)).

The notification of purpose further advised that a purpose of the investigation was “also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.” The CIDs required Fastbucks to produce documents and to make available three named employees and one witness to speak on behalf of Fastbucks, analogous to a witness examined pursuant to Fed. R. Civ. P. 30(b)(6), to provide oral testimony on March 13 and 14, 2018.

Pursuant to the Bureau’s rules, Fastbucks was required to meet and confer with a Bureau investigator within 10 days of its receipt of the CID. 12 C.F.R. § 1080.6(c). The meet-and-confer took place on February 22, 2018. Fastbucks timely filed its Petition to Set Aside or Modify the CIDs on March 14, 2018.

LEGAL DETERMINATION

I. The CIDs Were Issued for a Proper Purpose

The sole argument raised in Fastbucks’s Petition concerns the social-media messages sent by a Bureau Enforcement attorney to the company’s CEO. Fastbucks characterizes these messages as “harass[ing] and taunt[ing].” Petition at 6. It argues that the messages show that the Bureau’s CIDs were issued for an improper purpose and should be set aside.

The Bureau takes seriously the allegations contained in Fastbucks’s Petition. This Order, however, is appropriately addressed only to the limited question whether the Petition has identified legal grounds to set aside or modify the CIDs that the Bureau issued in aid of an ongoing investigation into possible violations of the CFPA, the Equal Credit Opportunity Act, and the Fair Credit Reporting Act. Because Fastbucks has failed to show that the CIDs were issued for an improper purpose, and because I have determined that the Bureau’s purpose in issuing the CIDs was instead a proper one—to obtain information relevant to possible violations of multiple federal consumer financial laws—Fastbucks’s Petition to Set Aside or Modify CIDs is denied.

As an initial matter, Fastbucks’s challenge to the CID seeking oral testimony from Tameka Johnson is denied as moot. The Bureau has withdrawn this CID after learning that Ms. Johnson is no longer a Fastbucks employee.

As to the remaining CIDs, Fastbucks contends that they must be set aside because they were “issued for an improper purpose.” Petition at 5-6. Under binding Supreme Court precedent, an administrative subpoena such as a CID is generally enforceable in court so long as “the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Courts will, however, decline to enforce administrative subpoenas that are “issued for an improper purpose, such as to harass the [recipient] or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.” *Powell v. United States*, 379 U.S. 49, 58 (1964).

Supreme Court precedent further makes clear that Fastbucks bears a “heavy” burden to show that an otherwise enforceable CID was issued for an improper purpose. *United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 316 (1978). To do so, Fastbucks must show that the Bureau, as an institution, acted for an improper purpose when it issued the CIDs. *Id.* Fastbucks thus cannot meet that burden based solely on the “personal intent” of an individual Bureau employee. *See id.* at 314-16; *see also United States v. Markwood*, 48 F.3d 969, 978 (6th Cir. 1995) (“*LaSalle* held that agency ‘bad faith’ could not be asserted based [solely] on the improper motivations of individual agency employees, but must be institutionalized bad faith.”); *United States v. Millman*, 822 F.2d 305, 309 (2d Cir. 1987) (applying same test).

The Bureau’s valid purpose in issuing the CIDs is not negated by the motivations of the individual Bureau attorney, even if, *arguendo*, those motivations were improper. *See LaSalle*, 437 U.S. at 314-16; *Markwood*, 48 F.3d at 984-85 (subpoena recipient failed to show, “as *LaSalle Bank* requires, that any improper motive on [an individual employee’s] part was adopted by, and therefore institutionalized by, [the agency official who] issued the subpoena”); *Millman*, 822 F.2d at 309-10 (even assuming individual agent’s motive was improper, his influence on the investigation “has not been so pervasive as to have become the institutional posture of the [agency]”).

First, Fastbucks acknowledges that the attorney in question has not been assigned to this investigation. Petition at 5. The Bureau’s internal review has likewise found no indication that the attorney played any role in the formulation or issuance of these CIDs. Although the Bureau has determined that the attorney did at one point participate in a telephone meeting with some members of the case team and another Bureau attorney in order to discuss the New Mexico enforcement matter, that meeting did not concern these CIDs.

Second, these CIDs have been subject to multiple levels of review within the Bureau, culminating today in this Order, that have ensured they were issued for a proper purpose and in accordance with all applicable procedures. *See LaSalle*, 437 U.S. at 315 (multiple “layers of review” within an agency provide “substantial protection” against an individual employee’s improper motives tainting the agency’s institutional purpose in pursuing an investigation). Following the Bureau’s two examinations of Fastbucks beginning in 2013, Petition at 2-3, the Bureau’s Action Review Committee decided to address various issues through the enforcement process. In accordance with the CFPA and the Bureau’s rules governing investigations, the CIDs were issued only after the Bureau’s Office of Enforcement made a determination that Fastbucks

“may be in possession” of information “relevant to a violation” of the laws the Bureau enforces, 12 U.S.C. § 5562(c)(1), and only after a Deputy Assistant Director in the Office of Enforcement reviewed and approved the CIDs, *see* 12 C.F.R. § 1080.6(a). Since receiving the CIDs, Fastbucks has also had an opportunity to raise its objection, first to the Director of the Office of Enforcement, Petition at 3, and now to the Director of the Bureau. *See LaSalle*, 437 U.S. at 315-16 (summons recipient’s ability to appeal to higher-ups within the agency helped ensure that investigation was undertaken for proper purpose).

In support of its request, Fastbucks cites *United States v. Gertner*, 65 F.3d 963 (1st Cir. 1995), which found no “clear error” in a district court’s conclusion that the IRS’s stated purpose for issuing an administrative summons was pretextual. The IRS had issued the summons to a law firm, purportedly to investigate the firm’s tax liability. The district court found that the firm had presented enough evidence to show that the IRS’s purpose in issuing the summons was in fact to investigate one of the firm’s clients. Although the IRS was authorized to pursue such an investigation, it failed to follow special procedures required for third-party summonses. *Id.* at 965-66 (citing 26 U.S.C. § 7609). *Gertner* is a highly fact-specific case with little application to Fastbucks’s Petition. The decision turned on facts not present here, such as evidence that the IRS already had sufficient information to assess the firm’s tax compliance, rendering the summons unnecessary, as well as public statements by the agency that, in the court’s view, suggested that the agency routinely used information gathered via summonses for other purposes. *Id.* at 969-72. More fundamentally, the evidence at issue in *Gertner* was properly focused on the institutional purposes of the agency itself, which Supreme Court precedent makes clear is the relevant inquiry. In contrast, Fastbucks’s Petition concerns only the alleged purposes of an individual agency employee which, for the reasons given above, did not negate the Bureau’s valid purposes in issuing the CIDs.

Of the other cases Fastbucks cites in its Petition, none found that an agency subpoena had been issued for an improper purpose. *See United States v. Zadeh*, 820 F.3d 746, 759 (5th Cir. 2016) (“We are not persuaded that the district court erred in rejecting the doctor’s abuse of process objections and enforcing the subpoena.”); *Crystal v. United States*, 172 F.3d 1141, 1145 (9th Cir. 1999) (“Having reviewed the record de novo, we are satisfied that there was no bad faith on anyone’s part.”); *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1348 (9th Cir. 1983) (remanding for a hearing to determine whether additional discovery was needed into the agency’s purpose). And some did not consider such an argument at all. *See United States v. Powell*, 379 U.S. 48 (1964); *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485 (5th Cir. 2014); *United States v. Ins. Consultants of Knox, Inc.*, 187 F.3d 755 (7th Cir. 1999); *United States v. Barrett*, 837 F.2d 1341 (5th Cir. 1988). The CIDs to Fastbucks were properly issued, as discussed above, and these cases do not support Fastbucks’s contrary argument.

In sum, Fastbucks has not demonstrated that the Bureau acted for an improper purpose in issuing the CIDs, and the CIDs were issued for a valid law enforcement purpose.

II. Modification of the Notifications of Purpose

Fastbucks does not challenge the sufficiency of the notifications of purpose in the CIDs, which describes the scope of the investigation as required by 12 U.S.C. § 5562(c)(2) and 12

C.F.R. § 1080.5. Nevertheless, pursuant to my authority under 12 C.F.R. § 1080.6(e)(4), I will modify the CIDs' notifications of purpose to provide even more information about the nature of the conduct under investigation and the applicable provisions of law, consistent with the recently announced policy of the Bureau's Office of Enforcement. Accordingly, the notifications in the CIDs will now read as follows:

The purpose of this investigation is to determine whether small-dollar lenders or associated persons, in connection with extending or servicing small-dollar loans or collecting debts, have: (1) made harassing debt-collection calls to consumers' workplaces in a manner that is unfair, deceptive, or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531, 5536; (2) failed to maintain and preserve records in a manner that violates Regulation B, 12 C.F.R. Part 1002, principally § 1002.12, implementing the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et. seq.; (3) failed to follow the requirements for providing disclosures to consumers in a manner that violates the Fair Credit Reporting Act, 15 U.S.C. § 1681 et. seq., principally §§ 1681g, 1681m; or (4) failed to maintain records or failed to provide information to the Bureau in connection with a Bureau examination in a manner that violates Section 1036(a)(2) of the CFPA, 12 U.S.C. § 5536(a)(2). The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

III. Good Cause Exists to Make Limited Redactions to the Petition and Exhibits

Finally, the Bureau's regulations governing investigations provide that a petition to modify or set aside a CID and the Bureau's order in response thereto are "part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown." 12 C.F.R. § 1080.6(g). Here, good cause exists to redact limited portions of Fastbucks's Petition and its attached exhibits in order to protect the privacy interests of persons not employed by the Bureau or otherwise involved in this matter, and to protect privileged supervisory material.

CONCLUSION

For the foregoing reasons, Fastbucks's Petition to Set Aside or Modify the CIDs is denied and the CIDs' notifications of purpose are modified as set forth above. Fastbucks is directed to produce all responsive documents and to produce the witnesses named in the three remaining CIDs to provide oral testimony at a time and location to be specified by Enforcement staff, or at another mutually agreeable time and location arranged with Enforcement staff.

April 25, 2019


Kathleen L. Kraninger, Director