

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Consumer Financial Protection Bureau,

Plaintiff,

v.

J.G. Wentworth, LLC,

Respondent.

Case No. 2:16-cv-02773-CDJ

**CONSUMER FINANCIAL PROTECTION BUREAU'S RESPONSE TO  
J.G. WENTWORTH'S OPPOSITION TO THE PETITION  
AND RESPONSE TO ORDER TO SHOW CAUSE**

**TABLE OF CONTENTS**

- I. INTRODUCTION..... 1
  
- II. UNDER THE APPLICABLE STANDARD, THE CID MUST BE ENFORCED. .... 2
  
- III. THE COURT SHOULD DEFER TO THE BUREAU’S DETERMINATION OF THE SCOPE OF ITS INVESTIGATIVE AUTHORITY. .... 5
  
- IV. THE INVESTIGATION UNDERLYING THIS CID IS WITHIN THE BUREAU’S AUTHORITY. .... 6
  - A. The Bureau Has Authority To Determine Whether JGW Is Extending Credit And Servicing Loans. .... 7
  
  - B. The Bureau Has Authority To Determine Whether JGW Is Providing Financial Advisory Services. .... 9

**TABLE OF AUTHORITIES**

**Cases**

*CFPB v. Accrediting Council for Indep. Coll. And Schools (ACICS), Case No. 1:15-cv-01838-RJL, Doc. No. 14, 2016 WL 1625084, (D.D.C. April 21, 2016), appeal docketed, No. 16-5174 (D.C. Cir. June 20, 2016)* ..... 3, 4, 5

*CFPB v. ITT Educational Services, Inc. (ITT), Case No. 1:14-cv-00292-SEB-TAB, --- F.Supp.3d ---, 2015 WL 1013508 (S.D. Ind. March 6, 2015)* ..... 9, 10

*Dole v. Trinity Industries, Inc.*, 904 F.2d 867 (3rd Cir. 1990)..... 2

*Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943)..... 2, 3

*FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981).....7

*FTC v. Ken Roberts Co.*, 276 F.3d 583 (D.C. Cir. 2001) ..... 2, 3, 4, 5, 7

*FTC v. Texaco*, 555 F.2d 862 (D.C. Cir. 1977) .....4, 5

*ICC v. Gould*, 629 F.2d 847 (3d Cir. 1980) ..... 1, 3, 4

*Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946)..... 1, 3

*Settlement Funding, LLC v. Brenston*, 998 N.E.2d 111 (IL App 4th 2013) ..... 7

*United States v. Morton Salt Co.*, 338 U.S. 632 (1950)..... 1, 2, 5

*United States v. Oncology Servs. Corp.*, 60 F.3d 1015(3rd Cir. 1995)..... 2

*United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir.1980) ..... 2

**Statutes**

12 U.S.C. § 5481 (15)(A)(viii)..... 9

12 U.S.C. § 5481(6) ..... 6

12 U.S.C. § 5531(15) ..... 6

12 U.S.C. § 5531(a). ..... 6

## I. INTRODUCTION

The Consumer Financial Protection Bureau (Bureau) served the civil investigative demand (CID) at issue during an investigation of persons involved in advancing funds in exchange for the rights to future payments from structured settlements or annuities. The CID's recipient, J.G. Wentworth, Inc. (JGW), contends that the CID is unenforceable because the Bureau has "no jurisdiction over the structured settlement and annuity payment purchase transactions in which JGW engages."<sup>1</sup> But whether the Bureau might ultimately have enforcement "jurisdiction over" JGW's conduct is not the question the Court should be attempting to answer now. Rather, the only question before this Court is whether the Bureau may issue a CID to gather facts to inform itself about whether unlawful conduct has occurred and whether the Bureau should take action to address such conduct.<sup>2</sup> Courts routinely enforce administrative subpoenas and CIDs to gather such facts, and decline requests, like JGW's, to adjudicate legal issues that are properly raised only as a defense to an enforcement action brought *after* the completion of the agency's investigation. Like many agencies before it, the Bureau seeks only "to get information from those who best can give it and who are most interested in not doing so."<sup>3</sup> There is thus nothing remarkable about this CID and the Court should enforce it.

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<sup>1</sup> Docket No. 13 (JGW Pet. Opp. and Resp. to Order to Show Cause) at p. 1.

<sup>2</sup> See, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 214 (1946); *ICC v. Gould*, 629 F.2d 847, 851-52 (3d Cir. 1980).

<sup>3</sup> *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950).

## II. UNDER THE APPLICABLE STANDARD, THE CID MUST BE ENFORCED.

The parties agree on the requirements for judicial enforcement of a CID: (1) the inquiry must be within the agency's authority; (2) the demand for production must not be too indefinite; and (3) the information sought must be reasonably relevant to the authorized inquiry.<sup>4</sup> JGW does not argue that the CID is too indefinite or that the materials sought are not reasonably relevant to the inquiry; it disputes only that the Bureau has satisfied the first requirement—that the investigation in which the CID was issued is within the Bureau's authority.

The principles governing a district court's analysis of a petition to enforce a CID are well-established and weigh heavily in the government's favor. A CID-enforcement proceeding "is not the proper forum in which to litigate disagreements over an agency's authority to pursue an investigation,"<sup>5</sup> and the agency need not "establish liability in order to seek to enforce a [CID]."<sup>6</sup> Rather, the agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."<sup>7</sup> And, of course, such an investigation may address whether an agency has authority (sometimes referred to as "jurisdiction") over an entity's conduct.<sup>8</sup> In light of these principles, it is not surprising that

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<sup>4</sup> *Morton Salt Co.*, 338 U.S. at 652 (1950); *United States v. Oncology Servs. Corp.*, 60 F.3d 1015, 1020 (3rd Cir. 1995); *Dole v. Trinity Industries, Inc.*, 904 F.2d 867, 871 (3rd Cir. 1990); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 574 (3d Cir.1980).

<sup>5</sup> *FTC v. Ken Roberts Co.*, 276 F.3d 583, 584 (D.C. Cir. 2001).

<sup>6</sup> *Oncology Servs. Corp.*, 60 F.3d at 1018-1019.

<sup>7</sup> *Morton Salt Co.*, 338 U.S. at 642-43.

<sup>8</sup> *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (In an action to enforce a government subpoena, Supreme Court found that district court could not hold a trial to determine whether company was covered by the relevant act. Instead, the Court held that, because "[t]he evidence sought by the subpoena was not plainly incompetent or irrelevant to

the overwhelming majority of courts faced with petitions to enforce CIDs or other agency demands have concluded that they must be enforced. Indeed, only where a court can determine on the record before that there is a “patent lack of jurisdiction” for an agency to investigate should it decline to enforce a CID.<sup>9</sup> Such determinations will be (and have been) unusual, including where facts bearing on a determination of jurisdiction are among the issues under investigation.<sup>10</sup> Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced.

JGW relies heavily on a single district-court decision, *CFPB v. Accrediting Council of Independent Colleges and Schools (ACICS)*, in which the court declined to enforce a CID issued by the Bureau.<sup>11</sup> While the *ACICS* court recited the correct deferential standard, that is not the standard the court actually applied. Instead of assessing whether the Bureau patently

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any lawful purpose of the Secretary of Labor in the discharge of her duties under the Act ... it was the duty of the District Court to order its production for the Secretary’s consideration.”); *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 170-71 (3rd Cir. 1986); *Ken Roberts Co.*, 276 F.3d at 586 (D.C. Cir. 2001)(explaining *Endicott*).

<sup>9</sup> *Ken Roberts Co.*, 276 F.3d at 587, *see also* 584.

<sup>10</sup> *Oklahoma Press Pub. Co.*, 327 U.S. at 214 (agency official had the authority, “in the first instance, to determine the question of coverage [under the relevant statute] in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners’ relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute’s authorization, to have the aid of the District Court in enforcing it”); *Endicott Johnson Corp.*, 317 U.S. at 509; *Gould*, 629 F.2d at 851-52 (noting that courts “have consistently accorded broad latitude to the agencies’ [investigative] powers, including ‘jurisdiction to determine jurisdiction’ by summary procedures” and discussing cases); *Ken Roberts Co.*, 276 F.3d at 586 (D.C. Cir. 2001) (“courts of appeals have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process.”).

<sup>11</sup> *CFPB v. Accrediting Council for Indep. Coll. And Schools (ACICS)*, Case No. 1:15-cv-01838-RJL, Doc. No. 14, 2016 WL 1625084, (D.D.C. April 21, 2016), *appeal docketed*, No. 16-5174 (D.C. Cir. June 20, 2016).

lacked authority for its investigation,<sup>12</sup> the court imposed a much higher hurdle—it required the Bureau to show “a clear nexus between the consumer financial laws it is tasked with enforcing and its . . . investigation.”<sup>13</sup> The “patent lack” standard means that doubt as to the agency’s authority should be resolved in the agency’s favor. The *ACICS* court’s “clear nexus” standard gave the benefit of its doubt to the target of the investigation.

Not only did the *ACICS* court apply the wrong standard, it also ignored the well-settled admonition that, at the compulsory-process-enforcement stage, a court should not base a determination of an agency’s authority on findings of fact. The Third Circuit has cautioned that, in assessing whether an agency lacks authority to conduct its investigation, a court should not make findings of fact regarding substantive issues. “If parties under investigation could contest substantive issues in an enforcement proceeding, when the agency lacks the information to establish its case, administrative investigations would be foreclosed or at least substantially delayed.”<sup>14</sup> In *ACICS*, the court did exactly what the Third Circuit (and the D.C. Circuit) said it should not do—it made findings of fact, relying solely on statements made by the target of the investigation regarding the nature of its business.<sup>15</sup> Then, based on those findings, the *ACICS* court concluded that, even if it were to enforce the Bureau’s CID, the Bureau would not identify any violations of the laws it enforces. The *ACICS* decision ignored longstanding precedent by depriving the Bureau of the opportunity

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<sup>12</sup> *Ken Roberts Co.*, 276 F.3d at 586 (D.C. Cir. 2001) (only where a court can determine on the record before it is “patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced.”).

<sup>13</sup> *Id.* at \*3.

<sup>14</sup> *ICC v. Gould*, 629 F.2d 847, 852 (3d Cir. 1980), quoting *FTC v. Texaco*, 555 F.2d 862, 879 (D.C. Cir. 1977).

<sup>15</sup> *ACICS*, 2016 WL 1625084, at \*3.

to “inform itself”<sup>16</sup> about the respondent’s conduct and whether any Federal consumer financial law applied to it, instead treating as conclusive the respondent’s own assertions about its conduct. *ACICS* provides no model for this Court, and this Court should reject JGW’s attempt to have it make the same mistakes made in *ACICS*.

**III. THE COURT SHOULD DEFER TO THE BUREAU’S DETERMINATION OF THE SCOPE OF ITS INVESTIGATIVE AUTHORITY.**

JGW contends that the Bureau lacks authority to issue the CID because “a CID must be predicated on a viable theory of a violation within the scope of the Bureau’s authority,” and none is apparent here.<sup>17</sup> In other words, JGW contends that the Bureau must articulate a specific theory of liability before it may enforce a CID. JGW’s position is incorrect as a matter of law: where, as here, an agency’s investigation is at “the pre-complaint stage, [it] is under no obligation to propound a narrowly-focused theory of a possible future case.”<sup>18</sup> Indeed, appellate courts consistently have deferred to agency determinations of their own investigative authority, and courts generally have refused to consider challenges to that authority in proceedings to enforce compulsory process.<sup>19</sup>

There are good reasons for courts’ deference to agencies’ determinations of their own authority to investigate. Perhaps most obvious, were recipients of CIDs able to foreclose investigations without providing information to the investigating agency, they could

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<sup>16</sup> *Morton Salt Co.*, 338 U.S. at 643.

<sup>17</sup> Docket No. 13 (JGW Pet. Opp. and Resp. to Order to Show Cause) at p. 12.

<sup>18</sup> *Texaco*, 555 F.2d at 874.

<sup>19</sup> *See, Ken Roberts Co.*, 276 F.3d at 586 (noting the “long-standing doctrine that precludes courts from entertaining challenges to the jurisdiction of administrative agencies during subpoena enforcement proceedings” and collecting cases).



effectively thwart the agency's effort to articulate "a viable theory of a violation," and thereby evade scrutiny altogether. The more sensible approach, embraced for decades by federal courts, is to allow agencies to gather facts and to decide for themselves whether they have authority over unlawful conduct. Should an agency decide to bring an enforcement action, the subject would *then* have an opportunity to argue that the agency is acting beyond its authority.

#### **IV. THE INVESTIGATION UNDERLYING THIS CID IS WITHIN THE BUREAU'S AUTHORITY.**

Under the CFPB, the Bureau is charged with investigating potential violations of "Federal consumer financial law," including the CFPB itself, which, among other things, prohibits a "covered person" from engaging in "any unfair, deceptive, or abusive act or practice."<sup>20</sup> A "covered person" is any person that engages in offering or providing a consumer financial product or service.<sup>21</sup> The term "financial product or service" includes (1) extending credit and servicing loans and (2) providing "financial advisory services."<sup>22</sup>

JGW contends that there is no potential basis for the Bureau's jurisdiction here because JGW provides neither credit nor financial advisory services. JGW's argument turns on what the company actually does. JGW asserts that the Bureau has "admitted to a clear understanding of the company's structured settlement payment purchasing business" and that determination of the Bureau's authority "does not depend on any facts sought to be gleaned

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<sup>20</sup> 12 U.S.C. § 5531(a).

<sup>21</sup> 12 U.S.C. § 5481(6).

<sup>22</sup> 12 U.S.C. § 5481(15).

through the subpoena.”<sup>23</sup> This is patently false. As described below, there are significant factual questions about JGW’s business that bear directly on the issues of whether it extends or has extended credit or loans and whether it provides or has provided financial advisory services. The CID seeks information to address those questions. The Court should reject JGW’s attempt to avoid providing the Bureau the information necessary to answer them.

Finally, JGW’s contention that the Bureau must lack jurisdiction over it and its products because it is subject to other federal and state laws is unavailing. That JGW is subject to the Internal Revenue Code, the Federal Trade Commission Act, and state laws in states where it does business does not somehow preempt the Bureau from also having jurisdiction over it.<sup>24</sup> Companies and products are routinely subject to multiple laws and the regulatory authority of multiple agencies. JGW’s reliance on state laws that require state-court approval for its transactions is particularly troubling considering that one of JGW’s subsidiaries was found by one court to have concealed material facts and procured by fraud a court order approving a transaction.<sup>25</sup>

**A. The Bureau Has Authority To Determine Whether JGW Is Extending Credit And Servicing Loans.**

JGW contends that it does not make loans or extend credit and that it has produced sufficient evidence for the Bureau to make such a determination.<sup>26</sup> In support of its

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<sup>23</sup> Docket No. 13 (JGW Pet. Opp. and Resp. to Order to Show Cause) at 8, 12 (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 390 (D.C. Cir. 1981)).

<sup>24</sup> See, e.g., *Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001).

<sup>25</sup> *Settlement Funding, LLC v. Brenston*, 998 N.E.2d 111, 120-21 (IL App 4th 2013).

<sup>26</sup> Docket No. 13 (JGW Pet. Opp. and Resp. to Order to Show Cause) at pp. 1, 2, 4.

contention, JGW relies on its limited production to date and a general description of its business and products in its opposition.<sup>27</sup>

JGW correctly notes that the Bureau served previous CIDs in this investigation, to which JGW responded. The issuing of prior CIDs, however, in no way means that all relevant facts have been gathered. Rather, by obtaining information and documents through prior CIDs, the Bureau learned basic information about JGW and the way it maintains consumer data and files. This enabled the Bureau to minimize JGW's burden of producing the materials now sought. And the company's limited production of information is insufficient to allow the Bureau, much less the Court, to properly assess whether JGW is, in fact, extending credit and servicing loans, or whether it has done so in the past. JGW asserts that the CID covers more than 50,000 transactions.<sup>28</sup> Yet, in its productions to date of fewer than 7,000 documents, JGW has produced only three relevant, exemplar consumer-transaction files, all from a single subsidiary during a two-month period in 2014.<sup>29</sup> The Bureau cannot properly assess whether JGW is in fact extending credit and servicing loans if it is forced to rely on the company's self-serving characterizations of its product and three cherry-picked files.

The information sought in the CID bears on precisely the questions JGW seeks to treat as settled. For example, JGW provides each of its customers a lump sum of money in

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<sup>27</sup> See, e.g., Docket No. 13 (JGW Pet. Opp. and Resp. to Order to Show Cause) at p. 2 (asserting that JGW is “in the business of purchasing structured settlement and annuity payments” and is “not a lender”).

<sup>28</sup> Docket No. 13 (JGW Pet. Opp. and Resp. to Order to Show Cause) at p. 1.

<sup>29</sup> Ex. I, Decl. of Meghan Sherman Cater dated August 31, 2016, at ¶ 4 (JGW produced three files related to structured settlement transactions and three files related to annuities—only the three structured settlement transaction files are relevant to the issues discussed here).

exchange for future payments; the CID seeks information reflecting the specific terms of these transactions and the ways in which JGW describes them to consumers. That information would inform the Bureau's assessment of whether, in form or substance, the transactions are extensions of credit or loans.

**B. The Bureau Has Authority To Determine Whether JGW Is Providing Financial Advisory Services.**

JGW also contends that it does not provide financial advisory services, but it has produced few materials that would enable the Bureau to make such a determination. Moreover, certain documents produced by JGW reveal that it may well be providing such services. The CFPA specifically defines "financial advisory services" to include providing credit counseling and providing services to assist a consumer with debt management or debt settlement.<sup>30</sup> While JGW contends that it cannot be providing financial advisory services because it does not formally "offer" or sell such services and consumers do not pay it for advice,<sup>31</sup> the CFPA requires only that financial advisory services be provided, not sold, paid for, or offered.<sup>32</sup>

Only one court has interpreted the meaning of "financial advisory services" under the CFPA.<sup>33</sup> In *ITT*, a civil action commenced by the Bureau against a for-profit school, the school argued that it did not provide any financial advisory services. Like JGW, the school neither sold financial advice nor offered a separate advice product, and students did not pay

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<sup>30</sup> 12 U.S.C. § 5481 (15)(A)(viii).

<sup>31</sup> Docket No. 13 (JGW Pet. Opp. and Resp. to Order to Show Cause) at pp. 16-17.

<sup>32</sup> 12 U.S.C. § 5481 (15)(A)(viii).

<sup>33</sup> *CFPB v. ITT Educational Services, Inc. (ITT)*, Case No. 1:14-cv-00292-SEB-TAB, --- F.Supp.3d ---, 2015 WL 1013508 (S.D. Ind. March 6, 2015).

for advice. Still, the court held that the Bureau's allegations that ITT advised students on how to manage their educational debt fell within the realm of credit counseling and assisting a consumer with debt management, and thus qualified as financial advisory services.<sup>34</sup>

JGW's activities may likewise constitute providing credit counseling and assisting consumers with debt management. JGW solicits consumers through television, radio, and internet advertisements.<sup>35</sup> At least one JGW subsidiary advertises that its transactions are a way for consumers to pay off debt, improve credit scores, and get better mortgage rates.<sup>36</sup> The advertisements encourage consumers to call toll-free numbers, at which point "account representatives" attempt to sell JGW's product to consumers.<sup>37</sup> The account representatives are instructed to collect information about consumers' financial situations, including whether the consumers have credit-card debt, medical bills, or are facing foreclosure.<sup>38</sup> "After an initial consultation with a representative . . . each customer is assisted in determining the present value of their future structured settlement payments, the financial needs to be addressed, and what portion of their structured settlement payment stream they would like to sell for a lump sum payment."<sup>39</sup> The representatives are consumers' points of contact for

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<sup>34</sup> *ITT*, 2015 WL 1013508 \*22.

<sup>35</sup> Ex. I, Sherman Cater Decl. at ¶ 5; Ex. J, Parker Investigational Hearing Transcript Excerpts at p.11, 30:3-12 (motion to file under seal submitted).

<sup>36</sup> Ex. I, Sherman Cater Decl. at ¶ 6; Ex. K, Peachtree Financial Solutions Blog – "How your mortgage rate is determined", JGW-CID-00041717-18, at p. 1.

<sup>37</sup> *Id.*; Ex. I, Sherman Cater Decl. at ¶ 7; Ex. L "Playbook," JGW-CID-00006127-191, at pp. 6-65 (motion to file under seal submitted).

<sup>38</sup> Ex. I, Sherman Cater Decl. at ¶ 7; Ex. L "Playbook," JGW-CID-00006127-191, at p. 10 (motion to file under seal submitted).

<sup>39</sup> Ex. I, Sherman Cater Decl. at ¶ 8; Ex. M "settlement-factsheet," JGW-CID-00028557-58, at p. 1.

transactions, including, when necessary, drafting affidavits to inform courts of why transactions are in consumers' best interests and the intended use of the funds.<sup>40</sup>

JGW's business is not akin to selling refrigerators, as it would like the Court to believe.<sup>41</sup> Rather, JGW appears to be providing consumers a way to manage pre-existing debt by using its products. Documents produced by JGW show that account representatives likely have discussions with consumers about how JGW's product "can help people to pay off, or pay down, existing debt" and serve as an alternative to student or auto loans.<sup>42</sup> Each of the three relevant consumer-transaction files produced by JGW contains applications that indicate that the consumers were seeking to pay off debts.<sup>43</sup>

JGW contends that the CID is not "aimed at investigating the provision of financial advice."<sup>44</sup> Leaving aside whether JGW is in a position to know what matters the CID seeks information to investigate, the CID itself *does* seek information directed at assessing whether JGW has provided financial advisory services. For example, the Bureau seeks documents reflecting discussions with consumers about their reasons for the transactions, as well as any

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<sup>40</sup> Ex. I, Sherman Cater Decl. at ¶ 5 and ¶ 11; Ex. J, Parker Investigational Hearing Transcript Excerpts at p. 7-11, 12:21-25, 19:24-22:21 (motion to file under seal submitted); Ex. R, Borowski Investigational Hearing Transcript Excerpts at p. 7, 68:3-9 (motion to file under seal submitted).

<sup>41</sup> Docket No. 13 (JGW Pet. Opp. and Resp. to Order to Show Cause) at p. 18.

<sup>42</sup> Ex. I, Sherman Cater Decl. at ¶ 9; Ex. N "Why-sell-structured-settlement," JGW-CID-00028568-69, at pp. 1-2 (motion to file under seal submitted).

<sup>43</sup> Ex. I, Sherman Cater Decl. at ¶ 10; Ex. O Consumer Application at p. 3 (motion to file under seal submitted); Ex. P Consumer Application at p. 3 (motion to file under seal submitted); Ex. Q Consumer Application at p. 3 (motion to file under seal submitted).

<sup>44</sup> Docket No. 13 (JGW Pet. Opp. and Resp. to Order to Show Cause) at p. 9.

evaluation or analysis of consumers' financial circumstances or needs.<sup>45</sup> The Bureau also seeks data that would enable it to obtain consumers' contact information and complete transactional files, reflecting various features of the transactions, and account-representative notes about consumers.<sup>46</sup> Because JGW did not historically record telemarketing-sales calls, the Bureau requires this information to interview consumers and potentially take testimony from account representatives about the nature and content of calls and the transactions with consumers. All of this information would inform the Bureau as to whether JGW has, indeed, provided financial advisory services.

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Because the Bureau meets the threshold to enforce the CID, the Court should grant the Bureau's petition and order JGW to comply with the CID within 10 days.

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<sup>45</sup> *See*, Docket No. 1 (Bureau Mem. in Supp. of Pet.) Ex. B, CID at Requests for Documents Nos. 5, 6, and 10.

<sup>46</sup> *Id.* at Requests for Documents Nos. 5, 6, 10, and 12; Written Report 1.

Dated: August 31, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, 2016, I caused a true and correct copy of the Consumer Financial Protection Bureau's Response To J.G. Wentworth's Opposition To The Petition And Response To Order To Show Cause, Declaration of Meghan Sherman Cater (Ex. I) and Exhibits K and M to be served on Respondent J.G. Wentworth, LLC, by electronically filing a true and correct copy of the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of Pennsylvania using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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