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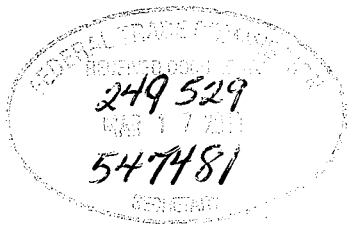

March 17, 2010

BY HAND DELIVERY

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: ***In the Matter of Lennar Corporation*, File No. 102-3051**
Request for Review by the Full Commission

Dear Mr. Clark:

As you know, on December 11, 2009, Lennar Corporation ("Lennar") filed its Petition to Quash or Limit the Civil Investigative Demand ("CID") that was served on November 3, 2009 ("Petition"). According to your letter of March 9, 2010, Lennar's Petition was denied by Commissioner Pamela Jones Harbour (hereinafter, the "Decision").[1] Your

[1] The rendering of a single decision on two separate petitions, file nos. 102-3050 and 102-3051, is inappropriate and fundamentally unfair. It is inappropriate because the two entities, Lennar and D.R. Horton, Inc., while represented by the same counsel, filed separate Petitions, and each has different factual bases for objecting to the individual CIDs. It is fundamentally unfair because the Decision utilizes snippets from one Petition to undercut the arguments of the other. For example, Commissioner Harbour relies on a simple division calculation to conclude that 960 hours identified by D.R. Horton's affiliated lender, DHI Mortgage, represents "less than a week's work for 20 people." However, Commissioner Harbour did not bother to perform the same calculation for the hours identified by Lennar, which were approximately 8,700 hours and 19,742 hours for the builder and its affiliated lender, Universal American Mortgage Company ("UAMC"), respectively. That calculation would have resulted in 35.5 weeks of work by 20 individuals, a fact not cited by Commissioner Harbour. At bottom, the

March 9 Letter was delivered to our firm on March 12, 2010, by certified mail. By this letter, Lennar is formally requesting review of the Decision by the full Commission, as allowed in 16 C.F.R. § 2.7(f).[2]

Lennar incorporates all of its arguments in its previously filed Petition, including the supplemental submission which was filed, without objection, on February 22, 2010.[3] The purpose of this submission is to demonstrate to the full Commission the errors in Commissioner Harbour's Decision and to highlight the extent to which Lennar's concerns have been summarily dismissed by FTC staff counsel.

As is readily apparent, the Decision reflects a genuine hostility towards Lennar. At the outset, Commissioner Harbour takes issue with Lennar's decision to structure its homebuilding and loan origination businesses in a diversified formation. Because Lennar structured its businesses in the most cost effective and efficient manner, and not in a centralized manner more conducive to responding to CIDs, Commissioner Harbour held that the Company loses any right to assert burdensomeness objections. Further, the Decision demonstrates that the FTC has already prejudged the outcome of its

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issuance of one Decision on two entirely separate Petitions was arbitrary, capricious, and an abuse of discretion.

[2] There are no instructions in Chapter 16 of the Code of Federal Regulations, or in the March 9 Letter denying the Petition as to the form or manner in which this appeal to the full Commission shall be submitted. Accordingly, Lennar is following the same procedures required for a Petition to Quash or Limit as set forth in the CID. Exhibits A through C were filed with the Petition. Exhibit D, the Letter from David Souders to Rebecca J.K. Gelfond dated February 22, 2010, is filed herewith.

[3] Due to their length, and the fact that 20 copies are already on file with the FTC, Lennar is not attaching copies of its prior filings to this request for review. However, if requested, Lennar is happy to file additional copies of these documents.

investigation by repeated inflammatory statements such as, for example, that Lennar's Petition represents a "recurrent law enforcement problem" and the "semantic obfuscation or evasion on the part of CID respondents and counsel." Such statements are unsupported by the record and demonstrate bias on the part of the decision maker. Finally, the finding that, in order to work with the FTC staff on scheduling, the Company must forfeit its right to preserve any objections demonstrates the unfair and overreaching manner in which the FTC has conducted itself in connection with the issuance and enforcement of the CID as against Lennar.

I. Lennar's Attempts to Resolve Production Issues Have Consistently Been Ignored or Denied by FTC Staff Counsel

Lennar has attempted to cooperate with the FTC on multiple occasions, all to no avail. On November 20, 2009, Lennar sent a letter to Mr. Joel Winston, Associate Director of the FTC, expressing its concerns about the breadth and scope of the CID. *See* Letter from Mitchel H. Kider to Joel Winston dated November 20, 2009 (attached to Lennar's Petition as Exhibit A). As noted in this letter, Lennar's express purpose for writing to Mr. Winston was "to resolve a number of issues related to the CID in lieu of filing a Petition to Quash or Limit . . . ." Ex. A at 1. On November 30, 2009, Lennar's counsel spoke with Ms. Rebecca J.K. Gelfond, FTC staff counsel assigned to this investigation, regarding Lennar's concerns about compliance with the CID as currently written. Ms. Gelfond advised Lennar to put these concerns in writing and to suggest potential limitations or modifications, as well as a potential timeline for production.

On December 10, 2009, Lennar sent Ms. Gelfond a thirty-eight page letter addressing specifications Lennar believed were particularly burdensome, suggesting modifications, and suggesting a timeline for production of materials in line with Lennar's suggested modifications. *See* Letter from David M. Souders to Ms. Gelfond dated December 10, 2009 (attached as Exhibit B to Lennar's Petition). The FTC did not agree to Lennar's suggested modifications or its suggested timeline for responses. Further, when Lennar requested an extension on this basis, staff counsel only granted a one-week extension on

both the return date for the CID and the date by which any Petition to Quash needed to be filed. During this time period the FTC staff made repeated representations that the failure to file a Petition to Quash within the time period allowed would result in the waiver of all such objections.

Lennar filed its Petition on December 11, 2009.[4] In a good faith gesture of its continuing desire to cooperate with the FTC in this investigation, Lennar scheduled a face-to-face meeting between FTC staff counsel and three Lennar executives on January 26, 2010. Lennar hoped that this meeting would facilitate negotiations between the parties and allow Lennar the opportunity to explain in detail why it believed the CID to be overly broad and burdensome. However, FTC staff counsel made it clear at the outset of this meeting that there would be no modifications or limitations to the CID granted at the meeting and that any such request would not be viewed favorably by the staff. Lennar subsequently decided to provide supplemental submissions to its Petition on February 22, 2010, in light of the stance the FTC took at this meeting.

Lennar believed that the supplemental declarations to its Petition addressed its concerns expressed at the January 26, 2010, meeting. However, in a letter thinly veiled to manufacture a pattern of good faith on the part of the FTC, Ms. Gelfond expressed her disappointment that the February 22 submission "did not contain any specific proposals for modification of particular specifications." Letter from Rebecca J.K. Gelfond to M. Kider & D. Souders dated March 12, 2010 at 3. As stated in the previous paragraph, Lennar submitted a thirty-eight page letter suggesting potential modifications or limitations on December 10, 2009, which was dismissed by the FTC. The FTC has made no concessions to Lennar, other than to purportedly limit the CID to

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[4] On December 18, 2009, Lennar subsequently produced responses to certain of the specifications in the original CID to which it had not filed objections as part of its Petition. *See* Letter from Mr. Souders to Ms. Gelfond dated December 18, 2009 (attached as Exhibit C to Lennar's Petition).

the marketing, sales, and/or mortgage lending activities. As Lennar has stated many times before, this is not a meaningful limitation because virtually **all** of Lennar's employees are in the business of marketing and selling homes and certainly **all** of UAMC's employees are in the business of originating loans on those properties.[5]

When Commissioner Harbour issued her Decision to Lennar, it became abundantly clear that Lennar's concerns were ignored. In fact, Commissioner Harbour used particularly curt language to dismiss Lennar's 155-page submission challenging the CID in a mere ten-page opinion some of which relates to an entirely separate entity. The decision cited only three court opinions in response to Lennar's Petition and made unnecessary and derogatory remarks about Lennar's business organization. *See* Decision at 4 ("Many of the objections expressed in the Petitions appear at bottom to be problems created by the business organization and management philosophies of the companies, not by the CIDs. The Commission is aware of no authority that would excuse a company from complying with law enforcement process because that company elected to create an unwieldly [sic] array of facilities and/or adopted a decentralized management style.") (footnotes omitted).

The Decision clearly reflects the FTC's dismissive attitude towards Lennar's concerns, and ignored the Company desire and willingness to cooperate with the Agency. The FTC quotes *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950), for the proposition that the FTC's investigative authority is designed to "get information from those who best can give it and who are most interested in not doing so." Decision at 4. This ignores the fact that Lennar has attempted to cooperate with the FTC from the start through counsels' first contact with Mr. Winston, and through the present day. Lennar remains committed to work with the FTC in a manner that will satisfy the FTC's

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[5] During the meeting on January 26, 2010, Lennar's representatives attempted to explain how the CID encompassed even the construction phase of Lennar's homebuilding activities. The staff who attended the meeting simply ignored Lennar's arguments on this point.

investigative concerns while not unduly burdening the business operations of the Company. The CID, as currently written, places an undue burden on Lennar by requiring the production of virtually every document generated within the relevant time period, a period that now exceeds four full years.[6]

Indicative of the FTC's dismissive attitude towards Lennar, Ms. Gelfond wrote a letter to Lennar's counsel, dated March 12, 2010, declaring without any factual basis, that Lennar's claim in its supplemental declarations that the CID would require two years for full compliance is "patently unreasonable." Gelfond March 12, 2010 Letter at 4. Ms. Gelfond's declaration of what is, or is not, reasonable with regard to the time necessary to comply with any one of the specifications is curious since neither she, nor any other FTC staff member, has ever visited the offices of Lennar, nor have they made any serious attempt to understand the scope of the requested materials or the manner in which they are kept. More to the point, the assertions by Lennar regarding the time to comply demonstrate the incredible breadth and scope of the CID as currently written. The estimates are not simply for the purpose of seeking additional time to comply, but instead they represent a reasonable approximation of time necessary to comply with the specifications the FTC staff drafted. Simply stated, in order to comply with this CID without shutting down its business operations, Lennar would require two years for full compliance. Lennar reiterates its willingness to cooperate with the FTC, but it should not be required to shut down a substantial portion of its business operations to do so.

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[6] In the Decision, Commissioner Harbour states that this assertion regarding the scope of the CID is based on a "misreading of the specifications, instructions, and definitions of the CIDs." Decision at 6. Yet, Commissioner Harbour cites not a single example of any such misreading, nor is there a single piece of correspondence from the FTC staff identifying any such misreading. The CID issued to Lennar speaks for itself and, contrary to the Decision, Lennar properly interpreted the CID in formulating its objections.

II. The Relevance Standard Cannot Be Construed to Encompass A Fishing Expedition Into All Documents of a Corporation

Commissioner Harbour's Decision devotes only three paragraphs to the relevance objection Lennar poses, citing sweeping language from *FTC v. Texaco*, 555 F.2d 862 (D.C. Cir. 1977), with no context whatsoever as to the issues raised in *Texaco* or the issues raised by Lennar. While the FTC is correct that it "is under no obligation to propound a narrowly focused theory of a possible future case," *see* Decision at 5, it certainly cannot propound requests that require the production of all or substantially all of a company's documents made over the relevant time period. Administrative subpoenas require "a realistic expectation rather than an idle hope that something may be discovered." *EEOC v. United Airlines*, 287 F.3d 643, 653 (7th Cir. 2002). *See also* S. Rep. 96-500 at 4 (1979) ("The FTC's broad investigatory powers have been retained but modified to prevent fishing expeditions undertaken merely to satisfy its 'official curiosity.'").

The Supreme Court recognized in *Morton Salt* that an administrative subpoena "may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." 338 U.S. at 652. FTC staff counsel went to great lengths at the January 26, 2010, meeting to ensure that Lennar and its counsel understood the breadth of the instant CID, which currently entails virtually every document Lennar and its affiliates and subsidiaries have generated over the last four-plus years. The FTC is not entitled to search through all documents produced by the company through an investigative subpoena. *See CFTC v. McGraw Hill Cos.*, 390 F. Supp. 2d 27, 35 (D.D.C. 2005) ("[T]his Court does agree that some of the Requests are excessively broad on their face and technically call for a larger volume of data than may have been intended by the CFTC.").

III. The FTC's Cursory Dismissal of Lennar's Objections Ignores the Specific-Fact Based Determination that Must be Performed to Determine Lennar's Burden to Comply with the CID as Written

The FTC apparently believes that companies should organize themselves in order to most efficiently comply with federal compulsory process: "Petitioners' asserted burden results in large part from their own decentralized management style and document storage." Decision at 6. The Decision mischaracterizes the burden, and acts on the premise that it is Lennar's management structure that is the problem, not the overly-broad CID issued by the FTC. Lennar is under no obligation, however, to organize its business and management structure in a manner that may one day be beneficial in responding to potential government investigations. Contrary to Commissioner Harbour's assertion that the "[b]urden caused by Petitioners' own organizational design cannot excuse them from compliance with the CIDs," Decision at 6, the burden analysis is a fact specific inquiry. "What is unduly burdensome depends on the particular facts of each case and no hard and fast rule can be applied to resolve the question." *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980). A decentralized management structure is without a doubt one of these "particular facts" that needs to be factored into a burden analysis. *See EEOC v. McCormick & Schmick's*, No. C 07-80065, 2007 WL 1430004, at *1 (N.D. Cal. May 15, 2007) (finding administrative subpoena to be unduly burdensome where "individual restaurants operate[d] with a great deal of autonomy," unit managers had high degree of responsibility and independence over key parts of the business, and the files requested were located at the individual offices instead of a central location).

McCormick & Schmick's is particularly analogous to Lennar's current situation. As with Lennar, the business in *McCormick & Schmick's* had a decentralized management structure because of its disparate presence across the country. *McCormick & Schmick's*, 2007 WL 1430004, at *1 (noting that the company operates "67 seafood restaurants in 27 states and the District of Columbia."). As with Lennar, the employees in the various offices enjoyed, by occupational necessity, a great deal of autonomy from the central

office. *Id.* at *1. As with Lennar, a high percentage of the requests required management to respond, the Company had employed tens of thousands of employees in the relevant time period, and each response would take a significant amount of time to complete, "representing a significant loss of man hours to respondent." *Id.* at *7. In fact, the number of hours cited by *McCormick & Schmick's* was 8,925, considerably fewer than the approximately 28,000 hours Lennar believes the current CID will require. *Id.* at *7. The court noted: "Compliance with the subpoena in its original form would be a considerable burden . . . management positions are staffed leanly. Taking large amounts of managers' time away from normal duties would be a significant hardship to its operations." *Id.* at *7.

Similarly, compliance with this CID in its original form will pose a considerable burden to Lennar. Lennar has provided a detailed analysis of how the CID, in its current, excessively broad form, imposes an undue burden on the Company. Lennar provided the FTC with three separate declarations from corporate executives at Lennar and its lending affiliate, UAMC, spanning 32 pages and describing the manner in which Lennar's various offices would need to search for material responsive to the CID. While Commissioner Harbour disputes the estimates provided in these declarations, *see* Decision at 7 n.9, these declarations expressly state that these numbers are approximations. The numbers in these declarations are used for illustrative purposes in order to demonstrate the enormous wake this CID produces. Instead of addressing these legitimate concerns, however, the FTC engaged in a simplistic and irrelevant argument regarding the numbers cited in the declarations. Further, the FTC's computations result in more, not less, hours for compliance for UAMC and a 1.3% difference for Lennar. Given the fact that these were all identified as "approximations" and based on the best information known to the two Companies, the FTC's quibbling is just a diversion to provide cover for the fact that the Agency never demonstrates with any specificity how or why the estimates are "unrealistically high" other than simply declaring them so.

Many courts that have upheld administrative subpoenas have done so only after considerable modification by the issuing agency prior to the judicial review, or after considerable modification by the court itself. In *Am. Motors Corp. v. FTC*, 601 F.2d 1329 (6th Cir. 1979), the Sixth Circuit noted that, regarding a third party not involved in the matter, the FTC denied a petition to quash only "after granting 'substantial modifications' of the [] subpoena which the FTC estimates will cut the [] compliance burden in half." *Id.* at 1339. In *McCormick & Schmick's*, the court upheld the subpoena only after noting that the agency "presented a compromise," including using random samples and the use of previously collected documents covered under the subpoena. *McCormick & Schmick's*, 2007 WL 1430004, at *7. Despite Lennar's multiple attempts to cooperate with the FTC on a mutually agreeable basis, the FTC continually has refused to concede a single concern to Lennar.

Finally, administrative subpoenas can just be excessively broad, and this CID is one of those. In *McGraw-Hill*, three separate specifications were stricken and modified because their language was "excessively broad . . . and technically call[ed] for a larger volume of data than may have been intended . . . ." 390 F. Supp. 2d at 35. Similar to the specifications Lennar cites in its Petition, all three specifications requested "[a]ll documents" reflecting, concerning, discussing, or implementing broadly worded subject areas. *Id.* at 37. In *Bell Fourche Pipeline Co. v. United States*, 554 F. Supp. 1350 (D. Wyo. 1983), the court halted all further compliance with an administrative subpoena that requested "virtually all of Plaintiffs' records and documents in their possession for the last five years." *Id.* at 1351. Similar to the current CID, the subpoena request was gaping in its scope, requesting:

> all documents generated . . . regarding policies, document distribution, accounting procedures, duties of officers and employees, work records of employees, organization charts, code books, all contracts, leases or agreements, virtually all documents . . . relating to its business . . . all contracts, agreements and correspondence or memoranda . . . relating to its sales . . . or offers . . . and its communications with other [companies].

Id. at 1362. The court finally noted, as Lennar has regarding the current CID, that: "If the Court were to try to think of a document that the Plaintiffs might have that is not covered by the subpoena, it could not do so." *Id.*

As an example of the breadth of the current CID, specification R-20 requires a report detailing nine separate categories of information about Lennar and every one of its subsidiaries' advertising and marketing activities. In addition, specification P-20 requires the production of all materials related to marketing and advertisement. As Becky Moore noted in her supplemental declaration filed on February 22, 2010, centralized advertising through one agency was not utilized until 2008, and for just this one agency during the relevant time period, Lennar estimates that it generated 27,500 advertisements. Moore Supplemental Declaration at ¶ 23. Further, Lennar informed FTC staff counsel at the January 26, 2010, meeting, and Kay Howard stated in her declaration submitted on February 22, 2010, that the central agency Lennar uses has yet to be able to compile all of the advertisements Lennar used in the year 2009. *See* Howard Declaration at ¶ 22. The court in *Bell Fourche* believed that a previous production of 13,000 documents was a substantial burden upon the subject of the investigation in that case (*see Bell Fourche*, 554 F. Supp. 2d at 1362) — Lennar would have to produce in excess of 27,000 documents from just one advertising agency in response to just one specification in this CID. Commissioner Harbour's ruling that Lennar has provided no evidence to support its assertion that this CID is unduly burdensome is without merit and willfully ignores the multiple conversations, correspondences, and negotiations in which Lennar has stated otherwise.

Curiously, the reasoning of the Decision serves only to punish those companies such as Lennar, which make serious efforts at compliance. For example, Lennar and UAMC undertake substantial efforts with regard to the training of their employees. Specifications R-5, R-7, P-4 and P-5 demand that the Companies: 1) describe their policies and procedures for ensuring compliance with the Federal Trade Commission Act, 15 U.S.C. § 45, *et seq.*; the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"), and 12 C.F.R. pt. 226; the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA");

and the Equal Credit Opportunity Act, 15 U.S.C. 1691, *et seq.* ("ECOA") and Regulation B, including its anti-discrimination, record keeping, and adverse action notice requirements; 2) describe all policies and procedures for training employees with respect to compliance with these statutory and regulatory provisions; 3) produce all documents that "describe, reflect or relate" to the "policies and procedures" for ensuring compliance with these regulatory provisions; and 4) produce all documents that "relate to, analyze or evaluate the compliance of the Company, its employees, its sales or loan brokers . . ." with these regulatory provisions. UAMC alone estimated that responding to these four specifications would require approximately 2,280 hours. Moore Supplemental Declaration at ¶ 5. Ms. Moore then goes on for eight paragraphs explaining how and why these specifications require so much time to respond to, which includes, among other things, the fact that UAMC conducts a significant amount of training. Had the Company not conducted training, it could have timely responded to the CID; however, that is not the manner in which the Company has decided to conduct its business, and it should not be punished for conducting such extensive training.

Other portions of the CID are also clearly designed to unduly burden Lennar. For example, Specification R-3 demands, in narrative form, the identification of "all corporate acquisitions and mergers involving the Company during the relevant time period." As Lennar explained repeatedly, that information is publicly available on the SEC's website: http://www.sec.gov/edgar.shtml. In addition, Lennar explained in its first letter response that the Company's recently filed 10-Q statement dated October 6, 2009, contains the most recent financial information which should be sufficient for Specification R-4. However, the FTC staff made clear that, in spite of the availability of this public information, Lennar would be required to download and deliver these materials and prepare a narrative response describing their content as well. The staff's inability to retrieve this information for itself, and to follow up with specific questions if necessary, is startling and demonstrates a genuine effort to overburden the Company rather than to make legitimate inquiries for relevant information.

IV. Lennar is Not Required to Waive its Objections in Order to Work With the Staff

In her Decision, Commissioner Harbour states as follows:

> To the extent Petitioners have specific concerns of burden as to certain specifications those concerns should be addressed to counsel and staff, who in appropriate circumstances and through good-faith negotiations can adjust production schedules, provide additional guidance as to specifications, and even modify certain specifications (footnote omitted).

Decision at 6. This statement reflects a fundamental misunderstanding of the FTC's process and lack of acknowledgement of the staff's conduct in this case. The CID only allowed Lennar until December 3, 2009, to file its Petition to Quash or Limit, otherwise, the FTC would deem all of the Company's objections waived. Thereafter, Lennar sought in good faith to negotiate a reasonable production schedule and reasonable limits on certain of the specifications. In order to continue to negotiate, however, Lennar required a reasonable extension of the time to file a Petition to Quash. The FTC granted only one extension of time, for a period of eight days, from December 3, 2009, to December 11, 2009. To be clear, the FTC **refused to grant any additional extensions of the time period to file a Petition to Quash**, thereby forcing the Company to either waive its rights to object or file its Petition. Given the refusal of the staff to extend the time for filing a Petition, Lennar elected the only reasonable course of action. Under Commission rules, the filing of the Petition stayed the time for compliance with the CID. *See* 16 C.F.R. § 2.7(e). Thereafter, Lennar could not have produced information in response to any of the specifications to which it had objected because such conduct would certainly be waiving its prior objections. Despite the fact that Lennar could have simply stood on its Petition, the Company -- not the FTC staff -- initiated a face-to-face meeting in an attempt to resolve the panoply of issues raised by the CID. Rather than resolve any issues, the FTC staff used the meeting to reemphasize the enormous scope

and breadth of the CID, which resulted in the supplemental submission of additional declarations by the Company.[7]

However, the fact of the matter is that the FTC staff forced Lennar into a classic Hobson's choice; that is, if the Company wanted to continue to negotiate with the FTC, it would be required to forfeit all of its rights to make objections. If it objected, it would be deemed by the FTC to be unwilling to cooperate in the Agency's investigation.

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[7] In footnote 18 of her Decision, Commissioner Harbour insinuates that the staff provided a "prioritization" of the specifications and requested that Lennar provide "specific requests for relief." To reach these conclusions, the Commissioner ignores the context of the February 22, 2010 letter from Lennar's counsel. As an initial matter, it should not escape notice that nowhere in any letter from the FTC staff is there any "prioritization" of requests; rather, the FTC staff steadfastly refused to put any such prioritization in writing. Further, a fuller reading of the context of the February 22, 2010 letter from Lennar's counsel demonstrates that, in fact, the opposite was true – that the staff's purported "prioritization" was "not helpful." As the letter states:

> Specifically, we believe it would be beneficial to resolving this matter if the Staff could prioritize the requests and agree to a more limited initial production without prejudice to the FTC's right to seek additional information. During the meeting, you did provide a prioritization, but that was not helpful because the items you placed at the top of the list, Interrogatories R-5, R-15, R-18, R-20 and production requests P-4, P-5, P-6, P-7 and P-20 are the most burdensome and include, for example, all policies and procedures as well as all advertisements.

See Exhibit D, hereto. With respect to the "specific requests for relief" from Lennar, Commissioner Harbour left out the portion of the February 22, 2010 letter wherein Ms. Gelfond stated that any such relief "would be limited because of the Staff's position that the burden was not 'undue.'"

Rather than forfeit its rights as demanded by the staff, the Company objected, and continues to object, to this process.

V. Lennar's Assertions of Privilege Are Valid

While Lennar will not address its privilege arguments in this letter, it does not waive any of these objections by not doing so. Instead, since the FTC merely made sweeping and conclusory statements regarding Lennar's arguments, *see* Decision at 8-9, citing to no legal authority, Lennar relies on its arguments made in its Petition as to privilege assertions. The FTC's citation to Federal Practice & Procedure § 5431, *see* Decision at 9, supports Lennar's assertion of a "self-evaluative reports privilege" by noting that this privilege has been recognized by federal courts. *See* Wright & Graham, Federal Practice & Procedure § 5431 n.97.1 (Supp. 2009). Despite the Federal Practice & Procedure authors' opinion that "there seems little justification for creating a new privilege," it is the court decisions that carry weight.

In addition, the FTC is attempting to limit Lennar's ability to assert appropriate privilege objections through its administrative process. That is so because all objections must be raised through the filing of a Petition to Quash; otherwise, the Commission deems such objections as waived. It was not, and is not, possible to ascertain all of the possible privilege objections in the short time period allowed by the CID and before the responsive materials have been collected. By way of example, Specification P-22 states as follows:

Produce all documents that relate to the following:

a. *Complaints from actual or prospective buyers or borrowers that relate to the Company's marketing and sales activities or mortgage lending activities;*
b. *Private litigation in which claims or counterclaims against the Company that relate to the Company's marketing and sale activities or mortgage lending activities were asserted; and*

c. *Law enforcement and regulatory proceedings, actions, and investigations of the Company that relate to the Company's marketing and sale activities or mortgage lending activities.*

Lennar properly objected to this request on a number of grounds, not the least of which is that it requires the production of, *inter alia*, all documents "related" to private litigation and "law enforcement and regulatory proceedings, actions and investigations" that "relate" to the "Company's marketing and sales activities or mortgage lending activities." This is a demand for every complaint, legal action, and any regulatory proceeding, as well as every document related to those matters including entire litigation files which are replete with attorney-client communications, internal attorney work product materials, as well as other potentially privileged materials, with no regard for the subject matter other than that it relates to a home sale or mortgage loan. Until those documents are collected and reviewed, it is not possible to frame all of the potential privilege objections; yet, if such objections are not specifically detailed by the initial date for filing objections, the FTC deems all such objections to be waived.

Specification P-22 is but one example of the refusal of the FTC staff to work with Lennar in good faith to resolve any issues regarding the breadth and scope of the CID. Nowhere in the record is there any written communication from the staff indicating any willingness, for example, to accept something less than full compliance with any single one of the specifications. Indeed, there is simply no reason why the staff could not initially accept just copies of the complaints responsive to P-22 without waiver of any right to request additional information and without requiring Lennar to waive its right to assert future objections. However, the staff repeatedly refused. For example, in the February 22, 2010 Letter to Ms. Gelfond, which was relied upon by Commissioner Harbour in chastising Lennar for its purported uncooperative conduct, Lennar's counsel stated:

> We believe that a more reasonable approach to resolving this issue would be for the FTC to identify with specificity the specific practice(s)

> that it is interested in and to focus the initial inquiry on that aspect. For example, it would be less burdensome for the Company to focus its initial production on particular markets that correspond to specific Lennar offices. Alternatively, or even in addition to a narrowing of the geographic scope of the CID, it would be less burdensome for the FTC to allow the Company to produce complete files in an electronic format rather than to require it to review each file for the purpose of removing and producing a select number of documents. Alternatively, we ask that the FTC consider randomly selecting a more limited number of loan files and then the Company could pull the specific documents that the FTC is interested in. Of course, Lennar would be open to producing additional materials if the Staff believes such production is appropriate. However, simply demanding every document on every aspect of the Company's home sales operations and loan origination business is objectionable for the reasons stated in Lennar's Petition to Quash and in the attached declarations.

Neither Ms. Gelfond, nor anyone else at the FTC, ever responded to this proposal.[8]

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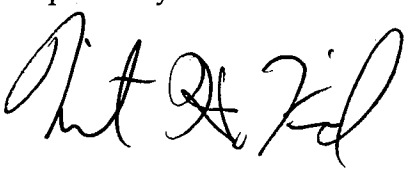
[8] Even more curious is the fact that Commissioner Harbour relied upon the February 22, 2010 Letter at all. That correspondence was not submitted by Lennar in connection with its Petition to Quash, nor was it included in Lennar's supplemental submission on February 22, 2010. Rather, that correspondence was only directed to Ms. Gelfond. In order to provide a complete record to the Commission, Lennar is submitting a copy of that correspondence. However, Lennar also objects on the additional grounds that it obviously has not been apprised of the complete basis for the Decision which apparently included information provided by the FTC staff but not made known to Lennar. The February 22, 2010 letter is attached hereto as Exhibit D.

VI. Conclusion

Contrary to a number of statements in the Decision, Lennar has continuously represented its willingness to cooperate with the FTC, and the FTC has summarily rejected each of Lennar's overtures. Any contention by the FTC otherwise is disingenuous. Lennar's intention throughout the process and during its conversations with the FTC has been to reach an agreement by which Lennar can furnish the appropriate information to the FTC without effectively shuttering its business operations. Those negotiations have failed to produce a mutually agreeable resolution, however, because the FTC staff has insisted on an "all or nothing" approach. The FTC has repeatedly rejected any proposal that would allow Lennar to produce documents in an orderly fashion while preserving its right to assert future objections based on a review of the materials gathered or unforeseen circumstances. Indeed, the FTC's hostility towards Lennar and even the manner in which it structures its business operations, is clear from the tone and content of the Decision. Contrary to the statements in the decision, this is not a case of an "attempt to 'get information from those who best can give and who are most interested in not doing so.'" *See* Decision at 4. Rather, this is now a case of the abuse of the investigatory process whereby the ends of impairing Lennar's and UAMC's ability to operate is achieved through improper means.

For all of the foregoing reasons, and for the reasons set forth in its prior Petition and supplemental submission, Lennar requests that the full Commission review and set aside the Decision and direct the staff to engage in good faith negotiations with Lennar with regard to the CID and without prejudice to Lennar's right to assert objections to the FTC's demands for information.

Respectfully submitted on behalf of Lennar Corporation.



Mitchel H. Kider

Enclosures

cc: Rebecca J.K. Gelfond
Division of Financial Practices
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20580
(by electronic mail and Federal Express delivery with enclosure)

D

Exhibit D

Lennar Corporation's Request for Review by the Full Commission

WEINER
BRODSKY
SIDMAN
KIDER PC

February 22, 2010

BY HAND DELIVERY

Rebecca J.K. Gelfond
Division of Financial Practices
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20580

CONFIDENTIAL COMMUNICATION

Dear Ms. Gelfond:

We are writing on behalf of our client, Lennar Corporation ("Lennar" or the "Company"), to follow up on our January 26, 2010 meeting with you and Messrs. Mahini and Weiss. As you know, during that meeting we expressed our continued objections to the breadth and scope of the Civil Investigative Demand ("CID") that was served on November 3, 2009. Specifically, as we explained, we believe that there is not a single document within the possession, custody, or control of our client that is not subject to production under the CID, with the possible exception of documents relating solely to the construction plans and specifications of the individual homes. For Universal American Mortgage Company ("UAMC"), Lennar's affiliated lender, there is no question that the CID demands every record relating to every loan application and transaction since January 1, 2006.

In addition, the CID also seeks production of every policy and procedure, as well as every change thereto, for the period of time from January 1, 2006, to the present. As Specification R-15 makes plain, the CID covers every aspect of Lennar's business regarding the sale of the home, and every aspect of UAMC's business, from the initial contact with a prospective homebuyer, to the actual closing of the loan transaction, and all steps in between including, but not limited to, selection of a loan product, underwriting, disclosures, appraisals, earnest money deposits, as well as any and all communications with the purchaser/borrower. Moreover, as you explained during our meeting, the FTC expects a full and complete narrative response to all 40 questions that

touch on every aspect of the home sale process and the origination of mortgage loans. These demands are particularly burdensome since they cannot be responded to by anyone other than senior management and only through the expenditure of thousands of hours. For this reason, we continue to believe that it is both appropriate and necessary to allow the Company to respond with the production of documents, as opposed to lengthy narratives, as is allowed by Rule 33(d) of the Federal Rules of Civil Procedure. Your complete rejection of that approach ensures that compliance with the CID will place an undue burden on the Company.

As we also explained, in addition to the overly broad drafting of each request, *e.g.*, the repeated use of the phrase "all documents," the fundamental problem with respect to the demands for information from the homebuilding operations is the decentralized structure of that part of the operation. As we indicated, Lennar operates in 40 markets in 14 states nationwide. The bulk of the requests would require the manual collection of information and documents from each separate office. Given the fact that Lennar delivered more than 90,000 homes since January 1, 2006, and, as a result of the current economic climate, the Company has been forced to operate with a minimum number of employees, the massive search and collection effort required would be prohibitively expensive and time-consuming.

During the meeting, you indicated that it was the Staff's position that Lennar's petition to quash would be denied by the Commission because the estimation of hours, approximately 1,360, was insufficient to demonstrate an "undue" burden on the Company. While we disagree with that assertion, we also believe that the previously provided estimate of 1,360 hours was woefully inadequate given what we now understand to be the scope of the demands to be. Indeed, our initial estimates were based on the production of information that was readily available and with the understanding that the FTC would accept documents in lieu of lengthy narrative statements in response to some of the interrogatories, a position that you rejected during our meeting. Accordingly, enclosed please find a declaration from Kay Howard, Lennar's Director of Communications, and a supplemental declaration from Becky Moore, a Vice President with UAMC. We are filing these with the Commission in further support of Lennar's Petition to Quash. As these declarations make clear, the

burden on Lennar and UAMC goes far beyond the initial estimate provided in the initial petition.

While we continue to believe that Lennar will be successful in its efforts to quash or limit the CID, we are also interested in resolving this matter in a manner that provides the FTC with the information it needs while protecting the Company from an unnecessary burden that will have a detrimental impact on its ongoing operations. During the meeting, you suggested that the Company make specific requests for relief; however, you also indicated that any such relief would be limited because of the Staff's position that the burden was not "undue." We believe that the attached declarations refute the Staff's position regarding undue burden, and we ask that the Staff enter into good faith negotiations with us regarding the information required to be produced. Specifically, we believe it would be beneficial to resolving this matter if the Staff could prioritize the requests and agree to a more limited initial production without prejudice to the FTC's right to seek additional information. During the meeting, you did provide a prioritization, but that was not helpful because the items you placed at the top of the list, Interrogatories R-5, R-15, R-18, R-20 and production requests P-4, P-5, P-6, P-7 and P-20 are the most burdensome and include, for example, all policies and procedures as well as all advertisements.

We believe that a more reasonable approach to resolving this issue would be for the FTC to identify with specificity the specific practice(s) that it is interested in and to focus the initial inquiry on that aspect. For example, it would be less burdensome for the Company to focus its initial production on particular markets that correspond to specific Lennar offices. Alternatively, or even in addition to a narrowing of the geographic scope of the CID, it would be less burdensome for the FTC to allow the Company to produce complete files in an electronic format rather than to require it to review each file for the purpose of removing and producing a select number of documents. Alternatively, we ask that the FTC consider randomly selecting a more limited number of loan files and then the Company could pull the specific documents that the FTC is interested in. Of course, Lennar would be open to producing additional materials if the Staff believes such production is appropriate. However, simply demanding every document on every aspect of the Company's home sales operations

and loan origination business is objectionable for the reasons stated in Lennar's Petition to Quash and in the attached declarations.

To reiterate, we remain committed to working with you to try to resolve the issues of scope and burdensomeness that are raised by the CID. Lennar wants to cooperate with the FTC and produce relevant information in a reasonable manner that does not disrupt the business operations of the Company.

Respectfully submitted on behalf of Lennar Corporation,

David M. Souders

Enclosures