

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

CONSUMER FINANCIAL
PROTECTION BUREAU,

Petitioner,

v.

HARBOUR PORTFOLIO ADVISORS,
LLC;

NATIONAL ASSET ADVISORS,
LLC;

and

NATIONAL ASSET MORTGAGE,
LLC;

Respondents.

MISC. NO. _____

**MEMORANDUM IN SUPPORT OF
PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMANDS**

The Consumer Financial Protection Bureau (Bureau) petitions this Court for an order requiring Harbour Portfolio Advisors, LLC (Harbour), National Asset Advisors LLC (NAA), and National Asset Mortgage LLC (NAM) to comply with the respective civil investigative demands (CIDs) issued to them on September 8,

2016.¹ CIDs are a type of investigative administrative subpoena, and proceedings to enforce them are initiated by a petition and an order to show cause.² Because the Bureau has authority to issue the CIDs and the Court has authority to enforce them, the Bureau respectfully requests that this Court direct Harbour, NAA, and NAM to show cause as to why they cannot or should not comply with their respective CIDs and, thereafter, enter an order enforcing the CIDs.

ISSUE PRESENTED

Whether Harbour, NAA, and NAM should be ordered to comply with the CIDs issued by the Bureau under the authority of section 1052(c) of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. § 5562(c).

CONTROLLING AUTHORITY

Cases:

United States v. Morton Salt, 338 U.S. 632 (1950);

United States v. Powell, 379 U.S. 48 (1964);

United States v. Will, 671 F.2d 963 (6th Cir. 1982);

United States v. Markwood, 48 F.3d 969 (6th Cir. 1995);

Doe v. United States, 253 F.3d 256 (6th Cir. 2001).

¹ Ex. A, Decl. of James Meade dated November 29, 2016 (Meade Decl.) at ¶ 4.

² See *United States v. Markwood*, 48 F.3d 969, 974-76 (6th Cir. 1995).

Statutes:

Consumer Financial Protection Act of 2010, 12 U.S.C. § 5481 *et seq.*

12 U.S.C. § 5561(5);
12 U.S.C. §§ 5562(c) and (e).

Regulations:

Code of Federal Regulations, 12 C.F.R. Part 1080, Rules Relating to Investigations.

12 C.F.R. § 1080.6;
12 C.F.R. § 1080.10.

JURISDICTION AND VENUE

The CFPA gives the Bureau authority to issue CIDs and enforce them in district court.³ When an entity fails to comply with a CID, the CFPA and its enabling regulations authorize the Bureau to petition the district court in “any judicial district in which [that entity] resides, is found, or transacts business” for an order to enforce the CID.⁴ Venue in this Court is proper because Harbour, NAA, and NAM transact business in this district.

STATEMENT OF FACTS

Harbour is a private investment firm that has purchased foreclosed properties in bulk and has resold them to consumers through agreements for deed,

³ 12 U.S.C. § 5562(c)(1), (e).

⁴ 12 U.S.C. § 5562(e)(1); 12 C.F.R. § 1080.10(b)(1).

also known as land contracts.⁵ NAA holds itself out as a private company that manages and markets distressed real estate, including properties that Harbour has sought to sell to consumers through land contracts.⁶ NAM holds itself out as a private company that provides mortgage loans and owner-financed real-estate sales, and it services Harbour's land contracts.⁷

Consumers who buy property from Harbour enter into a land contract and accompanying promissory note payable to Harbour.⁸ The contract and note obligate the consumer to pay Harbour a fixed purchase price, amortized over a number of years, with interest accruing on the outstanding balance at a fixed rate.

In May of this year, the Bureau issued a CID for oral testimony to Harbour.⁹ Under that CID, Harbour's Manager testified about Harbour's practices and procedures for the sale of residential properties to consumers.¹⁰

In September, the Bureau issued a second CID to Harbour, as well as CIDs to NAA and NAM, stating in the respective Notifications of Purpose that they were

⁵ Ex. B, Harbour's Petition to Set Aside or Modify September 8, 2016 Civil Investigative Demand, at p. 1 (Sep. 28, 2016) (Harbour Petition).

⁶ See Ex. C, Combined Petition to Set Aside or Modify September 8, 2016 Civil Investigative Demands Issued to National Asset Advisors LLC and National Asset Mortgage LLC, at p. 1 (October 2, 2016) (NAA-NAM Petition); Ex. B, Harbour Petition, at p. 1 n.1.

⁷ See Ex. B, Harbour Petition, at p. 1 n.1.

⁸ Ex. D, Agreement for Deed, at p. 1; Ex. B, Harbour Petition, at pp. 2, 12 n.10.

⁹ Ex. A., Meade Decl. at ¶ 3.

¹⁰ *Id.*

issued in connection with an investigation concerning unlawful acts or practices relating to the marketing, offering, servicing, or collection of loans for the purchase of residential properties, or similar products or services.¹¹ The CIDs sought documents, answers to interrogatories, and written reports.¹²

As required by the Bureau's investigative rules, Bureau counsel then met by telephone with Harbour's counsel to discuss compliance with the CID.¹³ At that conference, Harbour's counsel stated that Harbour would not comply because the Bureau lacked authority over its activities and because the scope and timeframe of the CID imposed an undue burden.¹⁴ Bureau counsel offered to discuss possible modifications to the CID, but Harbour's counsel declined to do so and instead filed a petition with the Bureau to set aside the CID.¹⁵ Bureau counsel later met by telephone with counsel for NAA and NAM to discuss compliance.¹⁶ At that conference, NAA and NAM counsel stated that the companies would not comply, making the same arguments as Harbour and adding that certain terms used in the

¹¹ Ex. E, Sept. 8, 2016 CID to Harbour at p. 1 (Notification of Purpose); Ex. F, Sept. 8, 2016 CID to NAA at p. 1 (Notification of Purpose); Ex. G, Sept. 8, 2016 CID to NAM at p. 1 (Notification of Purpose).

¹² Ex. A, Meade Decl. at ¶ 5.

¹³ *Id.* at ¶ 9.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 10.

¹⁶ *Id.* at ¶ 11.

CID were unclear.¹⁷ As with Harbour, Bureau counsel offered to discuss possible modifications to the CID, but NAA and NAM counsel declined to do so and instead filed a petition to set aside the CIDs.¹⁸

On November 1, the Bureau's Director denied the petitions and ordered Harbour, NAA, and NAM to produce "all responsive documents, items, and information within [their] possession, custody, or control that are covered by the CID" within 10 days.¹⁹ The Director invited the companies to discuss potential modifications to the CIDs.²⁰ As of November 29, 2016, Harbour, NAA, and NAM have not complied with the CIDs nor raised any potential modifications with Bureau counsel.²¹

ARGUMENT

Long-standing doctrine dictates that administrative agencies must be given wide latitude in asserting their power to investigate by subpoena.²² The standard

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 12.

¹⁹ Ex. H, Decision and Order on Petition by Harbour Portfolio Advisors, LLC to Set Aside or Modify Civil Investigative Demand, No. 2016-MISC-Harbour Portfolio-0001 (November 1, 2016) (Harbour Petition Order) at p. 4; Ex. I, Decision and Order on Combined Petition by National Asset Advisors, LLC and National Asset Mortgage, LLC to Set Aside or Modify Civil Investigative Demand, No. 2016-MISC-Harbour Portfolio-0001 (November 1, 2016) (NAA-NAM Petition Order) at p. 4.

²⁰ Ex. H, Harbour Petition Order, at p. 5; Ex. I, NAA-NAM Petition Order, at p. 5

²¹ Ex. A, Meade Decl. at ¶ 15.

²² *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

for enforcing investigative administrative subpoenas and CIDs is well settled.²³ To enforce an administrative subpoena, the district court must only determine that (1) the subpoena satisfies the terms of its authorizing statute, (2) the documents requested were relevant to the agency's investigation, (3) the information sought is not already in the agency's possession, and (4) enforcing the subpoena will not constitute an abuse of the court's process.²⁴ All four criteria are readily met here.

First, the CIDs meet the terms of their authorizing statute. The CFPA broadly authorizes the Bureau to investigate violations of any Federal consumer financial law and to issue a CID to "any person" whom the Bureau "has reason to believe . . . may be in possession, custody, or control of . . . any information, relevant to a violation."²⁵ The CFPA and the Bureau's Rules Relating to Investigations authorize the Bureau to request documentary material, written reports, answers to questions, and "any combination of such material, answers, or testimony."²⁶ The CID must "state the nature of the conduct constituting the nature of the . . . alleged violation . . . and the provision of law applicable . . ." and must

²³ *Doe v. United States*, 253 F.3d 256, 265 (6th Cir. 2001); *U.S. v. Markwood*, 48 F.3d at 976 (applying the test for enforcement of an administrative subpoena to CIDs because a CID is "at its essence, a subpoena issued by an administrative agency"); *Morgan Drexen, Inc. v. CFPB*, 979 F. Supp. 2d 104, 107 (D.D.C. 2013) (stating that a civil investigative demand is a form of administrative subpoena).

²⁴ *Doe v. United States*, 253 F.3d at 265; *Solis v. Pultegroup, Inc.*, No. 12-50286, 2013 WL 4482978 at *3 (E.D. Mich. Aug. 19, 2013).

²⁵ 12 U.S.C. §§ 5561(5), 5562(c).

²⁶ 12 U.S.C. § 5562(c)(1); 12 C.F.R. § 1080.6(a).

describe the sought material with such “definiteness and certainty” as to permit the recipient to fairly identify it.²⁷ Finally, the CID must be signed by an authorized officer of the Bureau.²⁸

The CIDs in question meet all the terms of the authorizing statute. By way of the CIDs, the Bureau seeks to determine whether persons involved in the marketing, offering, servicing, or collection of loans or similar products or services in connection with the sale of residential properties have been engaged in acts or practices that violate the laws the Bureau is charged with enforcing. Harbour, NAA, and NAM are all engaged in the marketing and sale of owner-financed residential properties, and the Bureau enforces several laws and regulations that apply to such activities, including (in addition to the CFPA) the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, and their implementing regulations. The Bureau is not required to show that there has been a violation of law to justify enforcement of the CIDs. The Supreme Court has made it clear that an agency “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”²⁹

²⁷ 12 U.S.C. § 5562(c)(2)-(5).

²⁸ 12 C.F.R. § 1080.6(a).

²⁹ *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

The other requirements of the authorizing statute have been met as well. The CIDs included a Notification of Purpose that stated the nature of the potential violations and the applicable laws, described the materials sought in sufficient detail, and were signed by a Deputy Assistant Director of the Office of Enforcement, an official designated by the Bureau's rules to issue CIDs.³⁰

Second, the requested materials are relevant to the Bureau's investigation. Courts traditionally give agencies broad discretion in determining whether an administrative subpoena's requests are relevant, and the Court should enforce the CID if the documents sought could be pertinent to a legitimate agency inquiry.³¹ An agency request is relevant so long as it is "not plainly incompetent or irrelevant to any lawful purpose" of the agency.³² Here, the Bureau seeks documents and information about Harbour's owner-financed sales of residences to consumers—which NAA and NAM manage, market, and service—in order to determine whether Federal consumer financial laws have been violated in the marketing, provision, or servicing of financial products in connection with such activities. The materials sought are essential to that inquiry.

³⁰ 12 C.F.R. § 1080.6(a).

³¹ *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507-09 (1943); *see also Morton Salt Co.*, 338 U.S. at 652; *United States v. O'Neill*, 619 F.2d 222, 228 (3d Cir. 1980).

³² *Endicott Johnson Corp.*, 317 U.S. at 509; *see also Oncology Servs. Corp.*, 60 F.3d at 1020.

Third, the information sought is not within the Bureau's possession.

Documents, records, and data relating to the offering and sale of Harbour's owner-financed properties to consumers are within the possession of Harbour, NAA, and NAM, all of whom have refused to produce any material.

And, fourth, enforcing the subpoena will not constitute an abuse of the Court's process. For the Court to make such a finding, Harbour, NAA, and NAM would have to show that the CID was issued for an improper purpose, such as harassment, pressuring them to settle another matter, or some other bad-faith motive.³³ Here, the Bureau has not acted in bad faith and there is no evidence that it has.

CONCLUSION

The Court should grant the Bureau's petition and order Harbour, NAA, and NAM to show cause as to why they cannot or should not comply with their respective CIDs. Further, after giving Harbour, NAA, and NAM an opportunity to be heard, the Court should order Harbour, NAA, and NAM to comply with their respective CIDs within 10 days of the Court's order, or at such later date as the Court or the Bureau may establish.

³³ *United States v. Powell*, 379 U.S. 48, 58 (1964); *United States v. Will*, 671 F.2d 963, 967 (6th Cir. 1982).

Dated: November 29, 2016

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