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 ORAL ARGUMENT REQUESTED

J.G. WENTWORTH, LLC'S REPLY TO THE CFPB'S RESPONSE IN SUPPORT OF ITS PETITION

In its Opposition to the Petition, J.G. Wentworth LLC ("JGW") has demonstrated that the CFPB's investigative jurisdiction is statutorily limited to information relevant to an "act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law." 12 U.S.C. §§ 5562(c)(1), 5561(5). The Opposition further demonstrated that there could be no such act or omission here because JGW's purchases of structured settlement payments are not subject to "Federal consumer financial law." The Bureau's Response makes two arguments: (1) that the Court should accord the Bureau complete deference to "decide for [itself]" (Resp. 6) whether it has authority to investigate JGW, and (2) that, in any event, the purchase of structured settlement payments may constitute "an extension of credit" or the offering of "financial advisory services" subject to the Bureau's statutory authority, *see* 12 U.S.C. § 5481(15)(A)(i), (viii). Both arguments are meritless: the Court's role in this proceeding is not that of a rubber stamp for the agency's determination of its investigative authority, and the Bureau's "credit" and "financial advisory services" arguments fail as a matter of law. The Court should therefore deny the Bureau's petition to enforce the CID.

ARGUMENT

I. The Bureau Is Not Entitled To The Unbridled Discretion It Seeks

The Bureau's primary argument is that the Court must allow the CFPB "to decide for [itself]" (Resp. 6) whether it has authority over JGW's conduct. According to the Bureau, this Court must "defer" to the agency's "determination of the scope of its investigative authority." (Resp. 5). No case supports this sweeping contention, which fails to account for the Court's proper role in this proceeding. That role is "neither minor nor ministerial," *FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001), and the Court is not a "rubber stamp" for the CFPB, *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir. 1995).

As the Third Circuit has made clear, this Court is "an independent reviewing authority called upon to insure the integrity of the proceeding." *Wentz*, 55 F.3d at 908 (internal quotation marks omitted). Accordingly, the Court must determine that the CFPB has authority to investigate JGW's conduct before it may enforce the CID. *See Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 492 (7th Cir. 1993) ("Questions of regulatory jurisdiction are properly addressed at the subpoena-enforcement stage if, as here, they are ripe for determination at that stage."). Indeed, the *Ken Roberts* decision—on which the CFPB places so much weight—expressly states that a reviewing court "*must assure itself* that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency." *Ken Roberts*, 276 F.3d at 586–87 (emphasis added).

The Bureau's claim (Resp. 5) that "courts generally have refused to consider challenges to [agency] authority in proceedings to enforce compulsory process" is therefore incorrect. To the contrary, "there is no doubt that a court asked to enforce a subpoena will refuse to do so if the subpoena exceeds an express statutory limitation on the agency's investigative powers." *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 369 (7th Cir. 1983). In order to analyze the scope of the agency's authority, the court of appeals in *Ken Roberts* engaged in a careful, seven-page analysis of the preemption issues raised by the defendants. *See* 276 F.3d at 587–593. The district court in *ACICS* applied a similar analysis in concluding that the subject matter of the investigation (college accreditation) had "no connection" to the CFPB's asserted basis for its authority ("private student lending practices"). *CFPB v. Accrediting Council for Independent Colleges & Schools* No. 15-cv-1838-RJL, 2016 WL 1625084, at *3 (D.D.C. Apr. 21, 2016), *appeal docketed*, No. 16-5174 (D.C. Cir. June 20, 2016). The same analysis of the basis for the CFPB's authority is required here. The Bureau is not entitled to deference to investigate anything it

wishes. To allow an agency such unbounded investigative authority would contravene judicial precedent and statutory limits on the Bureau, and carries an inherent risk of agency abuse.

Highlighting the need for judicial oversight of agency claims of jurisdiction is the Bureau's misapprehension of the scope of its authority here. The Bureau asserts that the Consumer Financial Protection Act ("CFP Act") "prohibits a 'covered person' from engaging in 'any unfair, deceptive, or abusive act or practice.'" (Resp. 6 (purporting to quote 12 U.S.C. § 5531(a))). In fact, what the CFP Act does is much narrower than the Bureau claims: it prohibits unfair, deceptive, or abusive acts or practices by covered persons *only* to the extent they are committed "in connection with any transaction with a consumer for a consumer financial product or service, or the offering of" such. 12 U.S.C. § 5531(a). The Bureau's CID disregards (and its Response conveniently fails to quote) this key jurisdictional limit on its statutory authority. The Truth in Lending Act ("TILA") is likewise limited in its reach to actions taken in connection with extensions of credit. *See St. Hill v. Tribeca Lending Corp.*, 403 F. App'x 717, 720 (3d Cir. 2010).

These jurisdictional limits on the reach of the CFP Act and TILA are critical because the CFPB's investigative authority—unlike the broad authority of the Federal Trade Commission to investigate matters "in or affecting commerce"[1]—extends only to information "relevant to" an "act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law." 12 U.S.C. §§ 5562(c)(1), 5561(5). Thus, in order to demonstrate that the "inquiry is within [its] authority," *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), the Bureau must show that the conduct it is investigating, if proved, would constitute a

[1] 15 U.S.C. § 45(a)(1); s*ee Ken Roberts*, 276 F.3d at 587.

violation of Federal consumer financial law. Resolution of that issue, in turn, depends on whether the subject matter of the CID—structured settlement and annuity payment purchases—involves the extension of credit or the provision of a consumer financial product or service. As explained below, it does not.

II. The Bureau Lacks Authority to Investigate JGW's Conduct

A. The CFPB makes no attempt to explain how the JGW transactions at issue *could* be deemed extensions of credit. The Bureau cites no authority whatsoever—much less any judicial decision or statute—for the proposition that purchasing the rights to future payments from structured settlements involves a loan or extension of credit. As JGW's opposition explained (Opp. 13-15), federal and state decisions have unanimously reached the opposite conclusion: these transactions are sales—not loans or extensions of credit—as a matter of law. *See, e.g.*, *Capela v. J.G. Wentworth, LLC*, No. CV09–882 (SJF)(WDW), 2009 WL 3128003, at *9–11 (E.D.N.Y. Sept. 24, 2009). Federal statutory law recognizes that such transactions involve a transfer of rights made by means of "sale, assignment, pledge or other form of encumbrance or alienation for consideration" and not a loan or extension of credit. 26 U.S.C. §§ 5891(b), 5891(c)(1)–(3). Laws in forty-nine states recognize the acquisition of rights to future payments from structured settlements as a sale or assignment. *See, e.g.*, 40 Pa. Stat. § 4001, *et seq.* (Pennsylvania Structured Settlement Protection Act). State court approval of the transfer of structured settlement rights is predicated on a finding of a valid sale or assignment of the rights

to receive future payments from a structured settlement.[2] *See, e.g.*, *Metro. Ins. & Annuity Co. v. Peachtree Settlement Funding, LLC*, No. 01-15-00147-cv, 2016 WL 3162770 (Tex. App. June 2, 2016); *In re Marshall*, 06-cv-1186, 2006 WL 1682793 (Ct. Com. Pl. of Pa., Lackawanna Cty. Apr. 12, 2006); *In re Settlement Funding of New York, LLC*, 774 N.Y.S. 2d 635 (Sup. Ct. 2003). The contractual documentation that the Bureau has long had in its possession makes clear that the transaction "is a sale and not a loan." Celestin Decl. Ex. 1 (Doc. #13-2), at 1.

Resolving the question of whether structured settlement and annuity payment purchases are loans is not a knotty factual issue requiring factual investigation. It is a basic legal question. As one court has stated, regulating structured settlement transactions as credit under the TILA "requires such stretching of the definitions of loan and credit that I find that TILA simply does not apply" and "calling the underlying transaction a loan does not make that description a reality."[3] *Capela*, 2009 WL 31280031 at *11. The Bureau's claim (Resp. 7) that "significant factual questions" preclude resolution of this issue is therefore disingenuous. The CFPB does

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[2] The Bureau claims (Resp. 7) that JGW has argued that the existing state and federal regulation of structured settlement transactions "somehow preempt[s]" the Bureau's jurisdiction. This is not our argument. JGW's Opposition merely explained, to provide the Court with context, that every structured settlement payment purchase is subject to substantive and procedural state law requirements and that the Federal Trade Commission is empowered to investigate unfair trade practices in interstate commerce. *See* Opp. 5-6.

[3] *See also, e.g.*, *321 Henderson Receivables Origination LLC v. Sioteco*, 173 Cal. App. 4th 1059, 1077 (Cal. Ct. App. 2009) ("[T]he transfer of structured settlement payment rights . . . is not a loan secured by assignment of periodic payments but is a sale of certain rights to receive periodic payments."); *Singer Asset Fin. Co. v. Bachus*, 294 A.D.2d 818, 820 (N.Y. App. Div. 2002) (stating that a structured settlement payment sale "is not a loan but an absolute assignment"); *W. United Life Assoc. Co. v. Rayden*, 64 F.3d 833, 835, 841–43 (3d Cir. 1995) ("[a] contractual right to receive a future stream of payments is typically assignable"); *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 2008 WL 597711, at *1 (E.D. Pa. 2008) (describing transaction as the "purchase" of "future payment rights"); *Liberty Life Assurance Co. of Boston v. Stone St. Cap., Inc.*, 93 F. Supp. 2d 630, 633–34 (D. Md. 2000) (stating that a sale of structured settlement payments is an assignment of rights); *Settlement Funding, LLC v. Jamestown Life Ins. Co.*, 78 F. Supp. 2d 1349, 1359 (N.D. Ga. 1999) (same).

not point to *a single fact* that, if proven, would render a structured settlement purchase a loan subject to the Bureau's statutory authority and thus give rise to a potential violation of Federal consumer financial law. *See* 12 U.S.C. § 5561(5). As it is, the company has produced more than 40,000 pages of documents and three company representatives for testimony over a period of nearly three years. Included in that material are representative structured settlement and annuity purchase files to allow the Bureau to understand the nature of these transactions. The claim (Resp. 9) that the Bureau now needs to review more than 50,000 structured settlement transactions—all of which take the same essential form—in order to make an assessment as to "whether . . . the transactions are extensions of credit or loans" is meritless.

B. The Bureau's authority to regulate "financial advisory services" likewise provides no basis to enforce the CID. The Bureau does not dispute that JGW does not offer or sell financial advice to its customers. Instead, the Bureau argues that no sale or offer of financial advisory services is necessary (Resp. 9) and that, in effect, a marketing statement suggesting that a product will help "manage pre-existing debt" (Resp. 11) qualifies as a "financial advisory service." That is incorrect as a matter of law.

As noted above, the CFP Act expressly limits the Bureau's investigative authority to practices "in connection with any *transaction . . . for* a consumer financial product or service, or the *offering of* [such] product or service." 12 U.S.C. § 5531(a) (emphases added). It is not enough merely to *provide* advice or other financial information that may be relevant to a consumer; the financial advice must be the "service" that is "offer[ed]" to the consumer or for which the consumer "transact[s]". *Id.* The Bureau's broad theory that it has authority to regulate any statement that can be characterized as "financial advice"—regardless of whether advice is sold or offered for sale—cannot be reconciled with the text of the CFP Act.

To bolster its argument, the Bureau likens JGW to ITT Educational Services, Inc., a for-profit school and private student lender that the Bureau sued for alleged violations of federal consumer financial law. *CFPB v. ITT Educ. Servs.*, No. 1:14-cv-00292-SEB-TAB, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015). In that case, the Bureau alleged that ITT provided loans directly to students and advised students on how to manage their student debt, including by obtaining financing under ITT's private loan programs. *Id.* at *22 (citing Compl. ¶¶ 110, 138–151). The Bureau also alleged that ITT "completed nearly every step in the process of acquiring . . . loans on the students' behalf, including filling out the requisite forms (save signatures) and forwarding them to the lending credit union." *Id.* (citing Compl. ¶¶ 91–92, 122, 139). On these facts, it should be no surprise that the court held ITT was subject to CFPB jurisdiction. *See id.* at *24. These allegations concerned practices in connection with transactions for private student lending—*i.e.*, extensions of "credit" in the heartland of the Bureau's regulatory and investigative authority. *See* 12 U.S.C. § 5481(15)(A)(i).

By contrast, the purchase of structured settlement payments by JGW is not a financial product or service. Sellers of structured settlement or annuity payments do not pay JGW for any advice, and the sale itself does not involve any loan or extension of credit (*see supra* at 2–4). To deem JGW a provider of "financial advisory services," in these circumstances, would erase any practical limit on the CFPB's authority, contrary to the statute that Congress enacted.

The Bureau complains that JGW's business is not "akin to selling refrigerators," but offers no reason why the appliance seller is any different. Under the Bureau's theory, *anyone* purchasing an asset who suggests that the sale proceeds could help the seller manage her finances is potentially subject to the Bureau's "financial advisory services" authority. Car sales are generally not subject to the CFPB's authority—but if a car buyer suggests that the seller

could pay off her credit card debt with the proceeds, suddenly the buyer becomes a provider of "financial advisory services." The same is true of an appliance retailer who suggests that the energy savings from a new refrigerator could allow a buyer to pay down her mortgage more quickly. The Bureau's expansive legal theory offers no principled basis to distinguish these circumstances and to confine the scope of Bureau's investigative powers to those matters prescribed by statute. Congress plainly did not intend such a result when it provided that the CFPB could regulate conduct in connection with the "offering" of or "transaction for" a consumer financial product or service. 12 U.S.C. § 5531(a). *See Loretangeli v. Critelli*, 853 F.2d 186, 191 (3d Cir. 1988) (courts will "look to Congressional purpose to illuminate" statutory meaning).

For these reasons and the reasons in JGW's Opposition, the Court should deny the CFPB's petition to enforce the CID.

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Respectfully submitted,

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