

FILED

2018 JUN -8 AM 9:20

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

FEDERAL TRADE COMMISSION,
Petitioner,

v.

FULLY ACCOUNTABLE, LLC,
Respondent.

JUDGE LIOI

Misc No. 18 MC

54

FEDERAL TRADE COMMISSION'S
MOTION FOR TEMPORARY SEAL OF PETITION TO ENFORCE CIVIL
INVESTIGATIVE DEMAND AND SUPPORTING PAPERS

Petitioner Federal Trade Commission ("FTC") moves the Court *ex parte* for an order temporarily sealing its Petition to Enforce Civil Investigative Demand (Petition) and supporting papers, including all exhibits to the Petition and the Memorandum of Points and Authorities in support of the Petition. The FTC requests that the seal remain in effect until the later of either of these periods: (1) ten days after the FTC notifies the Court that Respondent Fully Accountable, LLC (Fully Accountable) has been served with a signed Order to Show Cause and this Motion for Temporary Seal, or (2) Fully Accountable files its own motion for a protective order or seal and the Court rules on such motion.

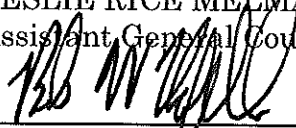
As more fully explained in the attached Memorandum in Support of this Motion, the FTC's Petition and supporting papers describe and contain references to materials produced by Fully Accountable to the FTC in response to a civil investigative demand, a form of administrative compulsory process. Under the Federal Trade Commission Act, such materials are normally restricted from public disclosure. See 15 U.S.C. § 57b-2(b)(3)(C). As provided in Rule 4.10 of the Commission's Rules of Practice, however, such materials may be disclosed in court proceedings involving the Commission provided that the submitter of such information is "afforded an opportunity to seek an appropriate protective or *in camera* order." 16 C.F.R. § 4.10(g). A temporary seal would therefore protect this information from disclosure and allow the FTC to notify Fully Accountable of this proceeding, thus affording the company an opportunity to determine whether to seek its own protective order or seal. A proposed order is attached.

Respectfully submitted,

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel for Litigation

LESLIE RICE MELMAN
Assistant General Counsel for Litigation



BURKE W. KAPPLER
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Tel.: (202) 326-2043
Fax: (202) 326-2477
Email: bkappler@ftc.gov

Dated: June 6, 2018.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

FEDERAL TRADE COMMISSION,
Petitioner,

v.

FULLY ACCOUNTABLE, LLC,
Respondent.

Misc. No. 5:18 MC

54

FEDERAL TRADE COMMISSION'S
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR TEMPORARY SEAL

Petitioner Federal Trade Commission ("FTC") moves the Court *ex parte* for an order temporarily sealing its Petition to Enforce Civil Investigative Demand (Petition) and supporting papers, including all exhibits to the Petition and the Memorandum of Points and Authorities in support of the Petition. The FTC requests that the seal remain in effect until the later of either of these periods: (1) ten days after the FTC notifies the Court that Respondent Fully Accountable, LLC (Fully Accountable) has been served with a signed Order to Show Cause and this Motion for Temporary Seal, or (2) Fully Accountable files its own motion for a protective order or seal and the Court rules on such motion.

STATEMENT OF FACTS

1. The FTC is filing today a Petition to Enforce Civil Investigative Demand and supporting documents. This Petition seeks to enforce a civil investigative demand issued to Fully Accountable as part of a law enforcement investigation into that company's conduct and association with two groups of Internet marketers.

2. As discussed in the Petition, Fully Accountable has produced no documents and made only partial and insufficient responses to the CID's interrogatories. Although the FTC is not at present providing Fully Accountable's responses to this Court in full, the Petition and supporting documents contain references to, describe, and quote from the company's responses to the CID.

3. Under the Federal Trade Commission Act (FTC Act), such information produced in response to compulsory process is deemed confidential and nonpublic and is protected from disclosure. As a general matter, such information may not be disclosed outside of the Commission "without the consent of the person who produced the material[]." 15 U.S.C. § 57b-2(b)(3)(C); *see also* 16 C.F.R. §§ 4.10(a)(8), (a)(9), (d) (deeming nonpublic information receiving by the Commission in an investigation or in response to compulsory process and restricting disclosure).

4. The FTC Act also provides, however, that the Commission may disclose such information "in judicial proceedings to which the Commission is a party" following "the rules of the Commission for adjudicative proceedings or by court rules or orders." 15 U.S.C. § 57b-2(d)(2). The relevant Commission rule further

provides that material produced in response to compulsory process “may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders” provided that the submitter of such information is “afforded an opportunity to seek an appropriate protective or *in camera* order.” 16 C.F.R. § 4.10(g).

5. Because this is a summary proceeding properly instituted by a petition and order to show cause rather than a complaint and summons, *see, e.g., United States v. Markwood*, 48 F.3d 969, 980-983 (6th Cir. 1995) (approving use of order to show cause and citing, *inter alia, United States v. Will*, 671 F.2d 963, 968 (6th Cir. 1982)), there is no means for the FTC to provide an opportunity for Fully Accountable to seek a protective order or seal prior to filing. The FTC will provide such notice once this Court has signed the Order to Show Cause and the FTC has served that Order and this Motion upon Fully Accountable.

LEGAL ANALYSIS

The Sixth Circuit recently described the standard for sealing documents in *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305-06 (6th Cir. 2016). As that Court recognized, there is a long-standing and “strong presumption in favor of openness” as to court records. *Id.* at 305 (quoting *Brown & Williamson*, 710 F.2d 1165, 1179 (6th Cir. 1983)). The “heavy” burden of overcoming that presumption is borne by the party that seeks to seal them, *see id.*; *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001), and “[o]nly the most compelling reasons can justify non-disclosure of judicial records.” *In re Knoxville News-Sentinel*

Co., 723 F.2d 470, 476 (6th Cir. 1983). And even where a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason. *See, e.g., Press-Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 509-11 (1984).

As shown from the statement of facts above, the FTC has sufficiently compelling reasons for a temporary seal in this case: in enacting the FTC Act, Congress has directed the agency to protect information submitted in response to compulsory process, permitting such disclosure only in court or adjudicative proceedings subject to the Commission's rules or rules or orders of court. 15 U.S.C. §§ 57b-2(b)(3)(C), (d)(2). The Commission has followed this authority, incorporating such protections into its own Rules of Practice. *See* 16 C.F.R. §§ 4.10(a)(8), (a)(9), (d). Under these Rules, the FTC may disclose information submitted in response to compulsory process in Commission adjudicative or court proceedings, provided that the submitter of such information is afforded an opportunity to seek a protective or *in camera* order. 16 C.F.R. § 4.10(g); *see also FTC v. Invention Submission Corp.*, Misc. No. 89-272(RCL), 1991 WL 47104, at *4 (D.D.C. Feb. 14, 1991) (stating that if the FTC proposes to use confidential information in litigation, it will "either file the information under seal or give [the respondent] an opportunity to seek protection"), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992). The FTC's Motion for Temporary Seal thus complies with all of these authorities, protecting Fully Accountable's information from public disclosure in this court proceeding while providing the company the opportunity required by Rule 4.10(g).

Even so, the FTC's Motion for Temporary Seal is narrowly tailored as the Sixth Circuit requires. The FTC is only asking this Court to seal certain documents—the Petition and supporting papers—for a period running to the later of the following: (1) ten days after the FTC notifies the Court it has served Fully Accountable with a signed Order to Show Cause and this Motion for Temporary Seal, or (2) Fully Accountable files its own motion for a protective order and this Court rules on it. This limited seal thus protects the information in the FTC's petition from public disclosure for the minimal period of time sufficient for Fully Accountable to determine whether to seek its own protection. If Fully Accountable does not seek to seal the FTC's Petition within days of receiving notice from the FTC, then this Court may lift the seal and place the information on the public record. If Fully Accountable does seek its own seal within that period, then the seal remains in place while the Court evaluates Fully Accountable's motion on its merits, consistent with the standards in *Shane Grp., Inc.* Either way, the restriction of public access to this information is as limited as possible, consistent with the governing statutory and regulatory requirements.

CONCLUSION

This Court should grant the FTC's Motion and place the FTC's Petition and supporting papers under seal for the later of the following periods: (1) ten days after the FTC notifies the Court it has served Fully Accountable with the Order to Show Cause and this Motion for Temporary Seal, or (2) Fully Accountable files its

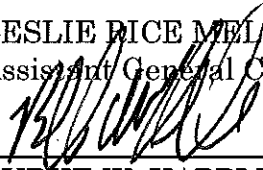
own motion for a protective order or seal and this Court rules on such motion. A proposed Order is attached.

Respectfully submitted,

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel for Litigation

LESLIE RICE MELMAN
Assistant General Counsel for Litigation



BURKE W. KAPPLER
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Tel.: (202) 326-2043
Fax: (202) 326-2477
Email: bkappler@ftc.gov

Dated: June 6, 2018.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

FEDERAL TRADE COMMISSION,
Petitioner,

v.

FULLY ACCOUNTABLE, LLC,
Respondent.

Misc. No. 5.18 MC

54

[PROPOSED] ORDER

Upon consideration of Petitioner Federal Trade Commission's *Ex Parte* Motion for Temporary Seal, and having reviewed the submissions of counsel and the record, the Court finds that good cause exists to temporarily seal the Federal Trade Commission's Petition to Enforce Civil Investigative Demand, supporting exhibits, and Memorandum of Points and Authorities in Support. Specifically, the Court finds as follows:

1. These documents contain and refer to information submitted to the Commission by Respondent Fully Accountable, LLC in response to a civil investigative demand, a form of administrative compulsory process;
2. The Federal Trade Commission Act and the Commission's Rules of

Practice restrict from disclosure such information and the Commission may only disclose such information in court or adjudicative proceedings consistent with the Commission's Rules. *See* 15 U.S.C. §§ 57b-2(b)(3)(C), (d)(2); 16 C.F.R. §§ 4.10(a)(8), (a)(9), (d);

3. The Commission's Rules allow such disclosure if "the submitter [is] afforded an opportunity to seek an appropriate protective or *in camera* order. 16 C.F.R. § 4.10(g);

4. The Commission's Motion for Temporary Seal is consistent with all of these authorities, protecting from disclosure the information produced in response to compulsory process while giving Fully Accountable the opportunity to seek its own protections; and

5. The Commission's request for a temporary seal is narrowly tailored to limit public access to this information for the minimal period required for Fully Accountable to determine whether to seek its own protections.

IT IS HEREBY ORDERED that (1) Federal Trade Commission's Petition to Enforce Civil Investigative Demand; (2) Petition Exhibits 1 through 8 and all attachments; and (3) the Federal Trade Commission's Memorandum of Points and Authorities in Support of Petition to Enforce Civil Investigative Demand are sealed and shall remain under seal until the later of the following periods: (1) ten (10) days after Petitioner Federal Trade Commission notifies this Court that it has served Respondent Fully Accountable, LLC with the Order to Show Cause and its Motion for Temporary Seal, or (2) Respondent Fully Accountable files a motion for protective order or seal and this Court rules upon such motion; and

IT IS FURTHER ORDERED that if Respondent Fully Accountable, LLC files no motion for protective order or seal within ten days of notice of these proceedings by the Petitioner Federal Trade Commission, then the seal shall be lifted and the documents described above be placed on the public record.

SO ORDERED, this ____ day of _____, 2018.

UNITED STATES DISTRICT JUDGE