

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**
Judge R. Brooke Jackson

Civil Action No. 1:16-cv-01653-RBJ

ELECTRONIC PAYMENT TRANSFER, LLC,
FLEXPAY, LLC,
ELECTRONIC PAYMENT SYSTEMS, LLC,
LAND ACQUISITION, LLC,
QUEBEC HOLDINGS, INC.,
ACCESS-NOW.NET, INC.,
ELECTCHECK, INC., and
FIRST MERCHANT PLATINUM, INC.,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, and
CITYWIDE BANKS, a Colorado corporation,

Defendants.

**FEDERAL TRADE COMMISSION'S MOTION TO
DISMISS PLAINTIFFS' AMENDED COMPLAINT (Dkt. 13)**

Defendant Federal Trade Commission (FTC or Commission) moves to dismiss this action under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) because as a pre-enforcement challenge to valid administrative compulsory process the Court lacks subject matter jurisdiction to review it, and Plaintiffs have failed to state a claim upon which relief may be granted. In support thereof, the FTC states as follows:

I. BACKGROUND

1. Plaintiffs, a group of affiliated corporate entities that includes Electronic Payment Transfer, LLC (EPT) and Electronic Payment Systems, LLC

(EPS) (collectively, EPT), have moved to quash a Civil Investigative Demand (CID) issued by the FTC to Defendant Citywide Banks for EPT bank records. Dkt. 9. The FTC issued the CID, a form of compulsory process similar to a subpoena, under Section 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 57b-1, as part of its ongoing investigation of EPT. *See* Exh. 1, Declaration of Michelle Chua, ¶ 13. The purpose of the investigation is to determine whether EPT or any of its corporate affiliates, in providing credit card payment processing or Independent Sales Organization (ISO) services to fraudulent telemarketers, may have engaged in an unfair or deceptive act or practice in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a), or violated a provision of the FTC's Telemarketing Sales Rule, 16 C.F.R. pt. 310. Exh. 1, ¶¶ 3-10 & Att. 1. The CID was authorized by an FTC investigational resolution and signed by an FTC Commissioner, as required under the FTC Rules of Practice and Procedure. *See* 16 C.F.R. §§ 2.6, 2.7(a); Exh. 1, ¶¶ 13-14 & Atts. 1, 2.

2. Consistent with these Rules, *see* 16 C.F.R. § 2.7(k), FTC staff and Citywide began to meet and confer regarding Citywide's compliance and potential modifications to the CID.¹ Exh. 1, ¶ 15. Those meet-and-confer discussions were ongoing when, on June 24, 2016, counsel for Citywide notified EPT that it had received an FTC CID for EPT records. Dkt. 9-8. Specifically, Citywide told EPT

¹ EPT is incorrect in stating that FTC and Citywide had reached an agreement to limit the scope of the CID. Dkt. 9 at 10. There will be no decisions about the scope of the CID until the FTC and Citywide are able to resume and conclude their meet-and-confer discussions, as provided in the FTC's Rules of Practice. EPT's complaint effectively brought those discussions to a halt. Exh. 1, ¶¶ 15, 17-19.

that “[u]nless prevented from doing so . . . Citywide will deliver records to the Federal Trade Commission by 10:00 a.m. on June 28.”² *Id.*

3. On June 28, 2016, EPT filed a complaint before this Court seeking an injunction against disclosure of the records requested by the CID, or limiting that disclosure in such fashion “as the Court may find appropriate.” Dkt. 1 at 5.³ Contemporaneously with its complaint, EPT moved for a temporary restraining order enjoining Citywide from providing the FTC with any financial information related to EPT “unless and until EPT is provided the [CID] and given a reasonable opportunity to respond, object, or consent.” Dkt. 2 at 6.

4. FTC staff promptly provided Plaintiffs a copy of the CID on June 28, 2016, Exh. 1, ¶ 17, and the parties then entered into a stipulation that provided EPT a ten-day period – *i.e.*, to and including July 11 – to evaluate “whether to seek to quash the CID or seek other protective measures.” Dkt. 5 at 2. That stipulation was entered by the parties – along with a joint motion to stay the TRO proceedings – on July 1, 2016. Dkts. 5, 5-1. On July 11, EPT filed a Motion to Quash the CID. In its Motion, EPT asks the Court to quash the CID to Citywide or require the FTC to provide additional information explaining its investigation. Dkt. 9 at 18.

² Contrary to the representation in Citywide’s notice, FTC and Citywide had not yet agreed on a deadline for compliance with the CID. Exh. 1, ¶¶ 15, 17-19.

³ Plaintiffs amended their complaint on July 18, 2016. Dkt. 13.

II. ARGUMENT

A. This Court lacks jurisdiction to entertain EPT's request for pre-enforcement review of agency investigative process.

It is well-established that the recipient of administrative investigative process cannot short circuit a statutorily prescribed process for obtaining judicial review by instituting an action for declaratory or injunctive relief. *See, e.g., Belle Fourche Pipeline Co. v. United States*, 751 F.2d 332, 334-35 (10th Cir. 1984) (district court lacks subject matter jurisdiction to order pre-enforcement injunctive relief).

The Commission's investigative authority arises from the FTC Act, which authorizes the FTC to issue civil investigative demands to compel production of documents, testimony, tangible things, and written answers to questions related to its investigations of potential legal violations. 15 U.S.C. § 57b-1. FTC CIDs, however, are not self-enforcing. Congress has authorized the FTC to seek judicial enforcement of its CIDs in federal district court. *See* 15 U.S.C. §§ 57b-1(e), (h). Such a proceeding is the only vehicle by which a CID recipient can raise legal challenges to the process. "Since the plaintiffs can, in the subpoena enforcement proceeding, get a judicial determination of the lawfulness of the investigation before any sanction for violating the law is imposed on them, a still earlier round of judicial review, in a suit to enjoin the investigation, would waste judicial resources." *General Finance Corp. v. FTC*, 700 F.2d 366, 369 (7th Cir. 1983) (citing *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980)) (Posner, J.).

Therefore, "[r]esort to a court by recipients of investigative subpoenas before an action for enforcement has commenced is disfavored." *FTC v. Manufacturers*

Hanover Consumer Svcs., 543 F. Supp. 1071, 1073 (E.D. Pa. 1982) (citing *Reisman v. Caplin*, 375 U.S. 440 (1964) Indeed, the Supreme Court and multiple Courts of Appeals have applied this rule to dismiss pre-enforcement proceedings and similar suits brought against the Commission. *See, e.g., General Finance Co.*, 700 F.2d at 372. Because the FTC has not commenced such a proceeding, this Court lacks jurisdiction to consider any of Plaintiffs' challenges to the CID's issuance.⁴

The Tenth Circuit and this court have followed this rule. In *American Buyers Network, Inc. v. FTC*, Civ. A. No. 91-B-750, 1991 WL 214164, *2 (D. Colo. Aug. 14, 1991), the court dismissed for lack of subject matter jurisdiction an action for declaratory judgment and injunctive relief against two FTC CIDs. *See also, Belle Fourche Pipeline Co.*, 751 F.2d at 334-35 (remanding with direction that the challenge to agency subpoenas be dismissed).

Plaintiffs' challenge to the CID here is also outside of this Court's jurisdiction because they cannot show that they face any harm from Citywide's compliance. In its initial filings, EPT asserted only one potential injury from Citywide's compliance with the FTC's CID: the risk of harm from public disclosure of its financial

⁴ If the FTC were to commence such a proceeding, the standard for enforcement would be highly deferential to the agency. Judicial review would be "strictly limited" to determining whether the FTC has demonstrated that "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). The Act further directs the Commission to protect the information it receives in response to CIDs, as well as trade secrets and confidential commercial or financial information, as nonpublic. *See* 15 U.S.C. §§ 46(f), 57b-2(b)(3)(C); 16 C.F.R. §§ 4.10(a)(2), (a)(8), (a)(9), (d).

information.⁵ See Dkt. 2 at 5. But because the Commission would treat any information received from Citywide about EPT and its affiliates as nonpublic, there is no such risk of harm. Indeed, the Commission routinely obtains highly sensitive corporate and personal information in the course of its investigations and courts have reviewed and found the Commission's authority sufficient to protect it.

Invention Submission Corp., 1991 WL 47104, at *4 (“[T]he FTC Act itself expressly forbids public disclosure by the Commission of confidential information obtained by CIDs.”). This suit is thus further without merit because it is unnecessary. Had EPT not filed this action, the FTC's investigation would have simply continued to gather evidence relating to EPT's practices – an investigation EPT knew of and had not objected to. Exh. 1, ¶ 11. Instead, EPT's action has delayed an otherwise proper investigation, which Plaintiffs lack a legal basis to impede.

Because Plaintiffs' complaint and motion amount to effectively the same type of premature pre-enforcement challenge uniformly rejected by courts, Plaintiffs' case should be dismissed for lack of subject matter jurisdiction.

⁵ It is well-established that a CID recipient may not refuse to produce information to the FTC simply because the information is confidential. “Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and must be complied with.” *FTC v. Invention Submission Corp.*, No. MISC. 89-282 (RCL), 1991 WL 47104, *4 (D.D.C. Feb. 14, 1991), *aff'd*, 965 F.2d 1086, 1089 (D.C. Cir. 1992).

B. Plaintiffs failed to exhaust their administrative remedies.

This Court also lacks jurisdiction over Plaintiffs' complaint and motion because Plaintiffs have not exhausted available administrative remedies before the Commission. *See Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Service*, 61 F. Supp.3d 1013, 1045-46 (D. N.M. 2014) (court lacks jurisdiction over unexhausted claims where exhaustion is mandatory). The FTC's own Rules of Practice provide that the exclusive method to challenge a CID is to file a petition to limit or quash with the Commission. *See* 16 C.F.R. § 2.10. The Rules require that such a petition raise "[a]ll assertions of protected status or other factual or legal objections." *Id.* (§ 2.10(a) (emphasis added)). It is undisputed that after learning of the CID Plaintiffs did not file such a petition nor did they seek to have Citywide, the actual recipient of the CID, file one on their behalf. Exh. 1, ¶ 15. This failure is fatal to Plaintiffs' claims here because exhaustion of administrative remedies is necessary for any judicial consideration. The reason for this doctrine is efficiency.

A primary purpose is, of course, the avoidance of premature interruption of the administrative process. 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.

McKart v. United States, 395 U.S. 185, 193-94 (1965); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 653-54 (1950) (holding that respondents should use administrative process to make "a record that would convince us of the measure of their grievance rather than ask us to assume it."). This principle applies with equal

force to proceedings involving FTC CIDs. *FTC v. Tracers Information Specialists, Inc.*, 2016 WL 3896840, *4 (M.D. Fla. June 10, 2016).

As a result, “one who has neglected the exhaustion of available administrative remedies may not seek judicial relief.” *E.E.O.C. v. Cuzzens of Georgia, Inc.*, 608 F.2d 1062, 1063 (5th Cir. 1979). Having failed to first bring its objections to the FTC, Plaintiffs cannot now raise them before this Court.

C. Plaintiffs’ claims arising from Colorado state law are without merit.

Plaintiffs’ reliance on two Colorado Supreme Court cases to support their claims (1) that they have “standing” to challenge the FTC’s CID for their bank records, and (2) that they were entitled to notice of the CID from the FTC is unavailing. These state cases cannot limit the jurisdiction of a federal court to entertain claims about agency process. In any event, they provide no support to Plaintiffs’ position.

It is a general rule that a party does *not* have standing to quash a subpoena issued to a third party, unless the subpoena seeks privileged information. *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997). Plaintiffs’ attempt to avoid this basic rule by pointing to *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980), a Colorado Supreme Court case that found an individual had standing to quash a subpoena issued to bank for that individual’s account records on grounds the Colorado constitution recognized a privacy interest in those records. Dkt 9 at 11. Plaintiffs also cite *People v. Lamb*, 732 P.2d 1216 (Colo. 1987), to claim that they should be notified of such subpoenas. Dkt. 9 at 13-14.

But *Charnes* and *Lamb* cannot bind a federal court in its consideration of the FTC's statutory authority to issue CIDs in support of a law enforcement investigation. See U.S. CONST. art. VI, cl. 2; *Liner v. Jafco, Inc.*, 375 U.S. 301, 309 (“To the federal statute and policy, conflicting state law and policy must yield.”); 15 U.S.C. § 57b-1. Indeed, courts have relied on the Supremacy Clause to find that state statutes requiring imposing notice or other requirements are preempted by federal law and do not apply to valid subpoenas and other process issued under federal authority. *United States v. First National Bank of Maryland*, 866 F. Supp. 884, 886-87 (D. Md. 1994); see also *United States Dept. of Justice v. Colorado Board of Pharmacy*, No. 10-cv-01116-WYD-MEH, 2010 WL 3547898, at *4 (D. Colo. Aug. 13, 2010), *report and recommendation adopted by* 2010 WL 3547896 (D. Colo. Sept. 3, 2010).

Also, *Charnes* and *Lamb* are inapposite because both concern subpoenas from state agencies to obtain information belonging to *individuals*. In contrast, at issue in this case is a civil investigative demand for bank records belonging to *corporate* entities. In these circumstances, as this Court has recognized, the law governing expectations of privacy in financial records is the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* (“RFPA”). See *Guglielmi v. Social Security Admin. Office of the Inspector General*, No. 12-cv-00442-DME, 2012 WL 1319477, *1 (D. Colo. Apr. 7, 2012).⁶

⁶ As the *Charnes* Court recognized, the Supreme Court has held that the Fourth Amendment provided no expectation of privacy in bank records. *United States v. Miller*, 425 U.S. 435, 440-43 (1976).

RFPA, however, does not extend its protections to corporate entities. Instead, the law only provides protections to “customer,” which is defined as “any person or authorized representative of that person who utilized or is utilizing any service of a financial institution.” 12 U.S.C. § 3401(5). In turn, “person” means “an individual or a partnership of five or fewer individuals.” 12 U.S.C. § 3401(4). The facts that RFPA protects individuals and closely held partnerships and not the types of corporate entities at issue here is why the CID at issue contained instructions specifically *excluding* records covered by RFPA and instead sought only those records belonging to corporate entities such as EPS, EPT, and their affiliates.⁷ See Exh. 1, Att. 2 at 7 (Instruction Q), 8; *see also First National Bank of Maryland*, 866 F. Supp. at 886.

It is true that RFPA provides a right to notice of administrative subpoenas seeking bank records, but this right only extends to customers, meaning individuals and closely held partnerships but not corporate entities. In section 3402, it states:

Except as provided by section 3403(c) or (d), 3413, or 3414 of this title, no Government authority may have access to or obtain copies of, or the information contained in the financial records of any *customer* from a financial institution unless the financial records are reasonably described and . . . such financial records are disclosed in response to an administrative subpoena or summons which meets the requirements of section 3405 of this title.

⁷ The distinction between individual and corporate privacy rights rests in Supreme Court precedent. In *United States v. Morton Salt Inc.*, the Supreme Court made clear that corporations do not have the same privacy interests or protections from government investigations as individuals do. “While they may and should have protection from unlawful demands made in the name of public investigations, corporations can claim no equality with individuals in the enjoyment of a right to privacy.” *Morton Salt Co.*, 338 U.S. at 652 (citations omitted).

12 U.S.C. § 3402 (emphasis added). In turn, section 3405 describes the terms of the notice to be provided to *customers* in response to an administrative subpoena for their records, but, again, the statutory reference to *customers* excludes the corporate entities listed in the CID at issue. 12 U.S.C. § 3405. Thus, under governing federal law, Plaintiffs – as corporate entities – do not have an expectation of privacy in its bank records, nor a right to notice of the CID. *First National Bank of Maryland*, 866 F. Supp. at 886. The CID issued by the FTC was thus lawful and proper.⁸

Finally, both *Charnes* and *Lamb* are ultimately adverse to Plaintiffs. Despite its other holdings, in *Charnes* the Colorado Supreme Court nonetheless correctly applied federal law to find that the individual taxpayer’s motion to quash was properly denied. *Charnes*, 612 P.2d at 1122-24. And in *Lamb*, the Supreme Court found that the evidence was obtained from the bank “in full compliance with statutory and constitutional requirements” and should not be suppressed despite a lack of notice. *Lamb*, 732 P.2d at 1222. Neither of these cases persuasively supports Plaintiffs’ position here.

III. CONCLUSION

The Court should dismiss Plaintiffs’ Amended Complaint because it lacks subject matter jurisdiction to review a pre-enforcement challenge to valid administrative compulsory process. The Court also lacks subject matter jurisdiction

⁸ Plaintiffs’ claims that the FTC attempted to “conceal” its investigation and have refused to provide information about the investigation likewise fail because the FTC’s conduct has been entirely consistent with the law. Dkt. at 9, 17. The FTC did not disclose to Plaintiffs that it issued a CID to Citywide Banks because CIDs are nonpublic. See 16 C.F.R. § 2.6; FTC Operating Manual Ch. 3.1.2.3.

over Plaintiffs' claim for which they did not exhaust available administrative remedies. Finally, Plaintiffs' claims that the FTC administrative subpoena is subject to challenge under state law fails to state a claim.

Respectfully submitted this 21st day of July, 2016

JOHN F. WALSH
UNITED STATES ATTORNEY

s/ Mark S. Pestal
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following agency representatives:

scott@kroblaw.com
dbarber@sbbolaw.com

s/Mark S. Pestal
U.S. Attorney's Office

FTC Exh. 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**
Judge R. Brooke Jackson

Civil Action No. 1:16-cv-01653-RBJ

ELECTRONIC PAYMENT TRANSFER, LLC,
FLEXPAY, LLC,
ELECTRONIC PAYMENT SYSTEMS, LLC,
LAND ACQUISITION, LLC,
QUEBEC HOLDINGS, INC.,
ACCESS-NOW.NET, INC.,
ELECTCHECK, INC., and
FIRST MERCHANT PLATINUM, INC.,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, and
CITYWIDE BANKS, a Colorado corporation,

Defendants.

DECLARATION OF MICHELLE CHUA

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am an attorney employed by the U.S. Federal Trade Commission (“FTC” or “Commission”), in Washington, D.C. I am presently employed in the Division of Marketing Practices in the FTC’s Bureau of Consumer Protection.
2. This declaration is based on my personal knowledge or official records maintained by the FTC. I have reviewed and verified that Attachments (“Att.”) 1 and 2 to this Declaration are true and correct copies of the original

documents. I have also read plaintiff's Motion to Quash. At the present time, I am the lead attorney assigned to the investigation of Electronic Payment Systems, LLC ("EPS"), FTC File No. 1523213.

3. Over the past several years, the FTC has investigated and brought actions against payment processors and other third parties who have assisted fraudulent telemarketers by, among other things, enabling and processing consumer credit card payments to such telemarketers. Such conduct may constitute an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or a violation of the Telemarketing Sales Rule ("TSR"), 16 C.F.R. pt. 310, or both.
4. A credit card payment processor is a firm that helps process credit card payments. What to a consumer appears as a seamless and near-instant event at a store or online website is actually a complicated series of exchanges involving multiple entities. These entities include, on one side, the consumer and the consumer's bank and, on the other, the merchant and the merchant's bank, while between them are the credit card networks (*i.e.*, VISA), payment processors, and other third parties involved in processing a transaction.
5. Another type of entity that is involved in this process is an Independent Sales Organization ("ISO"). Among other things, an ISO serves as a kind of "go-between" – it solicits and locates merchants seeking to open credit card

merchant accounts with the ISO's acquirer bank, which is the entity that has access to the credit card networks (*i.e.*, VISA). Without the approval of the ISO's acquirer bank, merchants have no way of using the credit card networks as a consumer payment mechanism for the merchants' sales transactions. Many acquiring banks require their ISOs to not only market the bank's processing services, but also perform the service of screening or underwriting prospective merchants on behalf of the acquiring banks. This screening is intended to, among other things, identify and screen out fraudulent merchants or merchants unlikely or unable to comply with the credit card association's rules. However, an ISO that is complicit with a fraudulent merchant can enable the merchant to have access to the credit card system it would not otherwise be able to get.

6. Plaintiff, Electronic Payment Transfer, LLC, d/b/a Electronic Payment Services, LLC ("EPS"), is a company incorporated in Colorado in 2000, with its principal place of business located at 6472 S. Quebec St., Englewood, Colorado 80111. For purposes of this Declaration, EPT and EPS are referred to collectively as "EPS."
7. In 2015, the FTC commenced an investigation of EPS to determine whether the company was providing payment processing or ISO services to telemarketers engaged in fraud. This investigation followed a previous case involving a fraudulent telemarketer called "Money Now Funding" ("Money

Now”). In 2013, the FTC sued Money Now for a scheme that involved, among other things, offering consumers the false business opportunity of referring other small businesses to Money Now for loans. In fact, as the FTC alleged, Money Now made no such loans and no consumer who purchased the business opportunity made money. The case settled in 2015. EPS served as the ISO and payment processor for the entities involved in the Money Now scheme.

8. On April 11, 2011, the Commission issued a Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others (FTC File No. 0123145). This Resolution authorized the use of compulsory process

[t]o determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission’s Telemarketing Sales Rule, 16 C.F.R. pt. 310 (as amended), including but not limited to the provision of substantial assistance or support – such as mailing lists, scripts, merchant accounts, and other information, products, or services – to telemarketers engaged in unlawful practices. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

9. On November 18, 2015, under the authority of this Resolution, the FTC issued a CID to Electronic Payment Systems, LLC. This CID requested

documents and information relating to (1) EPS's role in providing ISO services to the Money Now scheme and (2) EPS's ISO and payment processing practices. The CID also requests documents and information about EPS's overall ISO screening, underwriting, and monitoring practices for merchants deemed to be "high risk." It is therefore broader in scope than the description that appears in Plaintiff's Motion to Quash.

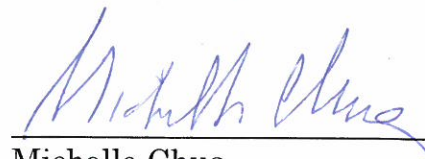
10. On March 2, 2016, the FTC issued a second CID to EPS under the authority of the same Resolution (FTC File No. 0123145).
11. Under the FTC's Rules of Practice, recipients of FTC investigative process may petition the Commission to limit or quash a CID or a subpoena. *See* 16 C.F.R. § 2.10. EPS did not file a petition to limit or quash either the November 2015 CID or the March 2016 CID.
12. On April 1, 2016, the Commission re-issued its Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others (FTC File No. 0123145). *See* Att. 1. This resolution was substantially the same as the resolution of April 11, 2011, which had expired after a five-year period.
13. Under this resolution, the FTC issued a Civil Investigative Demand to Citywide Banks on May 23, 2016 as part of the same investigation into EPS. *See* Att. 2.

14. The CID was signed by an FTC Commissioner and requested documents and responses to interrogatories. The Commission's requests are directly relevant to the Commission's investigation of EPS, and include bank records for bank accounts held (1) in the names of EPT and EPS and (2) in the names of affiliated corporations owned by EPT's and EPS's principals.
15. Citywide did not file a petition to limit or quash the CID. Instead, it informed the FTC that there were a total of 9 bank accounts, held in the name of 7 corporate entities, that were covered by the FTC's CID. Citywide and FTC staff then opened discussions regarding possible modifications in the scope of the CID's requests. As part of those discussions, the FTC asked Citywide to produce a partial set of bank records for purposes of considering whether to narrow the scope of the CID or extend the deadline for compliance.
16. On Monday, June 27, 2016, I was notified by Scotty Krob, counsel for EPS, that EPS had been notified by Citywide Bank of the CID.
17. On Tuesday, June 28, 2016, Mr. Krob informed me that EPT had filed a complaint and motion for temporary restraining order in the United States District Court for Colorado. I emailed to Mr. Krob a copy of the FTC's CID to Citywide Banks. I further informed Mr. Krob that the FTC and Citywide were in discussions regarding modifying the scope of the CID but that no decisions had been made.

18. Following these communications, counsel for the FTC, EPS, and Citywide Bank negotiated a stipulation to stay the hearing on EPS's motion for TRO. As part of that stipulation, Citywide Bank agreed that it would not produce information in response to the CID either (1) until EPS's suit was resolved or (2) Citywide was otherwise permitted under the terms of the stipulation. As a result, any discussions between the FTC and Citywide regarding modification of the CID are on hold.
19. To date, the FTC has not received any documents from Citywide Bank in response to the CID at issue because of the pendency of this action. The unavailability of these documents has materially impeded the FTC's investigation of EPS. Once this matter is concluded, however, the FTC intends to resume discussions with Citywide regarding compliance with the CID.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 2016



Michelle Chua
Division of Marketing Practices
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Mail Stop CC-8603
Washington, D.C. 20580
202-326-3248

Chua Declaration Attachment 1

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

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Maureen K. Ohlhausen
 Terrell McSweeney

**RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN A NONPUBLIC
INVESTIGATION OF TELEMARKETERS, SELLERS, SUPPLIERS, OR OTHERS**

File No. 012 3145

Nature and Scope of Investigation:

To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. pt 310 (as amended), including but not limited to the provision of substantial assistance or support — such as mailing lists, scripts, merchant accounts, and other information, products, or services — to telemarketers engaged in unlawful practices. The investigation is also to determine whether Commission action to obtain monetary relief would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed five years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, 57b-1 (as amended); and FTC Procedures and Rules of Practice, 16 C.F.R. §§ 1.1 *et seq.* and supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

Issued: April 1, 2016

Chua Declaration Attachment 2



United States of America
Federal Trade Commission

CIVIL INVESTIGATIVE DEMAND

1. TO

Citywide Banks
10637 East Briarwood Circle
Centennial, CO 80112

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED

You are required to appear and testify.

LOCATION OF HEARING	YOUR APPEARANCE WILL BE BEFORE
	DATE AND TIME OF HEARING OR DEPOSITION

You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.

You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS MUST BE AVAILABLE

JUN 20 2016

3. SUBJECT OF INVESTIGATION

See attached resolution.

4. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN

Kathleen Nolan, Records Custodian (202) 326-2795
Darren Wright, Deputy Records Custodian (202) 326-2348
Federal Trade Commission
600 Pennsylvania Ave. NW, Mail Stop: CC-8528
Washington, DC 20580

5. COMMISSION COUNSEL

Michelle Chua (202) 326-3248
Division of Marketing Practices
Federal Trade Commission
600 Pennsylvania Ave., NW, Mail Stop: CC-8528
Washington, DC 20580

DATE ISSUED

5/23/16

COMMISSIONER'S SIGNATURE

INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documents or the submission of answers and report in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances of such production or responsible for answering each interrogatory or report question. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 28 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

Form of Certificate of Compliance*

We do certify that all of the documents and information required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objections to such interrogatory or uncompleted portion and the reasons for the objections have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

*In the event that more than one person is responsible for complying with this demand, the certificate shall identify the documents for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 28 U.S.C. § 1746.

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

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Maureen K. Ohlhausen
 Terrell McSweeney

**RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN A NONPUBLIC
INVESTIGATION OF TELEMARKETERS, SELLERS, SUPPLIERS, OR OTHERS**

File No. 012 3145

Nature and Scope of Investigation:


To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission's Telemarketing Sales Rule, 16 C.F.R. pt 310 (as amended), including but not limited to the provision of substantial assistance or support — such as mailing lists, scripts, merchant accounts, and other information, products, or services — to telemarketers engaged in unlawful practices. The investigation is also to determine whether Commission action to obtain monetary relief would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed five years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, 57b-1 (as amended); and FTC Procedures and Rules of Practice, 16 C.F.R. §§ 1.1 *et seq.* and supplements thereto.

By direction of the Commission.


Donald S. Clark
Secretary

Issued: April 1, 2016

**CIVIL INVESTIGATIVE DEMAND
SCHEDULE FOR PRODUCTION OF DOCUMENTARY MATERIALS**

I. DEFINITIONS

As used in this Civil Investigative Demand (CID), the following definitions shall apply:

- a. **And**, as well as **or**, shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any specification in this Schedule all information that might be construed to be outside the scope of the specification.
- b. **Any** shall be construed to include **all**, and **all** shall be construed to include the word **any**.
- c. **CID** shall mean the Civil Investigative Demand, including the attached Resolution and this Schedule, and including the Definitions, Instructions and Specifications.
- d. **Company** shall mean **Citywide Banks**, and includes its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, members, employees, agents, consultants, and other persons working for or on behalf of the foregoing.
- e. **Document** shall mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, or label. **Document shall also include all documents, materials, and information, including Electronically Stored Information, within the meaning of the Federal Rules of Civil Procedure.**
- f. **Each** shall be construed to include **every**, and **every** shall be construed to include **each**.
- g. **Electronically Stored Information** or **ESI** shall mean the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by you into a reasonably usable form. This includes, but is not limited to,

electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards, magnetic or electronic tapes; disks; computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media.

- h. **Electronic Payment Transfer, LLC (“EPT”)** shall mean the entity that has or had a business address at 6472 S. Quebec Street, Englewood, Colorado 80111, and its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, members, employees, agents, consultants, and other persons working for or on behalf of the foregoing.
- i. **FTC or Commission** shall mean the Federal Trade Commission.
- j. **Referring to or relating to** shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.
- k. **You and Your** shall mean the person or entity to whom this CID is issued and includes the **Company**.

II. INSTRUCTIONS

- A. **Confidentiality.** This CID relates to an official, nonpublic, law enforcement investigation currently being conducted by the Federal Trade Commission. You are requested not to disclose the existence of this CID until you have been notified that the investigation has been completed. Premature disclosure could impede the Commission’s investigation and interfere with its enforcement of the law.
- B. **Meet and Confer:** You must contact **Michelle Chua at 202-326-3248** as soon as possible to schedule a meeting (telephonic or in person) to be held within fourteen (14) days after receipt of this CID, or before the deadline for filing a petition to quash, whichever is first, in order 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, and the submission of ESI and other electronic productions as described in these Instructions. Pursuant to 16 C.F.R. § 2.7(k), you must make available personnel with the knowledge necessary for resolution of the issues relevant to compliance with this CID, including but not limited to personnel with knowledge about your information or records management systems, relevant materials such as organizational charts, and samples of material required to be produced. If any

issues relate to ESI, you must make available a person familiar with your ESI systems and methods of retrieval.

C. Applicable Time Period: Unless otherwise directed in the specifications, the applicable time period for the request shall be from **January 1, 2012 to May 1, 2016**.

D. Claims of Privilege: If any material called for by this CID is withheld based on a claim of privilege, work product protection, or statutory exemption, or any similar claim (*see* 16 C.F.R. § 2.7(a)(4)), the claim must be asserted no later than the return date of this CID. In addition, pursuant to 16 C.F.R. § 2.11(a)(1), submit, together with the claim, a detailed log of the items withheld. The information in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. Submit the log in a searchable electronic format, and, for each document, including attachments, provide:

1. Document control number(s);
2. The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);
3. A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;
4. The date the material was created;
5. The date the material was sent to each recipient (if different from the date the material was created),
6. The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;
7. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors;
8. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;
9. The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;
10. The factual basis supporting the claim that the material is protected; and

11. Any other pertinent information necessary to support the assertion of protected status by operation of law.

16 C.F.R. §2.11(a)(1)(i)-(xi).

In the log, identify by an asterisk each attorney who is an author, recipient, or person copied on the material. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, provide in the log the information required by Instruction D.6. 16 C.F.R. §2.11(a)(2). The lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim of protected status must attest to the log. 16 C.F.R. §2.11(a)(1).

If only some portion of any responsive material is privileged, all non-privileged portions of the material must be submitted. Otherwise, produce all responsive information and material without redaction. 16 C.F.R. § 2.11(c). The failure to provide information sufficient to support a claim of protected status may result in denial of the claim. 16 C.F.R. § 2.11(a)(1).

- E. **Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this CID. The Commission may require the submission of additional documents at a later time during this investigation. **Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents** that are in any way relevant to this investigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise. *See* 15 U.S.C. §50; *See also* 18 U.S.C. §§ 1505, 1519.
- F. **Petitions to Limit or Quash:** Any petition to limit or quash this CID must be filed with the Secretary of the Commission no later than twenty (20) days after service of the CID, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of protected status or other factual and legal objections to the CID, including all appropriate arguments, affidavits, and other supporting documentation. 16 C.F.R. §2.10(a)(1). Such petition shall not exceed 5,000 words as set forth in 16 C.F.R. § 2.10(a)(1) and must include the signed separate statement of counsel required by 16 C.F.R. § 2.10(a)(2). **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 §2.11(b).
- G. **Modification of Specifications:** If you believe that the scope of the required search or response for any specification can be narrowed consistent with the Commission's need

for documents or information, you are encouraged to discuss such possible modifications, including any modifications of definitions and instructions, with **Michelle Chua** at 202-326-3248. All such modifications must be agreed to in writing by the Bureau Director, or a Deputy Bureau Director, Associate Director, Regional Director, or Assistant Regional Director. 16 C.F.R. § 2.7(i).

- H. **Certification:** A responsible corporate officer of the Company shall certify that the response to this CID is complete. This certification shall be made in the form set out on the back of the CID form, or by a declaration under penalty of perjury as provided by 28 U.S.C. §1746.
- I. **Scope of Search:** This CID covers documents and information in your possession or under your actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, and other agents and consultants, whether or not such documents and information were received from or disseminated to any person or entity.
- J. **Document Production:** You shall produce the documentary material by making all responsive documents available for inspection and copying at your principal place of business. Alternatively, you may elect to send all responsive documents to:

Kathleen Nolan
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop CC-8528
Washington, D.C. 20580

Because postal delivery to the Commission is subject to delay due to heightened security precautions, please use a courier service such as Federal Express or UPS. Notice of your intended method of production shall be given by email or telephone to **Michelle Chua**, mchua@fte.gov, at (202) 326-3248 at least five days prior to the return date.

- K. **Document Identification:** Documents that may be responsive to more than one specification of this CID need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the

documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number all documents in your submission with a unique identifier, and indicate the total number of documents in your submission.

- L. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this CID. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to Commission staff upon request. Copies of marketing materials and advertisements shall be produced in color, and copies of other materials shall be produced in color if necessary to interpret them or render them intelligible.
- M. **Electronic Submission of Documents:** See the attached "Federal Trade Commission, Bureau of Consumer Protection Production Requirements," which details all requirements for submission of information, generally requiring that files be produced in native form and specifying the metadata to be produced. As noted in the attachment, some items require discussion with the FTC counsel prior to production, which can be part of the general "Meet and Confer" described above. If you would like to arrange a separate discussion involving persons specifically familiar with your electronically stored information (ESI) systems and methods of retrieval, make those arrangements with FTC counsel when scheduling the general meet and confer discussion.
- N. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information of any individual, please contact us before sending those materials to discuss ways to protect such information during production. If that information will not be redacted, contact us to discuss encrypting any electronic copies of such material with encryption software such as SecureZip and provide the encryption key in a separate communication.

For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number in combination with one or more of the following: date of birth; Social Security number; driver's license number or other state identification number or a foreign country equivalent; passport number; financial account number; credit card number; or debit card number.

- O. **Information Identification:** Each specification and subspecification of this CID shall be answered separately and fully in writing under oath. All information submitted shall be clearly and precisely identified as to the specification(s) or subspecification(s) to which it is responsive.
- P. **Certification of Records of Regularly Conducted Activity:** Attached is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena the Company to testify at future proceedings in order to establish the admissibility of documents produced in response to this CID. You are asked to execute this Certification and provide it with your response.
- Q. **Right to Financial Privacy Act:** The documents demanded by this CID exclude any materials for which prior customer notice is required under the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 et seq.
1. RFPA, 12 U.S.C. § 3401(5), defines "customer" as any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name.
 2. RFPA, 12 U.S.C. §3401(4), defines "person" as an individual or a partnership of five or fewer individuals.
 3. The records demanded herein relate to an account or accounts at the Company in the name of a corporation or other entity that is not an individual or partnership of five or fewer individuals.
- R. **Exclusion of Suspicious Activity Reports:** The documents demanded by this CID exclude Suspicious Activity Reports, which should not be produced.

III. SPECIFICATIONS

"Corporate Accounts" shall mean the accounts maintained by the Company:

1. In the name of Electronic Payment Transfer, LLC, including but not limited to account #953063.
2. In the name of the following entities:
 - a. Flexpay, LLC, dba EZ Payment Program, including but not limited to account # 1841354;
 - b. Electronic Payment Systems, LLC

- c. Dormac, LLC dba Electronic Payment Systems
- d. Quebec Holdings, Inc.
- e. Access-Now.net, Inc.
- f. ElectCheck, Inc.
- g. First Merchant Platinum, Inc.

3. In the name of corporations, limited liability companies, partnerships of more than five individuals, or other entities that are not a "person" for purposes of the RFPA, for which any of the following individuals or entities are signatories or have other authority that is comparable to signatory authority:

- a. Electronic Payment Systems, LLC
- b. Electronic Payment Transfer, LLC
- c. Dormac, LLC
- d. Flexpay, LLC
- e. Tom McCann
- f. John Dorsey
- g. Anthony Maley
- h. Michael Peterson

A. Produce any and all documents relating to each Corporate Account, including but not limited to the following:

- 1. Signature cards, corporate resolutions, and all other documents regarding signatories on the account;
- 2. Copies of monthly or periodic bank statements;
- 3. Copies of checks, drafts, wire transfers, ACH transfers, and other debit instruments, including any agreements and instructions regarding such debit instruments; and
- 4. Copies of all deposit tickets, credits and wire transfers, ACH transfers, and other deposit instructions, including any agreements and instructions regarding such credit instruments.

NOTE: The documents demanded by this CID exclude any information for which prior customer notice is required under the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401, et seq. Documents produced should not contain any additional information. If you have any questions about these requests, please contact FTC staff attorney Michelle Chua at 202-326-3248 before providing responsive documents.

CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY

Pursuant to 28 U.S.C. § 1746

1. I, _____, have personal knowledge of the facts set forth below and am competent to testify as follows:
2. I have authority to certify the authenticity of the records produced by Citywide Banks and attached hereto.
3. The documents produced and attached hereto by Citywide Banks are originals or true copies of records of regularly conducted activity that:
 - a) Were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
 - b) Were kept in the course of the regularly conducted activity of Citywide Banks;
and
 - c) Were made by the regularly conducted activity as a regular practice of Citywide Banks.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2016.

Signature

Federal Trade Commission, Bureau of Consumer Protection Production Requirements

Submit all documents according to the instructions, below. Some instructions require discussion with FTC counsel prior to production, which can be part of a general "Meet and Confer" between the parties or a separate discussion involving persons specifically familiar with your electronically stored information (ESI) systems and methods of retrieval.

Types of Files

1. Native or Near-Native Files
 - a. Whenever possible, produce responsive ESI in its native form; that is, in the form in which the information was customarily created, used and stored by the native application employed by the producing party in the ordinary course of business (i.e., .doc, .xls, .ppt, .pdf).
 - b. If production of an ESI item in its native form is infeasible, it may be produced in a near-native form (i.e., there is not a material loss of content, structure or functionality as compared to the native form) that the FTC agrees to prior to production.
 - c. Native files containing embedded files must have those files extracted, produced in their native form in accordance with #1.a., and have the parent/child relationship identified in the accompanying production metadata.
2. Databases
 - a. Microsoft Access databases may be produced in either .mdb or .accdb format.
 - b. Discuss all other database formats with the FTC prior to production.
3. Multimedia
 - a. Multimedia files (i.e., audio, video) may be produced in .mp3 or .mp4 formats.
 - b. Discuss production of multimedia (i.e., audio, video) in other file formats with the FTC prior to production.
4. Discuss production of instant messages, CRM, proprietary applications, and any other type of ESI not specifically referenced in #1, 2, or 3 with the FTC prior to production.
5. Hard Copy Documents
 - a. Scan in an electronic format documents stored in hard copy in the ordinary course of business.

- b. Produce scanned documents as 300 DPI individual multi-page PDFs per document. For marketing materials and where necessary to interpret documents or render them intelligible, submit documents in color.
 - c. Produce scanned documents with embedded searchable text.
 - d. Produce hard copy documents in the order in which they appear in your files and without being manipulated or otherwise rearranged.
 - e. Treat documents kept in folders or binders as family members. Scan the cover of a binder or folder separately and have it serve as the parent document. Scan each document within a folder or binder as an individual document and have it serve as a child to the parent folder or binder.
6. Redacted Documents
- a. Produce ESI requiring redaction in a near native searchable PDF format.
 - b. Produce redacted documents as individual multi-page PDFs per document.
 - c. Produce redacted documents with embedded searchable text.
 - d. If hard copy documents require redaction, follow all requirements laid out in #5.

De-duplication, Email Threading, and Passwords

7. De-duplication
- a. De-duplication based on MD5 or SHA-1 hash value may be conducted within a custodian's set of files without FTC approval so long as the FTC is notified of the intent to de-duplicate prior to production.
 - b. Discuss de-duplication of any other scope or means with the FTC prior to production.
8. Use of email threading software must be discussed with the FTC prior to production.
9. For password protected files, remove their passwords prior to production. If password removal is not possible, provide a cross reference file including original filename, production filename, and the respective password.

Production Metadata

10. Family Relationships: Regardless of form of production, preserve the parent/child relationship in all files as follows:

- a. Produce attachments as separate documents and number them consecutively to the parent file.
- b. Complete the ParentID metadata field for each attachment.

11. Document Numbering and File Naming

- a. Each document must have a unique document identifier (“DOCID”) consisting of a prefix and 7-digit number (e.g., ABC0000001) as follows:
 - i. The prefix of the filename must reflect a unique alphanumeric designation, not to exceed seven (7) characters identifying the producing party. This prefix must remain consistent across all productions.
 - ii. The next seven (7) digits must be a unique, consecutive numeric value assigned to the item by the producing party. Pad this value with leading zeroes as needed to preserve its 7-digit length.
 - iii. Do not use a space to separate the prefix from numbers.
- b. Name each native or near native file with its corresponding DOCID number and appropriate file extension (e.g., ABC0000001.doc).

12. Load File Format

- a. Produce metadata in a delimited text file (.DAT) for each item included in the production. The first line of the delimited text file must contain the field names. Each subsequent line must contain the metadata for each produced document.
- b. Use these delimiters in the delimited data load file:

Description	Symbol	ASCII Code
Field Separator	␣	020
Quote Character	␣	254
New Line	␣	174
Multiple Field Entries	;	059

13 The following chart describes the required metadata for native, scanned, and redacted documents. If you want to submit additional metadata, discuss with the FTC prior to production.

Production Metadata				
Field Name	Native	Scanned	Redacted	Format
DOCID	Y	Y	Y	Alphanumeric (see #11 above)
PARENTID	Y	Y	Y	Alphanumeric
NATIVELINK	Y	Y	Y	Alphanumeric
CUSTODIAN	Y	Y	Y	Alphanumeric
RESPSPEC	Y	Y	Y	Alphanumeric (question # record responds to)

ORIGFILENAME	Y	Y	Y	Alphanumeric
SOURCE	Y	Y	Y	Alphanumeric
SOURCEFILEPATH	Y	Y	Y	Alphanumeric
ORIGPATH	Y	Y	Y	Alphanumeric
CONFIDENTIAL	Y	Y	Y	Boolean - Y/N
HASH	Y	Y	Y	Alphanumeric
From	Y	Y	Y	Alphanumeric
To	Y	Y	Y	Alphanumeric
CC	Y	Y	Y	Alphanumeric
BCC	Y	Y	Y	Alphanumeric
EmailSubject	Y	Y	Y	Alphanumeric
DateSent	Y	Y	Y	MM/DD/YYYY HH:MM:SS AM/PM
DateRcvd	Y	Y	Y	MM/DD/YYYY HH:MM:SS AM/PM
Author	Y	Y	Y	Alphanumeric
Subject	Y	Y	Y	Alphanumeric
DateCreated	Y	Y	Y	MM/DD/YYYY HH:MM:SS AM/PM
DateLastMod	Y	Y	Y	MM/DD/YYYY HH:MM:SS AM/PM

Production Media

14. Prior to production, scan all media and data contained therein for viruses and confirm the media and data is virus free.
15. For productions smaller than 50 GB, the FTC can accept electronic file transfer via FTC-hosted secure file transfer protocol. Contact the FTC to request this option. The FTC cannot accept files via Dropbox, Google Drive, or other third-party file transfer sites.
16. Use the least amount of media necessary for productions. Acceptable media formats are optical discs (CD, DVD), flash drives, and hard drives. Format all media for use with Windows 7.
17. Data encryption tools may be employed to protect privileged or other personal or private information. Discuss encryption formats with the FTC prior to production. Provide encryption passwords in advance of delivery, under separate cover.
18. Mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

**MAGNETIC MEDIA – DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.**

19. Provide a production transmittal letter with all productions which includes:
 - a. A unique production number (e.g., Volume I).
 - b. Date of production.
 - c. The numeric range of documents included in the production.
 - d. The number of documents included in the production.