

UNITED STATES DISTRICT COURT -  
BEFORE THE FEDERAL TRADE COMMISSION -

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IN THE MATTER OF THE )  
MAY 23, 2016 CIVIL INVESTIGATIVE )  
DEMAND ISSUED TO CITYWIDE )  
BANKS )  
)-

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**CITYWIDE BANKS' PETITION TO QUASH CIVIL INVESTIGATIVE DEMAND -**

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Petitioner Citywide Banks (“Bank”), through undersigned counsel Shapiro Biegging Barber Otteson LLP, hereby petitions the Federal Trade Commission (the “FTC”), pursuant to 16 C.F.R. 2.10 and 15 U.S.C. § 57b-1, to quash the Civil Investigative Demand issued by the FTC to Bank dated May 23, 2016 (the “CID”). A copy of the CID is attached hereto as **Exhibit 1**.

**FACTUAL BACKGROUND**

The CID requests production by Bank of financial records maintained by Bank relating to the accounts of certain Bank customers, including Electronic Payment Transfer, LLC (“EPT”). Service of the CID was effected upon Bank on May 26, 2016.

Thereafter, counsel for the Bank entered into discussions with Commission Counsel Michelle Chua, Esq., regarding the potential for narrowing the scope of documents responsive to the CID. In connection with those discussions, Bank counsel advised Ms. Chua that, pursuant to Colorado law, Bank was required to provide prior notice to its customers of the request for production of their financial records. *See, e.g., In re E. Nat. Bank of Denver*, 517 F. Supp. 1061,

1067 (D. Colo. 1981) (authorizing banks, without threat of prosecution, to provide notice to customers that “the customer’s bank records have been subpoenaed.”).<sup>1</sup>

Undersigned counsel’s discussions with Ms. Chua culminated in Ms. Chua’s request for production of a set of preliminary documents requested in the CID relating only to EPT. As a result, given its obligations under Colorado law, Bank provided notice of the request for production of financial records to EPT on June 24, 2016. Shortly thereafter, Bank also provided notices to other entities for which Bank possessed financial documents responsive to the requests for production contained in the CID.

On June 28, 2016, after receipt of Bank’s notice to EPT, counsel for EPT filed a Complaint and Motion for Temporary Restraining Order and Preliminary Injunction in the United States District Court for the District of Colorado, Civil Action No. 16-CV-1653-RBJ, styled *Electronic Payment Transfer, LLC v. Federal Trade Commission and Citywide Banks* (the “Action”). On July 1, 2016, the parties filed their Joint Motion to Stay the Action until July 11, 2016, to allow the parties to continue discussions to attempt to resolve issues relating to production of documents responsive to the CID. However, the parties were unable to resolve matters relating to the CID.

On July 11, 2016, EPT filed its Motion to Quash the CID and the FTC filed its Response to the Motion to Quash on July 21, 2016. Copies of the Motion to Quash and Response thereto are attached as **Exhibit 2** and **Exhibit 3**, respectively. On July 20, 2016, additional entities joined in the Motion to Quash filed by EPT. Those entities, Flexpay, LLC, Electronic Payment

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<sup>1</sup> The CID expressly “exclude[s] any materials for which prior customer notice is required under the Right to Financial Privacy Act (“RFPA”), 12 U.S.C. §§ 3401, et seq.” CID [Exhibit 1] at Instructions § Q.

Systems, LLC, Land Acquisition, LLC, Quebec Holdings, Inc., Access-Now.net, Inc., ElectCheck, Inc., and First Merchant Platinum, Inc., together with EPT, are at times referred to herein as the “EPT Entities.”

A Hearing on the Motion to Quash was held on August 10, 2016. At the Hearing, the Court memorialized the agreement that the parties had reached during the Hearing in a Minute Order that: (i) ordered the Action dismissed without prejudice, (ii) tolled the statute of limitations, (iii) found that the Motion for Temporary Restraining Order and Motion to Quash were moot, and (iv) granted Bank 20 days to decide whether to petition the FTC to quash the CID. A copy of the Court’s August 10, 2016 Minute Order (the “Order”) is attached at **Exhibit 4**.

Pursuant to the Court’s Order, the deadline for Bank to petition to quash the CID is August 30, 2016. As a result, this Motion is timely.

By email notification received August 29, 2016, counsel for the EPT Entities advised that the EPT Entities object to production by Bank of documents responsive to the CID. *See* August 29, 2016 Email from Scott Krob, Esq., counsel for EPT Entities to various counsel for Bank and the FTC, attached at **Exhibit 5**.<sup>2</sup>

#### **LEGAL BASIS FOR MOTION TO QUASH**

Colorado recognizes that a “bank depositor has a reasonable expectation of privacy in the bank records of his financial transactions.” *See Charnes v. DiGiacomo*, 612 P.2d 1117, 1121(Colo. 1980); *cf. United States v. Miller*, 425 U.S. 435 (1976). In light of the EPT Entities’

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<sup>2</sup> The referenced email contains a discussion of matters to which Bank is not involved or otherwise aware. Apparently, the FTC’s underlying investigation has been on-going for several years. Bank has no direct knowledge nor involvement with that on-going matter other than recently as a result of the CID.

objection to production of documents responsive to the CID, Bank seeks entry of an order - quashing the CID and otherwise relieving Bank from any obligation to produce any documents responsive thereto. Failure to do so would place the Bank in the untenable position of potentially violating its customers' expectations of privacy in their financial records.

WHEREFORE, Bank respectfully requests that the Commission quash the CID and grant Bank such additional relief as is appropriate under the circumstances.

DATED this 30<sup>th</sup> day of August, 2016.

SHAPIRO BIEGING BARBER OTTESON LLP

/s/ Duncan E. Barber

Duncan E. Barber, #16768  
4582 S. Ulster Street, Suite 1650  
Denver, CO 80237  
Telephone: (720) 488-0220  
dbarber@sbbolaw.com

**CERTIFICATE OF SERVICE** -

I hereby certify that on August 30, 2016, pursuant to 16 C.F.R. 4.2(d), I caused the original and one copy of Citywide Banks' Petition to Quash Civil Investigative Demand to be hand delivered to the Secretary of the Federal Trade Commission at the following address and, in addition, provided a copy of the same by Electronic Mail in pdf format to [electronicfilings@ftc.gov](mailto:electronicfilings@ftc.gov).

Donald Clark  
Secretary of the Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail Stop CC-5610  
Washington, D.C. 20580

I further certify that, on August 30, 2016, I caused a copy of Citywide Banks' Petition to Quash Civil Investigative Demand to be hand-delivered to Commission Counsel Michelle Chua, Esq., at the following address:

Michelle Chua, Esq.  
Commission Counsel  
Division of Marketing Practices  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Suite CC-8528  
Washington, D.C. 20580

I further certify that, on August 30, 2016, I caused a copy of Citywide Banks' Petition to Quash Civil Investigative Demand to be delivered to additional interested counsel in this matter via electronic mail as follows:

Scotty P. Krob  
Krob Law Office, LLC  
[scott@kroblaw.com](mailto:scott@kroblaw.com)

Burke W. Kappler, Esq.  
Attorney, Office of General Counsel  
Federal Trade Commission  
[bkappler@ftc.gov](mailto:bkappler@ftc.gov)

Mark S. Pestal  
U.S. Attorney's Office- Denver  
[Mark.pestal@usdoj.gov](mailto:Mark.pestal@usdoj.gov)

/s/ Duncan E. Barber  
Duncan E. Barber, Colo. Bar No. #16768  
SHAPIRO BIEGING BARBER OTTESON LLP  
4582 S. Ulster Street, Suite 1650  
Denver, CO 80237

**STATEMENT OF CONFERENCE WITH COMMISSION STAFF -**  
**PURSUANT TO 16 C.F.R § 2.7(k)**

I hereby certify that undersigned counsel for the Petitioner Citywide Banks has conferred with Commission staff pursuant to 16 C.F.R. § 2.7(k) in a good faith effort to resolve by agreement the issues raised by the petition and has been unable to reach such agreement.

/s/ Duncan E. Barber

Duncan E. Barber, Colo. Bar No. #16768  
SHAPIRO BIEGING BARBER OTTESON LLP  
4582 S. Ulster Street, Suite 1650  
Denver, CO 80237



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) 326-2316  
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 20 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](http://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.

Printed Authorized Employee's Name: Nicole Mouton

Initials: N.M.M.

Branch Number Where Documents Were Served: #12 Centennial

Date Document was Served: 5-26-16

Time of Receipt: AM or PM: 10:56 am

Received by Mail, in Person, or Email: Fed-EX



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## Form of Certificate of Compliance\*

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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 TELEMARETERS, SELLERS, SUPPLIERS, OR OTHERS**

File No. 012 3145

Nature and Scope of Investigation:

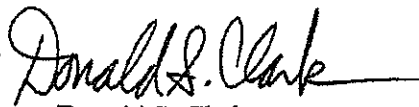
To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive 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@ftc.gov](mailto:mchua@ftc.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.

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

|  |   |                   |
|--|---|-------------------|
| ELECTRONIC PAYMENT TRANSFER, LLC )       | ) |                   |
|  | ) |                   |
| Plaintiff,                               | ) |                   |
|  | ) | 1:16-cv-01653-RBJ |
| v.                                       | ) |                   |
|  | ) |                   |
| FEDERAL TRADE COMMISSION, and )          | ) |                   |
| CITYWIDE BANKS, a Colorado corporation ) | ) |                   |
|  | ) |                   |
| Defendants.                              | ) |                   |

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**MOTION TO QUASH**

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**COMES NOW** Plaintiff, Electronic Payment Transfer, LLC, by and through its attorneys, the KROB LAW OFFICE, LLC and pursuant to the stipulation of the parties and the order of the Court respectfully moves the Court to quash or limit the Civil Investigative Demand served by the Defendant Federal Trade Commission (“FTC”) on Defendant Citywide Banks dated May 23, 2016, seeking to acquire Plaintiff’s confidential banking information without advance notice to Plaintiff and without providing any nexus between the FTC’s investigation and the material requested or otherwise satisfying the Colorado constitutional requirements for such administrative subpoenas.

**I. BACKGROUND FACTS**

**A. Nature of EPT, the EPS Entities and their relationship with Wigdore and Abdelmesseh**



Electronic Payment Transfer, LLC d/b/a Electronic Payment Systems, LLC (“EPS”) is registered with Visa as an “Independent Sales Organization” (“ISO”) and MasterCard as a “Merchant Service Provider” (a/k/a MasterCard Service Provider) (“MSP”), and has been registered with the “Card Associations” (“Associations”) for many years. Currently EPS is sponsored by Esquire Bank. Just prior to EPS’ relationship with Esquire they were sponsored by Merrick Bank. Merrick Bank was the primary source of sponsorship for the Subject Accounts (discussed below) and held the accounts through which the merchants were paid and merchant reserves were maintained.

The “Corporate Accounts” noted in the most recent CID related to this case and dated May 23, 2016, including Flexpay, LLC, Electronic Payment Systems, LLC, Dormac, LLC dba Electronic Payment Systems, Access-Now.net, Inc., ElectCheck, Inc. and First Merchant Platinum, Inc. represent companies that support various product offerings related to the core business of EPS. Flexpay, LLC offers several check processing services and Merchant Based Payment Plans. Electronic Payment Systems, LLC is the name used in marketing card processing services. Dormac, LLC dba Electronic Payment Systems is a secondary operating account used primarily as a recipient of funds from the card processing business. Access-Now.net, Inc. offers web development and hosting service to EPS’s merchants. ElectCheck, Inc. is an older version of EPS’s check services product that is still in use by several merchants and will not be sunset until those merchants cease using the product. Finally, First Merchant

Platinum, Inc. is a warranty product that covers the typical terminal products used to process credit cards.

Also noted as “Corporate Accounts” are Quebec Holdings, Inc., and accounts in the name of corporations, limited liability companies, partnerships of more than five individuals, or other entities that are not a “person” for the purposes of the RFPA, for which any noted individuals or entities are signatories or have other authority that is comparable to signatory authority. Quebec Holdings, Inc. is a real estate holding company with no employees or active operation. The named individuals do have other business interests unrelated to EPS’s credit/debit card processing services and the FTC has not indicated any relationship between any of the named individuals and any activity that is the subject of the investigation.

Based on the rules established by the Associations, EPS offers processing services for credit and debit card transactions. Essentially, EPS facilitates the agreements and relationships between a merchant and a sponsoring Bank, and for this EPS earns the revenue produced by the merchant as a result of the fees charged to the merchant less the cost of services (e.g. Interchange, transactional fees, residency fees, expenses related to the processing of the transaction, etc.). These margins are small in nature representing, in most cases, significantly less than 1% of the face amount of the transactions.

EPS has a small sales force which performs some sales as part of its operations, although it has always been the primary marketing thrust of EPS to employ independent contractors to solicit and sell EPS’ Processing Services. An independent contractor is

free to utilize the services offered by EPS although many have alternate sources of some or all of the processing services offered by EPS. Additionally, an independent contractor may offer services to a merchant that are not available through EPS (e.g. business consulting and payroll processing to name a few). By way of example, an independent contractor (as is the case with the Subject Accounts) may offer a “Payment Gateway” product to facilitate the processing of a transaction. The independent contractor may offer a myriad of vehicles to process transactions based on the merchant’s needs including but not limited to a credit card processing terminal, a “Point of Sale” (“POS”) system, or a mobile processing application. These are options available to the independent contractor and a critical part of the negotiation with the merchant. At times, the method of processing and an ability to facilitate that method is as important to the merchant as the fee for those services. This is evaluated on a merchant-by-merchant basis as part of the service offered by the independent contractor. EPS simply facilitates an ability to process credit and debit transactions based on the independent contractor’s and merchant’s decision. In essence, the independent contractor goes out and solicits merchants to use EPS’ (or other’s) card processing services. The independent contractor then provides the merchant to EPS who, in turn, introduces the merchant to the sponsoring Bank.

As part of being an ISO/MSP the sponsoring Bank(s) (in the case of the Subject Accounts Merrick Bank for the transactions and Esquire Bank for some of the trailing activity) typically require the ISO/MSP to assume all liability for the transactions

processed by merchants they introduce to the Bank. This is sometimes referred to as “Recourse” and typically arises when there is a chargeback by a customer (the credit/debit card holder) for a good or service they purchased from a merchant, but for whatever reason, seek to reverse payment.

In or about March, 2013 two individuals, Jay Wigdore and Michael Abdelmesseh a/k/a Michael Stewart, who together formed Electronic Payment Solutions of America, Inc., entered into an agreement with EPS to act as independent contractors marketing EPS’ processing services. Wigdore had previously done business with EPS through his wife (Sandy Wigdore through Sandy Wigdore Enterprises) and another partnership with Richard Kuhlman. EPS’ relationship with Wigdore dates back to roughly 2004. Wigdore had demonstrated an ability to secure and manage relationships with merchants of all types and varied backgrounds.

The types of merchants Wigdore and Abdelmesseh wanted to provide to EPS beginning in 2013, although acceptable to Merrick Bank, represented a departure from the more typical brick-and-mortar businesses EPS was comfortable dealing with. Wigdore, with the assistance of Abdelmesseh, made commitments to EPS related to Recourse. Wigdore and Abdelmesseh agreed to assume 100% of the liability for the merchants they brought to EPS as long as EPS gave them a chance.

The merchants provided by Wigdore and Abdelmesseh to EPS did not perform as expected. Initially Wigdore and Abdelmesseh fulfilled their agreement to indemnify EPS for Recourse, including chargebacks. However, this ended relatively quickly. Some of

the merchant accounts brought to EPS by Wigdore and Abdelmesseh had reserve accounts, but those were rapidly exhausted. The overall loss to EPS totaled over \$1,000,000. EPS has filed suit against Wigdore, Abdelmesseh and Electronic Payment Solutions of America, Inc. in the United States District Court, District of Colorado, Case No. 1:14-cv-02624-WYD-MEH, to recover those losses, as well as all expenses EPS incurs in the course of the FTC investigation, for which Wigdore and Abdelmesseh are contractually obligated to indemnify EPS.

**B. FTC's initiation of the investigation**

On April 11, 2011, the FTC adopted a resolution authorizing compulsory process to investigate the activities of “unnamed telemarketers, sellers, or others assisting them” engaged (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. Section 45 and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission’s Telemarketing Sales Rule, 16 C.F.S. pt 310.”

More than four years later, the FTC first contacted EPS about the matter by serving a CID on them dated November 18, 2015. A copy of the November 2015 CID, including the FTC’s resolution is attached as Exhibit 1. The CID inquires primarily about 29 merchants, referred to in the CID as “Subject Accounts.” Each of the Subject Accounts is a merchant that Wigdore, Abdelmesseh or their associates introduced to EPS. Subsequent to the first CID, EPS and its counsel have had multiple discussions with FTC’s counsel. In the course of those discussions, the FTC has identified additional

merchant accounts in which they are interested. Each of the merchant accounts, like the original 29 Subject Accounts, relates to a merchant brought to EPS by Wigdore, Abdelemsseh or their associates.

In March 2016, the FTC sent a second CID to EPS, which was also based on the FTC's April 11, 2011 Resolution. A copy of the March 2016 CID, including the FTC's resolution is attached as Exhibit 2. The second CID to EPS asked for additional information regarding merchants associated with Wigdore and Abdelmesseh and also inquired further into chargebacks by those merchants and EPS' involvement with the merchants, Wigdore and Abdelmesseh, and their merchants' chargebacks. It also inquired into other entities owned by the owners of EPS. In addition, EPS has responded to numerous informal requests for information and further documentation.

In the course of responding to both CIDs, including interrogatories and requests for production, as well as the multiple informal requests from the FTC's counsel, EPS and its counsel have expended an enormous number of man hours and incurred large expenses in terms of staff time, attorneys fees and other costs. To date EPS' efforts include providing the FTC more than 55,000 pages of documents, answering written interrogatories, and the FTC's interview of EPS' risk manager, Michael Peterson, and its data entry manager, Rob Johnson.

Despite these efforts by EPS, the FTC has neither concluded the matter nor proceeded to file legal proceedings against any party. Instead, each time EPS provides

information or documentation, the FTC has requested more and flatly refused to provide EPS with any information related to their queries.

**C. The Citywide Banks CID**

Without any prior notice to EPS, on or about May 23, 2016, the FTC sent a CID to Citywide Banks seeking the financial records of EPS and several other entities some, of which are related to EPS and others of which have nothing to do with EPS, much less the FTC's investigation. The CID to Citywide Banks was based on a new FTC resolution dated April 1, 2016, as the previous resolution had expired according to its five year term. The new FTC resolution is virtually identical to the 2011 resolution, except the date.

Although the FTC's CID to Citywide Banks was provided to the bank on May 23, 2016, the FTC did not provide a copy to EPS at the same time. The deadline indicated in the CID for Citywide Banks to produce documents was June 20, 2016. As of June 20, 2016, neither the FTC nor the Bank had provided EPS any notice of the Citywide Banks CID.

More than a month after Citywide Banks received the CID from the FTC, on Friday, June 24, 2016, Citywide Banks' counsel sent EPS a letter alerting EPS for the first time that it had been served with a "subpoena duces tecum" by the FTC and that it would deliver the requested documents to the FTC at 10:00 a.m. the following Tuesday, unless prevented from doing so. See Exhibit 3. EPS's counsel requested Citywide Banks provide a copy of the document from the FTC and, although Citywide Banks' counsel indicated it would so, he did not. Therefore, that same day EPS's counsel forwarded the

Citywide Banks letter to FTC's counsel Michelle Chua, along with a request that she provide EPS with the "subpoena duces tecum" referenced by in the Citywide Banks' letter. See Exhibit 4. On Monday, June 27, 2016, the FTC provided EPS a copy of the document served by the FTC on Citywide Banks, which is the Citywide CID that is the subject of this action. See Exhibit 5.

When asked why Citywide Banks did not provide the notice letter sooner or a copy of the CID, Citywide Banks' counsel indicated the Bank was under no obligation to do so and the notice letter was merely provided as a courtesy. The FTC has also expressly indicated its belief that it was under no obligation to notify EPS that its financial records had been administratively subpoenaed from Citywide Banks. See Exhibit 6. The FTC further indicated that EPS has no standing to challenge the CID.

In an effort to preserve its ability to object to the release of its financial documents to the extent such release is improper, on June 28, 2016, EPS filed the present action. The parties have stipulated and the Court has ordered that EPS will have until today to file its brief seeking to have the Citywide Banks CID quashed or limited.

The Citywide Banks CID is a far ranging request that seeks materials related not only to EPS, but also to several other entities owned by the two owners of EPS. Some of those entities are related to EPS' credit and debit card services, such as First Merchant Platinum, Inc. which offers warranty coverage for POS terminals, but none of the Subject Accounts used POS terminals provided through EPS. Nor did any of the Subject Accounts use the check guarantee programs provided by ElectCheck, Inc. Other entities



about which account information was subpoenaed have nothing to do with the debit/card business of EPS, such as Quebec Holding, which is a holding company and merely owns, among other things, the office building where EPS is located.

Apparently recognizing the over-breadth of its request as set forth in the Citywide Banks CID, even before EPS was notified of the Citywide Banks CID, the FTC engaged in substantial discussions with Citywide Banks in an effort to narrow the broad scope of the Citywide Banks CID. According to the Bank's counsel, counsel for the FTC, Michelle Chua, had agreed to recommend that the Citywide Banks CID be limited to just EPT accounts and not to records related to any of the other entities. However, now that EPS has filed the present action challenging the FTC's CID to Citywide Bank, the FTC has withdrawn any willingness to confer with Citywide Banks about narrowing the scope of the CID. Instead, the FTC has indicated to Citywide Bank's counsel that the FTC wants all of the records of all of the entities and individuals referenced in the CID. See Exhibit 7.

By email dated July 7, 2016, Counsel for EPS pointed out to the FTC that the FTC bears the burden to justify the documents it seeks from Citywide. Therefore, to enable EPS to address the issue with the Court, EPS requested the FTC to "Please explain with particularity the FTC's justification for each of the specific documents and categories of documents requested from the Bank related to Electronic Payment Transfer LLC" and to provide the same information related to the other entities whose document the FTC sought from Citywide Banks. See Exhibit 8. EPS also asked the FTC to indicate "who

is being investigated, what they are being investigated for, and how EPS's banking information or the banking information of the other entities listed in the CID are relevant to the investigation of those individuals or entities." See Exhibit 8. FTC's counsel refused to provide any of the requested information stating merely, "EPS is not entitled to discovery regarding the FTC's investigation of EPS." See Exhibit 8.

## II. ANALYSIS

### A. **EPS has standing to raise the issue of whether the Citywide Banks CID seeking EPS's financial records should be quashed or limited.**

Contrary to the FTC's position, EPS has standing in the present matter under the Colorado Constitution and clear case law. The issue of whether an individual may challenge a subpoena to a third-party requesting the individual's bank records of his financial transactions was addressed in *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980). In *Charnes*, a governmental agency attempted to issue an administrative subpoena through the court system to a bank for a taxpayer's financial records. The taxpayer moved to quash the subpoena. Based on the U.S. Supreme Court's holding in *U.S. v. Miller*, 425 U.S. 435 (1976), the administrative agency argued the taxpayer had no protected interest in his financial records and therefore should not even be allowed to intervene in the matter between the administrative agency and the bank.

The Colorado Supreme Court acknowledged the holding in *Miller* that "any expectation of privacy which a customer had in his records was forfeited when he disclosed the information to the bank in the course of his bank transactions" under the U.S. Constitution, however, it interpreted Colorado's Constitution more broadly.

*Charnes*, 612 P.2d at 1120. The Court explained “*Miller* limits our application of the Fourth Amendment to the facts before us, but it does not determine the scope of protection provided to individuals in Colorado by the constitution of this state.” *Id.* Rather, the Colorado Supreme Court applied the reasonable expectation of privacy test from *Katz v. U.S.*, 389 U.S. 347 (1967), which looked “not to the location of the act, [individual in a public phone booth], but to the expectation of the individual.” *Charnes*, 612 P.2d at 1120. The *Katz* Court held that although Katz was in a public telephone booth, he expected privacy, and government agents could not record his call without receiving prior judicial approval. *Id.* Relying on Art. II, Sec. 7 of the Colorado Constitution, the *Charnes* Court applied the *Katz* reasonable expectation of privacy test. “The test we adopt to determine the taxpayer’s interest in his bank records follows *Katz* and *Burrows*: whether the bank depositor has a reasonable expectation of privacy in the bank records of his financial transactions. We conclude that the taxpayer here does.” *Id.* at 1121.

Thus, the Colorado Supreme Court in *Charnes* held:

We agree with the taxpayer that he has an expectation of privacy in his bank records and that the records are protected from unreasonable search and seizure by the Department of Revenue. Therefore, we conclude that the taxpayer has sufficient interest in the statutory subpoena proceeding to permit him to intervene in the action and to file a motion to quash the subpoena duces tecum.

*Id.* at 1119.

This analysis does not bar government agents from obtaining bank records. Governmental access to the records is limited in that appropriate legal process must be

used to obtain them. but *Charnes* makes clear that bank customers have standing to assert their expectation of privacy in the records during the legal process.

**B. The Citywide Banks CID should be quashed because the FTC failed to give EPS advance notice as required by law.**

The FTC's issuance and execution of the CID without notifying EPS in advance violates EPS's due process rights clearly stated in Colorado law. As discussed above, under Colorado constitutional standards a bank depositor has a reasonable expectation of privacy in the bank records of his financial transactions. *Charnes v. DiGiacomo*, 612 P.2d 1117, 1119-21 (Colo. 1980). As a result, those records are protected by the Colorado Constitution against unreasonable searches and seizures. *People v. Lamb*, 732 P.2d 1216, 1221 (Colo. 1987). In order to give effect to the customer's privacy interest, the customer "must have an opportunity to test the constitutional validity of an administrative subpoena before it is executed." *Id.* at Therefore, "to protect a bank customer's expectation of privacy in bank records, that person must have notice of judicial or administrative subpoenas prior to their execution." (emphasis added) *Id.* at 1220-21. While the Supreme Court of Colorado opted not to suppress the documents produced without advanced notice in *Lamb*, it did so, in part, because the "requirement of notice had not been definitively established prior to [its] decision today." *Id.* at 1222. Thus, the court held that suppression "would be an inappropriately severe consequence to impose for the [administrative agencies] failure to give notice." *Id.*

The FTC failed to provide notice before giving the CID to Citywide Banks on May 23, 2016. The FTC failed to provide EPS notice prior to the initial documents due

date of June 20, 2016. Seven days after the due date, and only after EPS's request did the FTC provide EPS with a copy of the CID.

Not only did the FTC fail to provide EPS notice of the CID at issue in the present matter, it actively attempted to conceal the CID from EPS. In the CID the FTC states "you, [Citywide Banks], are requested not to disclose the existence of this CID until you have been notified that the investigation has been completed." CID Schedule II. A. This statement, along with the FTC's failure to notify EPS of the CID in advance show the FTC is actively violating EPS' due process rights. Unlike in *Lamb*, the law is now clear. Since 1987, administrative agencies are required to give notice to bank customers before executing a subpoena for bank records. FTC's flouting of such notice requirement should not go unsanctioned and its reckless indifference to well-established Colorado law should result in this Court quashing the subject CID.

**C. The Citywide Banks CID should be quashed because the FTC has failed to satisfy the requirements of the *Walling* test.**

The burden is on the FTC to justify the Citywide Banks CID. *See Charnes*, 612 P.2d at 1122 ("The motion to quash requires the director of the Department of Revenue to justify access to the taxpayer's bank records."); *see also U.S. v. Frontier Airlines, Inc.*, 563 F.2d 1008 (10<sup>th</sup> Cir. 1977) (With respect to the subpoena power of administrative agencies, agency has burden of demonstrating that it is acting within its authority; it must also be shown that data sought is reasonably relevant to agency's inquiry).

The proper test for determining whether an administrative subpoena is reasonable, and therefore enforceable, was set forth in *Oklahoma Press Publishing Company v.*

*Walling*, 327 U.S. 186 (1946). *Charnes*, 612 P.2d at 1122. A subpoena is reasonable if (1) the investigation is for a lawfully authorized purpose; (2) the information sought is relevant to the inquiry; and (3) the subpoena is sufficiently specific to obtain documents which are adequate but not excessive for the inquiry. *Id.* at 1222.

The FTC may have satisfied the first and third prongs of the *Walling* test, but it failed to provide the required nexus showing that the information sought is relevant to its investigation. The second prong of the *Walling* test is that the “information sought is relevant to the inquiry.” *Walling*, 327 U.S. 186 (1946). Courts should not construe the relevance requirement so broadly as to “render[ ] that requirement a nullity.” *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

The Supreme Court of Colorado in *Board of Medical Examiners v. Duhon*, 895 P.2d 143 (1995), applied the standards stated in *Charnes*. In *Duhon* the State Board of Medical Examiners filed a petition to enforce an administrative subpoena duces tecum upon a physician for production of patient records reflecting the physician’s use of a diagnostic device. *Id.* The Supreme Court of Colorado explained that “until the Board indicates with particularity what it deems to be appropriate for investigation and notifies the licensee of such determination, a court in all probability will be unable to evaluate the reasonableness of an administrative subpoena.” *Id.* at 149. The court could not uphold the FTC’s administrative subpoena because the subpoena did not contain sufficient information to show the requested documents were relevant to the underlying investigation.

In *Benson v. People*, 703 P.2d 1274 (Colo. 1985), the Colorado Supreme Court again applied the relevancy prong of *Walling* to determine whether administrative subpoenas were proper. The Court upheld a subpoena which was supported by an affidavit stating “the reasons for the investigation...[and] establishing a sufficient nexus between the investigation” and the bank customers. *Id. at 1279*. The court explained that “[t]he relevancy requirement is met if the government makes a prime facie showing that the requested documents bear some general relationship to the subject matter of the investigation.” *Id.* The requirement of relevancy is met by a showing that a relationship exists between the documents which must be produced and the purposes of the inquiry. *Id.* In contrast, the Court in *Benson* quashed a subpoena in which “the record contain[ed] insufficient evidence to support the district court’s determination that the records and documents of [a company were] relevant to the investigation”. *Id. 1279-80*. Because the prosecution had “presented no evidence, either by affidavit or otherwise, that establishes a relationship between MSSSI and the purpose of the investigation,” the Court quashed the demand served on MSSSI. *Id. at 1280*.

There is no evidence that the Citywide Banks CID requesting EPS’ bank records, is reasonably related to the purposes for which it purports to be enforced. Per the CID, the Nature and Scope of the Investigation is:

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.

First, this Court could not determine whether the documents sought are relevant because the ambiguity in the CID itself. The CID merely states that it is investigating “unnamed” persons for engaging in unfair or deceptive acts or practices. In order to determine relevance to the FTC’s investigation, at a minimum, the FTC should identify those suspected of such acts and how EPS and the other requested accounts relate to the inquiry. Absent such information, the FTC has failed to make a prima facie showing that EPS’ bank statements bear some general relationship to the investigation of “unnamed” individuals. No evidence has been presented connecting EPS to the FTC’s inquiry or the “unnamed” persons involved in such inquiry. As discussed above, EPS’ counsel requested a clarification regarding relevancy from FTC’s counsel prior to filing this motion, but the FTC refused to provide any information.

Second, EPS’s bank account information is not relevant to any of the inquiries cited in the CID. A bank account will not provide information that the account holder mailed “lists, scripts, merchant accounts, or other information” to a telemarketer. Nor will it indicate whether a party assisted telemarketers in unfair or deceptive acts or practices. A bank account will simply provide when a company received or deposited money and when it paid a third party. None of the allegations in the broadly worded CID are informed by information regarding a bank account.



Permitting such a grossly obtuse CID to be enforced would provide the FTC carte blanche in investigations and encourage violations of EPS' rights under the Colorado Constitution. Such abuse should not be permitted as it is contrary to well-settled law. Accordingly, the Citywide Banks CID should be quashed.

### **III. CONCLUSION**

The Citywide Banks CID should be quashed, or at a minimum, the CID should be held in abeyance unless and until the FTC identifies who is the subject of the investigation, what it is they are believed to have done, and explains what nexus the documents requested have to the persons and events identified.

**DATED** this 11<sup>th</sup> day of July, 2016.

/s/ Scotty P. Krob

Scotty P. Krob  
KROB LAW OFFICE, LLC  
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Greenwood Village CO 80111  
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[scott@kroblaw.com](mailto:scott@kroblaw.com)  
**COUNSEL for**  
**Electronic Payment Transfer, LLC**

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of July, 2016, I electronically filed a true and correct copy of the above and foregoing Motion to Quash with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses: [mchua@ftc.gov](mailto:mchua@ftc.gov) and [dbarber@sbbolaw.com](mailto:dbarber@sbbolaw.com)

/s/ Scotty P. Krob

Scotty P. Krob

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

ELECTRONIC PAYMENT TRANSFER, LLC )

Plaintiff, )

v. )

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

Defendants. )

1:16-cv-01653-RBJ

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**DECLARATION OF ANTHONY S. MALEY**

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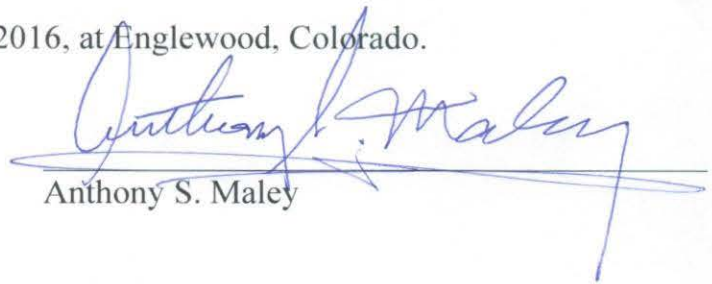
I, ANTHONY S. MALEY, hereby declare and affirm as follows:

1. I am the Chief Operating Officer of Electronic Payment Systems, LLC, the Plaintiff in the above-captioned matter.

2. I have reviewed Section I, Background Facts, of the Motion to Quash to which this Declaration is attached. I am personally familiar with the facts set forth therein other than discussions among counsel to which I was not a party, and they are true and correct.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 11<sup>th</sup> day of July, 2016, at Englewood, Colorado.

  
Anthony S. Maley

**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.

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**FEDERAL TRADE COMMISSION'S RESPONSE  
TO PLAINTIFFS' MOTION TO QUASH (Dkt. 9)**

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Defendant Federal Trade Commission (FTC) responds as follows to Plaintiffs' Motion to Quash:

1. On July 11, 2016, Plaintiffs moved to quash a Civil Investigative Demand (CID) (dated May 23, 2016) served upon Defendant Citywide Banks by the FTC.
2. Plaintiffs challenge the FTC's authority to obtain financial information related to Plaintiffs' business entities in the possession of Defendant Citywide

Banks on grounds of financial privacy, lack of notice, and relevance. Dkt. 9 at 11-18.

3. On July 21, 2016, Defendant FTC filed a Motion to Dismiss Plaintiffs' Amended Complaint (Dkt. 16). Pursuant to Fed. R. Civ. P. 10(c), Defendant FTC incorporates that motion herein by reference. For the reasons set forth in that motion, Plaintiffs' Motion to Quash should be denied as lacking substantive merit.

4. With respect to Plaintiffs' challenge concerning relevance (Dkt 9 at 14), that argument is premature for the reasons stated in the FTC's Motion to Dismiss. Even if it were properly before this Court (which it is not), the test for relevance is highly deferential to the agency, and in this case, has been met. Given that the information the FTC seeks relates to a lawfully authorized administrative investigation rather than a civil action, the required showing of relevance is "relaxed." *United States v. Morton Salt*, 338 U.S. 632, 642-43 (1950) (a federal agency is entitled to broad deference in its investigation of possible legal violations); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) (finding that the FTC need only show that material requested related to investigation, "which may be defined quite generally"). Indeed, material requested as part of that investigation is relevant if it merely "touches a matter under investigation." *EEOC v. Elrod*, 674 F.2d 601, 613 (7th Cir. 1982). Here, the records specified by the CID clearly meet this basic threshold and "touch" the matter under investigation, as defined by the FTC's investigational resolution. *Sandsend v. Financial Consultants, Ltd. v. Fed. Home Loan Bank Bd.*, 878 F.2d 875, 882 (5th Cir. 1989

(enforcing subpoena issued to bank for third party's records because such records "touch[ed] on a matter under investigation."). Defendant FTC has set forth in the Declaration of Michelle Chua (Dkt. 16, Exh. 1), the basis for the FTC's investigation of Plaintiff's potential involvement with practices that may be deceptive in nature. Indeed, Ms. Chua's Declaration establishes that Plaintiffs EPT and EPS provided services to a fraudulent telemarketer that was the subject of an earlier FTC investigation, and this provision of services is plainly identified as a subject of the investigation in the FTC's resolution. Were this issue properly before the Court, that fact alone would be sufficient to establish relevance in a process enforcement proceeding.

5. More generally, in the context of a lawful investigation of potential legal violations by an administrative agency, a court's role in reviewing an administrative subpoena against a target of an investigation is necessarily limited. *United States v. Markwood*, 48 F.3d 969, 986 (6th Cir. 1995) (review of an administrative subpoena is strictly limited). To enforce an administrative subpoena, a court need only find that "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Morton Salt Co.*, 338 U.S. at 652. The Declaration of Michelle Chua establishes that the investigation and CID are within the FTC's authority, the demand specific, not indefinite, and the information sought reasonably relevant to the investigation. Were the FTC to commence an affirmative proceeding to enforce the CID, the FTC's showing combined with the Court's limited standard of review

would be sufficient for this Court to conclude the FTC was entitled to the information specified. *FDIC v. Garner*, 1126 F.3d 1138, 1143 (9th Cir. 1997) (affidavit of government official sufficient to establish prima facie showing for enforcement).

WHEREFORE Defendant FTC respectfully requests that the Court deny Plaintiffs' Motion to Quash.

Respectfully submitted this 21st day of July, 2016

JOHN F. WALSH  
UNITED STATES ATTORNEY

s/ Mark S. Pestal  
Assistant U.S. Attorney  
1225 17th Street, Suite 700  
Denver, Colorado 80202  
(303) 454-0100  
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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

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
**JUDGE R. BROOKE JACKSON**

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Civil Action: 16-cr-01653-RBJ  
Courtroom Deputy: Julie Dynes

Date: August 10, 2016  
Court Reporter: Kara Spitler

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*Parties*

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*Counsel*

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

*Scotty P. Krob*

FEDERAL TRADE COMMISSION  
CITYWIDE BANKS

*Mark S. Pestal  
Duncan E. Barber*

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**COURTROOM MINUTES**

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**MOTIONS HEARING**

Court in Session: 9:59 a.m.

Appearance of counsel.

Defendant present in custody.

Status of the case discussed.

**Court in Recess: 10:13 a.m.**

**Court in Session: 10:29 a.m.**



Parties have reached an agreement, as stated on the record.

**ORDERED: Case is dismissed without prejudice, statute of limitations is tolled.**

**[2] Motion for Temporary Restraining Order is MOOT.**

**[9] Motion to Quash is MOOT.**

**Citywide has 20 days to decide whether or not to petition the FTC.**

Court in Recess: 10:44 a.m.

Hearing concluded.

Total time in Court: 00:29

**From:** Scott Krob [mailto:scott@kroblaw.com]  
**Sent:** Monday, August 29, 2016 3:55 PM  
**To:** Kappler, Burke; Chua, Michelle  
**Cc:** Duncan Barber; Anthony Maley; Nathan Krob; Stacey Dawes  
**Subject:** Citywide Banks CID

All:

At the outset, let me reiterate, as Tony Maley explained to Burke and Duncan following the Court hearing on August 10th, EPS remains willing to cooperate with the FTC. Burke mentioned that in the FTC's eyes, there were still several "holes" in the materials EPS has provided in response to the FTC's CIDs. As you will recall, during the discussions among Burke, Tony, Duncan, and I, Tony indicated EPS wants to cooperate with the FTC and it also wants to bring this matter to an end, whether that is dismissal or direction to EPS to fix something the FTC has concerns about, or whatever it is. With that purpose in mind, Tony asked that the FTC provide a complete list of the "holes" they are referring to so EPS could fill them. EPS understands that there may be additional materials the FTC wants after it receives the additional information from EPS. But what EPS requested was a list of all the known "holes" that Burke was referring to and the Michelle believes currently exist in the responses EPS has provided to date. That was where we left matters on August 10th.

What EPS received was not what was discussed. One week later, on August 17th, Michelle provided a "priority list" which expressly indicated it was not a complete list of the existing holes the FTC was aware of and that had been referred to in the previous discussion. I promptly sent a response asking for the complete list of known holes that the FTC had been referring to. Today you advised me that it would take too much time to put together a complete list and that the complete list might not be necessary once the "priority items" are produced, and that was why Michelle had provided the "priority list". I conveyed your explanation of the "priority list" to Tony Maley and discussed the matter at some length with him today.

The bottom line is that the FTC providing only a partial list, regardless of what it is called, rather than a complete list of known items, puts EPS in the same position it was in prior to our post-hearing discussions on August 10th. EPS committed to cooperating and providing the items on the complete list in a timely manner once the complete list of the currently known "holes" as referred to by the FTC is provided. EPS remains willing to stand by its commitment. EPS merely asks that the FTC fulfill their commitment to provide the list of things they are currently aware of.

Until this matter is resolved, EPS does not consent to and affirmatively objects to Citywide Banks releasing any financial information related to any of the information requested by the FTC's CID to Citywide Banks in connection with this matter.

Scott Krob  
Attorney for EPS

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