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

Office of the Secretary

July 12, 2010

VIA E-MAIL AND EXPRESS MAIL

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

Re: Requests for Review by the Full Commission of the Denial of Petitions to Limit or Quash Civil Investigative Demands Issued to D. R. Horton, Inc. and Lennar Corporation, File Nos. 102-3050 & 102-3051

Dear Mr. Kider:

On December 11, 2009, D. R. Horton, Inc. ("DHI") and Lennar Corporation ("LC") (collectively, "Petitioners") filed substantially similar Petitions to Limit or Quash Civil Investigative Demands Issued by the Commission to Petitioners ("Petitions"). On March 9, 2010, Commissioner Pamela Jones Harbour, acting pursuant to Commission Rule 2.7(d)(4), 16 C.F.R. § 2.7(d)(4), issued a Letter Ruling denying the Petitions ("Letter Ruling"). Pursuant to Commission Rule 2.7(f), 16 C.F.R. § 2.7(f), Petitioners filed substantially similar Requests for Full Commission Review of the Letter Ruling ("Requests"). This letter is to advise you that the Commission has completed this review and affirms the Letter Ruling in its entirety. Because neither Petitioner requested a stay pending full Commission review as permitted by Commission Rule 2.7(f), the now expired March 24, 2010, return date set by the Letter Ruling remains in effect.

I. Background

Both Petitioners are multi-state builders of homes, each with several billion dollars of annual revenues.[1] As stated in its Petition, LC "was ranked as the nation's third largest homebuilder in 2008"; currently, it "builds single-family homes in 41 markets in 16 states" and employs 3,900 employees. LC Petition at 2, 6. "[D]uring the time period at issue here, [DHI]

[1] *See infra* notes 11 and 12.

was ranked as the largest homebuilder by units sold in the United States"; it "employs approximately 3,000 workers nationwide" and "builds single-family homes in 83 markets in 27 states." DHI Petition at 3. Through subsidiaries and affiliates, Petitioners also provide mortgage loans and other loan-related services to the buyers of their houses. *See* LC Petition, Ex. A at 2; DHI Petition, Ex. A at 2-3.

Pursuant to two Commission resolutions,[2] on November 12, 2009, the Commission issued substantially similar Civil Investigative Demands ("CIDs") to both Petitioners. Petitioners filed substantially similar Petitions, pursuant to Commission Rule 2.7(d)(1), 16 C.F.R. § 2.7(d)(1). The Petitions asserted, among other arguments, that the CIDs: (1) seek information that is beyond the scope of the investigation authorized by the resolutions; (2) request information that is too indefinite because the CIDs do not identify any specific actions or business practices that the Commission believes Petitioners conducted; (3) require the production of information and materials that are unduly burdensome to produce; and (4) command the production of privileged information. *E.g.*, LC Petition at 5-8, 13, 28-29; DHI Petition at 6-9, 14, 32-33.

The Letter Ruling denied the Petitions in their entirety. It found that: (1) "all of the information sought by the CIDs is reasonably relevant to purposes of the inquiry determined by reference to the resolutions," Letter Ruling at 5-6; (2) the claims "that the CIDs are too indefinite in their description of the information and materials to be produced are simply without merit," *id.* at 6 n.16; (3) the evidence supporting the Petitions did not demonstrate that compliance with the CIDs by Petitioners would "unduly disrupt or seriously hinder [their] normal operations," *id.* at 7; and (4) the "CIDs expressly do not require the production of privileged materials," *id.* at 8.

In their Requests, Petitioners attribute the following errors to the Letter Ruling: (1) a single decision for the two Petitions was "inappropriate and fundamentally unfair," DHI Request at 1 n.1; LC Request at 1 n.1; (2) the Letter Ruling reflects a "genuine hostility" towards Petitioners, DHI Request at 2; LC Request at 2; (3) the Letter Ruling held that because Petitioners have decentralized business structures they have no "right to assert burdensomeness objections," DHI Request at 2; LC Request at 2; (4) the Letter Ruling failed to acknowledge that the CIDs constitute an improper "fishing expedition" into all of Petitioners' documents, DHI Request at 5; LC Request at 7; (5) the Letter Ruling demonstrates that the FTC has already

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[2] Resolution Directing Use of Compulsory Process In Nonpublic Investigation: Unnamed Violators of the Equal Credit Opportunity Act (Aug. 1, 1994) (relating to acts or practices that may violate the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f, and Regulation B, 12 C.F.R. pt. 202, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45); Resolution Directing Use of Compulsory Process In Non-Public Investigations of Various Unnamed Loan Brokers, Lenders, Loan Servicers, and Other Marketers of Loans (Dec. 15, 2008) (relating to acts or practices that may violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or the Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693r, including the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, the Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x, and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f).

prejudged the outcome of its investigation by repeated inflammatory statements, DHI Request at 2; LC Request at 3; (6) the Letter Ruling demonstrates that Petitioners were forced to choose between negotiating with Commission staff on scheduling or forfeiting their right to preserve any objections, DHI Request at 2; LC Request at 3; (7) the Letter Ruling did not find that the FTC has conducted itself in an "unfair and overreaching manner" in connection with the issuance and enforcement of the CIDs, DHI Request at 2-4; LC Request at 3-6; and (8) the Letter Ruling permits the Commission to "limit [Petitioners'] ability to assert appropriate privilege objections," DHI Request at 13; LC Request at 15.

II. Standard of Review

It is well-established that a CID is proper so long as: (1) the investigation is within the scope of the Commission's jurisdiction; (2) the information sought by the CID is reasonably relevant to the investigation authorized by the Commission's resolutions; and (3) compliance is not unduly burdensome. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *United States v. Legal Servs. for New York City*, 249 F.3d 1077, 1083 (D.C. Cir. 2001); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Texaco Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (en banc). If the Commission determines a CID fails to meet these criteria, the Commission has the authority to modify or quash it. 15 U.S.C. § 57b-1(f)(1); 16 C.F.R. §§ 2.7(d)(4) and (f).

III. Analysis

A. The investigation is within the scope of the Commission's jurisdiction.

Petitioners do not challenge that an investigation of possible violations of the Federal Trade Commission Act[3] and the Consumer Credit Protection Act,[4] including the Equal Credit Opportunity Act and its implementing Regulation B,[5] the Truth in Lending Act and its implementing Regulation Z,[6] and the Fair Credit Reporting Act,[7] is within the scope of the Commission's jurisdiction.

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[3] 15 U.S.C. §§ 41–58.

[4] 15 U.S.C. §§ 1601–1693r. The Consumer Credit Protection Act has several titles, including the Truth in Lending Act (Title I), 15 U.S.C. §§ 1601–1667f, the Fair Credit Reporting Act (Title VI), 15 U.S.C. §§ 1681–1681x, and the Equal Credit Opportunity Act (Title VII), 15 U.S.C. §§ 1691–1691f.

[5] 15 U.S.C. §§ 1691–1691f; 12 C.F.R. pt. 202.

[6] 15 U.S.C. §§ 1601–1667f; 12 C.F.R. pt. 226.

[7] 15 U.S.C. §§ 1681–1681x.

B. The information sought by the CIDs is reasonably relevant to the investigation authorized by the Commission's resolutions.

In the context of a CID, the information being sought is "reasonably relevant" so long as it is "not plainly incompetent or irrelevant to any lawful purpose of the agency." *Invention Submission*, 965 F.2d at 1089 (citing *Texaco,* 555 F.2d at 872-73 n.23, and quoting *Morton Salt*, 338 U.S. at 652). In a CID, the Commission "is under no obligation to propound a narrowly focused theory of a possible future case." *Texaco*, 555 F.2d at 874. "Certainly a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance." *Id.* at 877.

Petitioners assert that the CIDs seek information that is beyond the scope of the investigation authorized by the resolutions. They also claim that the CIDs' specifications are too indefinite because they do not identify any specific actions or business practices of Petitioners that are the focus of the investigation. Both contentions are unfounded.

The two relevant Commission resolutions authorize the issuance of CIDs to investigate potential violations of the Federal Trade Commission Act and the Consumer Credit Protection Act. Specifically, the two resolutions authorize the issuance of the CIDs to investigate whether in the advertising, marketing, or sale of homes and loans Petitioners have engaged in: (1) deceptive or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; or (2) acts or practices in violation of the Consumer Credit Protection Act, including the Equal Credit Opportunity Act and its implementing Regulation B, the Truth in Lending Act and its implementing Regulation Z, or the Fair Credit Reporting Act. Such acts or practices may include, but are not limited to, discriminating in the extension of credit on the basis of an applicant's race or national origin; failing to disclose properly consumer credit terms; and failing to provide an appropriate notice of adverse action to the consumer.

The Commission is not required to identify to Petitioners the specific acts or practices under investigation. *Texaco*, 555 F.2d at 874, 877 ("[T]he relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation."); *see also Morton Salt*, 338 U.S. at 642-43 (holding that the FTC's power of inquiry is "more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"). It is sufficient that a CID identify the subject matter of the investigation, which these CIDs do by stating that the Commission is investigating the sales, marketing and loan practices of Petitioners for potential violations of the aforementioned statutes.

Moreover, we agree with Commissioner Harbour that a fair reading of the CIDs does not support Petitioners' claim that the CIDs require the production of every document created by Petitioners during the relevant time period and, therefore, require the production of information irrelevant to the investigation. For example, most of the specifications apply only to either marketing and sales activities or to mortgage lending activities. This limitation alone excludes a

large portion of Petitioners' business operations, such as home construction and land development.

C. Compliance is not unduly burdensome.

Compliance with the requirements of a CID is an undue burden only when compliance would threaten to seriously impair or unduly disrupt the normal operations of the target's business. *See FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *Texaco*, 555 F.2d at 882. The target of a CID must expect to incur some burden in responding to a CID and the level of burden required increases when the burden is in large part attributable to the magnitude of the target's business operations and the comprehensive nature of the investigation. *See Texaco*, 555 F.2d at 882 ("There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations."); *In re FTC Corporate Patterns Report Litig.*, Nos. 76-0126, 76-0127, 1977 WL 1438, at *16 (D.D.C. July 11, 1977) (concluding that "there is no doubt that the relative size and complexity of the corporate parties' business operations contribute to the compliance burden" and noting that "the cost of compliance for the corporate parties, even if high in an absolute sense, is not high compared to other costs borne by such large corporations"). Thus, in *Texaco,* a court of appeals enforced a CID even though Texaco claimed it would take 62 work-years and $4 million (in 1977 dollars) to comply with the Commission's CID. 555 F.2d at 922. This amount is equivalent to approximately $14.4 million in 2010 dollars.[8]

The burden of establishing undue burden rests wholly on Petitioners, *Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998), and "the presumption is that compliance should be enforced to further the agency's legitimate inquiry into matters of public interest." *Shaffner*, 626 F.2d at 38. At bottom, Petitioners assert four bases for their undue burden claim. First, they assert that the decentralized nature of their businesses means that much of the information responsive to the CIDs is located in regional and divisional offices, not at their corporate headquarters, and that it will take thousands of hours to retrieve this information from those offices and the employees located there.[9] Second, they claim that the collapse of the new

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[8] This figure is derived from the Bureau of Labor Statistics' average Consumer Price Index for each calendar year and the latest monthly index value for the current year. *See* Bureau of Labor Statistics, CPI Inflation Calculator, *available at* http://www.bls.gov/data/inflation_calculator.htm.

[9] DHI belatedly filed a supplemental declaration with its Request, which raises its estimation of hours required to comply with the CID, based on its self-described "fuller understanding of the demands of the CID," Hedgepeth Supp. Decl. ¶ 3. DHI's explanation for its belated filing is not persuasive because DHI's Petition had already taken the position that the CID "seeks the production of virtually every document created by D.R. Horton." DHI Petition at 2. Moreover, like the Petition it seeks to supplement, this declaration rests on a misreading of

housing market has hurt their companies financially, which amplifies the impact that the CIDs have on Petitioners' ability to continue to operate. Third, they claim that, due to significant corporate contraction resulting from the housing market collapse, they would be forced to contact thousands of former employees to formulate responses to the CIDs. Finally, both Petitioners contend that the CIDs require them to individually review each of their tens of thousands of loan files.

Even if Petitioners are as decentralized as they contend, a company's decision as to how to structure itself does not excuse it from compliance with a valid CID. Otherwise, any decentralized business would be exempt from anything more than a cursory investigation by the Commission.[10] As to the impact of the decline of the housing market on Petitioners' ability to comply with the CIDs, even though they have fewer employees and lower revenues than during

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the CID and double-counts many estimated hours. Assuming for argument's sake, however, that the declaration is timely and its estimate accurate, it still does not warrant a finding that compliance is unduly burdensome.

[10] Neither of the two "decentralized business operations" cases cited by Petitioners is persuasive here. *EEOC v. McCormick & Schmick's*, No. 07-80065, 2007 WL 1430004 (N.D. Cal. May 15, 2007), involved a company with about one-tenth the revenues of Petitioners, and requiring McCormick & Schmick's to respond to an administrative subpoena would have imposed a far greater relative burden than any imposed on either Petitioner by the Commission's CIDs. *Compare* McCormick & Schmick's Seafood Restaurants, Inc., Annual Report (Form 10-K for fiscal year ended Dec. 26, 2009), at 25-26 (Mar. 8, 2010) (noting annual revenues of $308 million, total stockholders' equity of $160 million, and cash and cash equivalents of $10.5 million for fiscal year ended 2006), *with* D.R. Horton, Annual Report (Form 10-K for fiscal year ended Sept. 30, 2009), at 23, 72 (Nov. 20, 2009) (noting consolidated revenues of $3.66 billion, $2.3 billion total stockholders' equity, and cash and cash equivalents of $2.0 billion for fiscal year ended 2009), *and* Lennar Corporation, Annual Report (Form 10-K for fiscal year ended Nov. 30, 2009), at 20, 36, 66 (Jan. 29, 2010) (noting consolidated revenues of $3.12 billion, $2.4 billion total stockholders' equity, and cash and cash equivalents of $1.5 billion for fiscal year ended 2009).

Bell Fourche Pipeline Co. v. United States, 554 F. Supp. 1350 (D. Wyo. 1983), *remanded for lack of subject matter jurisdiction*, 751 F.2d 332 (10th Cir. 1984), not only lacks any precedential value, but also is distinguishable. In contrast to the instant Petitions, in *Bell Fourche*, the subpoena respondents presented evidence that compliance with the administrative subpoenas had "severely disrupted" their day-to-day operations because of the presence of Commission investigators on their business premises. 554 F. Supp. at 1362. In addition, the administrative subpoenas at issue in *Bell Fourche* – unlike those at issue here, as discussed above, *see supra* Section III.B – were so extensive as to cover literally every document of the subpoenaed companies. *See id.*

the housing boom years, DHI[11] and LC[12] remain Fortune 700 companies with billions of dollars in annual revenues and significant equity and assets. Moreover, an economic downturn cannot bar the Commission from investigating possible illegal acts and practices within the Commission's statutory jurisdiction, especially where, as here, any illegal acts and practices by Petitioners could have affected tens of thousands of home buyers.

In any event, no reasonable interpretation of the CIDs' specifications requires either Petitioner to contact former employees to formulate their responses to the CIDs. Rather, Petitioners need only formulate responses using information and materials in their possession, custody or control. CID Instruction H.

Furthermore, as the CIDs' specifications make clear on their face, they do not require the manual review and production of all of Petitioners' loan files. Indeed, in certain specifications, the CIDs invite Petitioners to contact Commission staff to discuss limiting the scope of the CIDs to the extent responsive information in individual loan files is not stored electronically or if more than a specified number of individual loan files may be responsive to a particular specification. *See* Specifications P-25, P-26, and Data Request Instructions.

Neither Petitioner provided the Commission in its Petition or Request with sufficient information about what potentially responsive information, at the corporate, regional, and divisional levels, is stored electronically or how that electronically stored information ("ESI") can be searched or reviewed. In an age when most corporate information is maintained as ESI, this failure is highly significant to the Commission's review process. Having offered scant information in their Petitions and Requests about Petitioners' ESI, its storage structure and its ability to be searched, both Petitioners fail to demonstrate undue burden.

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[11] D.R. Horton, Annual Report (Form 10-K for fiscal year ended Sept. 30, 2009), at 23 (Nov. 20, 2009) (noting consolidated revenues of $3.66 billion for fiscal year ended Sept. 30, 2009); D.R. Horton, Quarterly Report (Form 10-Q for quarter ended Mar. 31, 2010), at 3-4 (Apr. 30, 2010) (noting consolidated net income of $203.4 million and $11.4 million for the six and three months ended Mar. 31, 2010, respectively; as of Mar. 31, 2010, DHI had $1.61 billion of unrestricted cash and $2.59 billion of shareholders' equity, including $792.8 million of retained earnings).

[12] Lennar Corporation, Annual Report (Form 10-K for fiscal year ended Nov. 30, 2009), at 20 (Jan. 29, 2010) (noting consolidated revenues of $3.12 billion for fiscal year ended Nov. 30, 2009); Lennar Corporation, Report of Unscheduled Material Events or Corporate Changes (Form 8-K stating results for second quarter ended May 31, 2010), Ex. 99.1 at 8, 11 (June 24, 2010) (noting net earnings attributable to Lennar of $33.2 million and $39.7 million for the six and three months ended May 31, 2010, respectively; noting that as of May 31, 2010 LC's homebuilding segments had $1.1 billion of unrestricted cash and LC as a whole had $2.5 billion of stockholders' equity).

Moreover, we agree with Commissioner Harbour's finding that Petitioners' estimates for compliance "include unrealistically high estimates of the number of staff hours required to comply because . . . the companies' estimates are based on erroneous, overblown constructions of the CIDs." Letter Ruling at 7. Likewise, we concur with Commissioner Harbour's determination that,"even if those quantified estimates of burden-hours had any credibility, they seem relatively insignificant when measured against the size of the companies." *Id.* Thus, in the end, Petitioners have not demonstrated that compliance with the CIDs would "threaten to seriously impair or unduly disrupt the normal operations of [their] business[es]." *Shaffner*, 626 F.2d at 38 (citing *Texaco*, 555 F.2d at 882).

D. The CIDs do not seek privileged information.

Commission Rule 2.8A, 16 C.F.R. § 2.8A, expressly authorizes the target of a CID to withhold information for which it asserts privilege, as does Instruction C of the CIDs. Petitioners' claims that the CIDs seek privileged information, and that Petitioners would waive their privilege objections if they did not file a petition to quash, are therefore without basis.

E. Petitioners' other assertions of error in the Letter Ruling are without merit.

Petitioners have not produced any credible evidence to support their claims of hostility, bias, or prejudgment. The Commission does not find error in Commissioner Harbour conserving resources by using a single letter ruling to dispose of substantially similar petitions from the same counsel involving substantially similar CIDs, the dispositions of which do not turn on any material factual differences. Nor does the issuance of a single letter ruling making findings contrary to positions taken by Petitioners demonstrate any prejudice, impropriety, hostility or bias.

Petitioners further contend that Commission staff did not act in good faith in their negotiations with Petitioners and that they were forced to forego negotiating with staff to file their Petitions. The Commission finds that these contentions are without merit. Before Petitioners filed their Petitions, staff offered to narrow the scope of the CIDs and to extend the time for compliance, but Petitioners either ignored or rejected those offers. After the Petitions were filed, staff made themselves available to both Petitioners to discuss the scope and timing of the CIDs, but without success. After the Petitions were denied and Petitioners filed the present Requests, staff continued to attempt to work with Petitioners as to the scope and timing of the CIDs even though they had not yet made any meaningful efforts to comply with the CIDs.

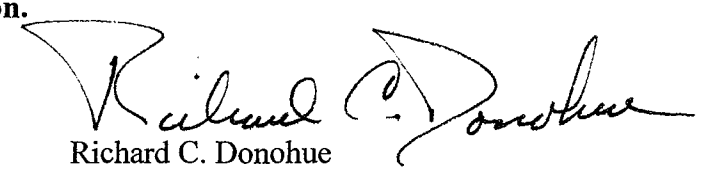
It was only after staff's repeated attempts to discuss the scope and timing of the CIDs and the expiration of the compliance deadline that Petitioners were willing to meaningfully discuss modifications and time lines for production that were consistent with the investigations. During those discussions, Petitioners agreed to several proposed modifications that were designed to reduce their burden of compliance, consistent with the scope of the investigations – a number of which staff had proposed before Petitioners filed their Petitions. The Associate Director for the Division of Financial Practices has recently modified the CIDs to reflect those agreements, and

both Petitioners have agreed to comply with the modified CIDs under a tentative production schedule. Thus, contrary to Petitioners' contentions, staff's extensive efforts to work with both Petitioners – even after their noncompliance with the CIDs – demonstrate staff's good faith in this matter.

IV. Conclusion

For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

By direction of the Commission.



Richard C. Donohue
Acting Secretary