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June 10, 2015

***via* E-MAIL (*.pdf) & FEDERAL EXPRESS**

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Re: *Petition to Modify or Set Aside Demand*

To the Executive Secretary of the Consumer Financial Protection Bureau:

This office represents Selling Source, LLC and Tim Madsen, a Selling Source employee and recipient of a Civil Investigative Demand ("CID") for oral testimony issued May 21, 2015. We respectfully petition on behalf of the foregoing that the CID issued to Mr. Madsen be set aside.

My partner Michelle L. Landry and myself met-and-conferred by telephone conference call with CFPB counsel Lisa Rosenthal and Christina Coll on May 27, 2015, and I attest to the occurrence of that meet-and-confer by my signature on this letter.

We respectfully submit that the CID is objectionable and should be withdrawn for the following related reasons:

1. The Notification of Purpose Pursuant to 12 C.F.R. § 1080.5 is inadequate, evasive and misleading. Further, the stated purpose of the investigation is for a

prospective enforcement proceeding which is not within the scope of CFPB's statutory authority.

2. Because every indicia is that CFPB already has resolved to initiate a proceeding against Selling Source, LLC, it is improper for CFPB to continue using investigatory CIDs not subject to the discovery protocols and protections applicable once a proceeding has been initiated.

THE NOTIFICATION OF PURPOSE IS OBJECTIONABLE

12 C.F.R. § 1080.5 requires that "[a]ny person compelled to furnish documentary material, tangible things, written reports or answers to questions, oral testimony or any combination of such material, answers, or testimony to the Bureau *shall be advised of the nature of the conduct constituting the alleged violation that is under investigation* and the provisions of law applicable to such violation." Emphasis added. During the course of this investigation, CIDs issued to Selling Source or affiliated persons consistently have included a Notification of Purpose which says only that "[t]he purpose of this investigation is to determine whether lead generators or other unnamed persons have engaged or are engaging in unlawful acts and practices in connection with the marketing, selling, or collection of payday loans, in violation of Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act . . . (Numerous further statutes and regulations omitted).

Even if we assume for purposes of argument that including in the Notification every consumer finance law and regulation imaginable as adequate notice of the "alleged violations," by no stretch of the imagination does the Notification speak to the "nature of the conduct" which is under investigation for the alleged violation. Put simply, what is it you *think* we did wrong? Does it involve advertising? Handling of complaints? Advanced vetting or monitoring of customers (if such was ever required!)? Particularly given the absence of federal rules governing payday lenders, the absence of rules anywhere purporting to govern lead generators, and the great variety of rules in those states which do regulate payday lenders, if this investigation to date has not been a pure fishing expedition motivated by an intent to indirectly throttle payday lending through an attack on a lawful business perceived by CFPB and other federal and state departments and agencies to be a "choke point" for payday lending, plainly CFPB must have some knowledge of the *nature of the conduct* it believes to be unlawful.

That this has become even more clear as a result of the CIDs issued in 2015, the follow-up by CFPB to CID responses, and the initial hearing conducted by CFPB at which Glenn McKay, Selling Source's Chief Executive Officer was examined for two days. These inquiries have been highly focused on certain aspects of Selling Source's business practices, making it plain that CFPB is well able to specify in the Notification of Purpose the nature of the conduct being investigated as potentially violating consumer financial protection laws. There is no good or valid reason of which we are aware for failing to do so. Disappointingly, it also suggests an unwillingness of CFPB to engage with Selling Source directly to discuss potential concerns and resolutions without CFPB first obtaining the publicity value of initiating an action with an accompanying press release.

The Notification of Purpose also is misleading in stating that the "purpose of this investigation is to determine whether lead generators or other unnamed persons have engaged or are engaging. . . . " This investigation is entirely focused on Selling Source. We are well aware that since the beginning of 2015 at the *latest*, CFPB has had a formal or informal "MoneyMutual Team," which may include involvement by state agencies such as the New York Department of Financial Services and other federal department or agencies. We know CFPB previously agreed to cooperate with other federal departments and agencies in Operation Choke Point, targeting lawful businesses as a means of 'choking off' payday lending. The CIDs issued to date have not sought to develop information concerning any other person or entity other than Selling Source, and we question whether similar CIDs are going to any other lead generator. For the Notification of Purpose to suggest that this investigation is broader in scope than is actually the case is inappropriate, misleading and inadequate.

Because it appears increasingly likely that CFPB intends to allege violations based upon Dodd-Frank sections 1031 and 1036, 12 U.S.C. §§ 5531, 5536, the Notification of Purpose is improper also because it is predicated upon a potential enforcement proceeding that is not within CFPB's authority. We explain in detail immediately below.

SELLING SOURCE IS NEITHER A "SERVICE PROVIDER" NOR A "COVERED PERSON"

As CFPB is aware, Selling Source, LLC, through various subsidiaries, is a marketing company engaged in the business of generating and selling leads. Lead generation is the process, typically utilizing advertising and related means, of collecting names and contact information about qualified potential customers for products or services, who may then be contacted by the

company selling such products or services. Lead generation is a pervasive and "generic" marketing tool utilized by companies of all sizes in all segments of the American economy, in both business-to-business and business-to-consumer marketing, as a strategy by which companies seek to maximize their return on marketing and sales costs by efficiently identifying and thereafter approaching their most likely customers.

Selling Source and its subsidiaries generate leads for a broad variety of businesses, including customers in the financial services industry but also some of America's largest retail companies with no connection to financial services. In the financial services industry, Selling Source generates leads primarily through television and radio advertising and through its proprietary website, www.moneymutual.com. The television, radio and website advertising used to generate leads is not done on behalf of, nor does it identify, any specific lender. Consumers interested in obtaining payday loans are offered the opportunity to submit certain personal information through the moneymutual.com website, in order to be matched with a prospective lender from whom they *may* obtain a loan if they and the lender are able to reach an agreement. The leads are offered in real time to lenders who have contracted with Selling Source's subsidiary, PartnerWeekly, for lead offerings meeting parameters specified by each lender pursuant to their own underwriting standards, and for which each lender offers to pay a specified price. The lenders analyze offered leads in real time pursuant to their own analytics, and either accept or reject offered leads. The lenders pay PartnerWeekly for accepted leads without regard to whether or not the lead results in a loan agreement with a consumer.

PartnerWeekly is not informed of whether leads have resulted in loan agreements. Once a lender has accepted a lead, the lender and consumer are put in touch with each other, and PartnerWeekly has no further role whatever. It does not set any terms and has no knowledge of the terms being offered by individual lenders or the course of negotiations between lender and consumer. It has no knowledge of how much money is loaned or the ultimate disposition of the loan. It does not monitor loans, does not process payments, does not engage in collections and does not even know if the loan has been paid off. Neither Selling Source nor any of its subsidiaries provide loans or financial services of any kind. Selling Source has no ownership interest in, or common ownership with, any lender, and vice versa.

CFPB is aware of all the foregoing and cannot reasonably dispute them.

Pursuant to 12 U.S.C. § 5536, CFPB may engage in enforcement activities with regard to "covered person[s]" and "service provider[s]," and "any person [who] knowingly or recklessly provide[s] substantial assistance to a covered person or service provider. . . ."

A "covered person" is defined by Dodd-Frank as "any person that engages in offering or providing a consumer financial product or service," or acts as a "service provider" (*see* below) **and** is a corporate affiliate of a covered person. 12 U.S.C § 5481(6).

"Financial product or service" is likewise a defined term – the statute lists a number of activities that are defined as a "financial product or service": extending credit or servicing loans; lease-to-own financing; real estate settlement services; taking deposits or acting as a custodian of funds; issuing stored-value cards or instruments; check cashing; financial data processing; financial advisory services; creating consumer reports or credit histories; collecting consumer debt; and "such other financial product or service as may be defined by the" CFPB, provided it is either conducted as subterfuge to avoid the law or is a permissible banking service likely to have a material impact on consumers. 12 § U.S.C. 5481(12).

As relevant here, [1] Selling Source does not "offer or provide" any of the above-listed services directly, and nobody has ever asserted that it does so. Selling Source is therefore not a "covered person."

The term "service provider" means "any person that provides a material service to a covered person in connection with" the offering of a financial product or service, "including a person that—(i) participates in designing, operating, or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service," but does not include "support" or "ministerial" services "of a type provided to businesses generally," or providing advertising time or space. 12 § U.S.C. 5481(26).

However, in granting the CFPB authority over "service providers," Congress did not intend to provide the CFPB with blanket authority over any company that transacts business with a financial institution. Rather, Congress intended to prevent financial institutions from hiding their consumer financial operations from scrutiny by outsourcing core functions to affiliated or unaffiliated third parties. This purpose is evident in the statutory history of the Dodd-Frank Act, the statutes from which the Dodd-Frank Act draws inspiration, and the exclusions written into the act itself.

Congress explicitly modeled CFPB's authority to regulate service providers on earlier legislation, the Bank Service Company Act, 12 U.S.C. 1861 *et seq.* The Bank Service Company Act originally allowed depository institutions to acquire shares in operating subsidiaries known

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[1] Selling Source has one credit-reporting subsidiary, DataX, but CFPB has advised Selling Source that DataX is not involved in the CFPB investigation. Selling Source's other subsidiaries do not provide services to DataX.

as "bank service companies" to perform enumerated banking functions, specifically "check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and mailing of checks, statements, notices, and similar items, or any other clerical, bookkeeping, accounting, statistical, or similar functions performed for a depository institution." *See* 12 U.S.C. § 1863.

In 1982, Congress amended the Bank Service Company Act to allow bank service companies to engage in activities that the Federal Reserve has determined to be "so closely related to banking as to be a proper incident thereto."[2] These activities specifically authorized in regulation are: extending credit and servicing loans, and related activities (specifically, real estate and property appraising; acting as an intermediary in a real estate transaction by arranging transfer of title, control and risk; check-guaranty services; collection agency services; credit bureau services; asset management, servicing and collection; and acquiring debt in default); real estate settlement servicing; leasing property; operating nonbank depository institutions; trust company functions; financial and investment advisory activities; securities transactional services; investment transactions as principal; management consulting and counseling; courier and accounting services for commercial papers, documents, and written instruments; insurance agency and underwriting; money orders, savings bonds and travelers checks; and processing of financial, banking or economic data. 12 C.F.R. § 225.28.

To summarize, as shown in the preceding paragraphs, the Bank Service Company Act allowed banks to hold ownership in operating entities authorized to perform certain specific activities. A "bank service company" is not simply any company that services a bank, but rather is specifically defined as a bank-owned entity to which the bank has committed *core* banking or financial functions specifically listed in the Act (either directly or by reference).

We emphasize that nowhere in these provisions is there found any reference to marketing or advertising functions, and certainly not to marketing and advertising functions of the kind employed by businesses generally.

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[2] The precise statutory trail has several steps. The Bank Service Company Act authorizes bank service companies to perform any function "permissible for a bank holding company under section 1843 (c)(8) of this title as of the day before November 12, 1999." 12 U.S.C. § 1864(f). Section 1843(c)(8), within the Bank Holding Company Act, in turn authorizes bank holding companies to hold shares in companies that perform activities the Board of Governors of the Federal Reserve System has determined "to be so closely related to banking as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8). On November 12, 1999, the Board of Governors promulgated Regulation Y, which lists the activities determined by the Board to meet the criteria in Section 1843(c)(8). 12 C.F.R. § 225.28(b); *see also* 12 CFR 225.86(a)(1).

Although the Bank Service Company Act is primarily concerned with bank service companies, *i.e.*, operating subsidiaries wholly owned by insured depository institutions, 12 U.S.C. § 1861, the Act also provides that, where a bank is regulated by a federal agency, that agency is granted authority over any third party with whom the bank contracts to perform the functions of a bank service company. Thus:

> **(c) Services performed by contract or otherwise**
>
> Notwithstanding subsection (a) of this section, whenever a depository institution that is regularly examined by an appropriate Federal banking agency, or any subsidiary or affiliate of such a depository institution that is subject to examination by that agency, causes to be performed for itself, by contract or otherwise, *any services authorized under this chapter*, whether on or off its premises—
>
> (1) such performance shall be subject to regulation and examination by such agency to the same extent as if such services were being performed by the depository institution itself on its own premises, and
>
> (2) the depository institution shall notify each such agency of the existence of the service relationship within thirty days after the making of such service contract or the performance of the service, whichever occurs first.

12 U.S.C. § 1867(c) (emphasis added). But because the provision refers specifically to "any services authorized under this chapter," *i.e.,* the Bank Service Company Act, federal authority is explicitly limited to third parties performing the functions authorized by the Act and enumerated in 12 U.S.C. § 1863 or 12 C.F.R. § 225.28(b) ("Regulation Y") – that is, *core* banking functions. *C.f., American Bar Ass'n v. F.T.C.*, 430 F.3d 457 (D.C. Cir. 2005) (where Federal Financial Modernization Act authorized F.T.C. to promulgate privacy rules for financial institutions, and where scope of "financial" institutions was keyed to Regulation Y, F.T.C. authority did not extend to regulation of attorneys or law firms as these persons did not fit within Regulation Y's reach).

As stated above, the Dodd-Frank Act copies the scope of the Bank Service Company Act, including the latter's limitations on authority over third parties. The report from the Senate

2015-MISC-Selling Source, LLC-0001 Received 6/10/2015 7:44 p.m.

Committee on Banking, Housing, and Urban Affairs recommending passage of the Dodd-Frank Act states that the definition of "service provider" was "designed to create authority that is generally comparable to the authority that federal banking regulators have under the Bank Service Company Act," and is included to ensure that "material outsourced services by a covered person in connection with the offering or provision of a consumer financial product or service" do not escape regulation by being outsourced to third parties. S. Rep. 111-176 p. 160-161. The legislation's co-author, Senator Chris Dodd, confirmed the bill's intent to provide the CFPB "authority comparable to the authority that Federal bank regulators have over service providers to banks under the Bank Service Company Act." 156 Cong. Rec. S3965-03 (May 19, 2010).

Further, the sections of the Dodd-Frank Act that provide the CFPB supervisory authority over service providers state that this authority exists "to the same extent as if such service provider were engaged in a service relationship with a bank, and the [CFPB] were an appropriate Federal banking agency under section 1867 (c) of this title [*i.e.*, the Bank Company Service Act]." 12 U.S.C. §§ 5514(e), 5515(d). The CFPB has cited these provisions in asserting authority over service providers. *See* CFPB Bulletin 2012-03 at 2, CFPB Bulletin 2015-01 at 2. By explicitly incorporating Section 1867(c), the Dodd-Frank Act also incorporates that section's limitations, providing the CFPB with authority over only those service providers that perform the financial services-related activities enumerated in 12 U.S.C. § 1863 or Regulation Y.

These limitation are squarely incorporated in the definition of "service provider" provided in the Dodd-Frank Act, as follows:

> **Service provider**
>
> **(A) In general**
>
> The term "service provider" means any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that—
>
> (i) participates in designing, operating, or maintaining the consumer financial product or service; or
>
> (ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data

is undifferentiated from other types of data of the same form as the person transmits or processes).

(B) Exceptions

The term "service provider" does not include a person solely by virtue of such person offering or providing to a covered person—

(i) **a support service of a type provided to businesses generally or a similar ministerial service**; or

(ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.

18 U.S.C. § 5481(26) (emphasis added). The definition thus includes only those persons who provide a material service "in connection with the offering or provision . . . of a consumer financial service." Further, the statute provides specific examples as to what constitutes such material service: "participating in designing, operating, or maintaining the consumer financial product or service" and "processes transactions relating to the consumer financial service." The definition of "service provider" must be construed in the context of these illustrations. *See, e.g., Post v. St. Paul Travelers Ins. Co.,* 691 F.3d 500, 520 (3d Cir. 2012) ("Under the principle of *ejusdem generis*, '[i]t is widely accepted that general expressions such as 'including, but not limited to' that precede a specific list of included items should not be construed in their widest context, but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples.'") (citation omitted). Congress's intent to limit CFPB authority to "service providers" providing core financial services functions is further evidenced by the explicit exclusion of services that are "provided to businesses generally."

Selling Source is being investigated solely as a *marketing* company as is stated in the Notification of Purpose. The lead generation services it provides are not limited to financial services companies, and also as described above, lead generation is exactly the kind of service "provided to business generally." In that regard, such services are no different than advertising agency services, public relations services, marketing consultants and strategists and any other of the numerous support services which are now inextricably woven into the fabric of the American business model. They have absolutely nothing to do with core financial services functions.

The Notification of Purpose and CFPB's Investigation to Date are Inconsistent and Inadequate to Support an Argument by CFPB that it is Investigating to Determine Whether Selling Source "Substantially Assisted" a Violation Pursuant to 12 U.S.C. § 5536(a)(3)

The "substantial assistance" provision of section 5536(a)(3) in essence makes unlawful "aiding and abetting" a covered person or a service provider in violating various financial services laws, including by covered persons or service providers engaged in UDAAP pursuant to section 5531. Typically, even civil aiding and abetting requires actual or deemed complicity in the allegedly unlawful underlying conduct of a third-party, such as via actual knowledge that the underlying conduct is unlawful. The same is true of section 5536(a)(3), which requires that such "substantial assistance" be provided "knowingly or recklessly."

Moreover, use of the qualifier "substantial," in addition to (a) the "knowingly or recklessly" language; (b) the primary statutory focus on defined service providers and covered persons; and (c) the specific exclusion from the definition of service providers of persons providing services of a kind provided to businesses generally, demonstrates a Congressional intent that a *very high amount of individual culpability in specific circumstances involving a specific primary violator* be shown before enforcement proceedings are brought against a person or entity who does not qualify as, and indeed is expressly excluded from, the definition of, a service provider or covered person.

This reading is confirmed by case law construing the source language for section 5536(a)(3), taken directly from the Securities Exchange Act of 1934, 15 U.S.C. § 78t(e) (as amended in 2011 to add "recklessly" to "knowingly" for the *scienter* requirement). Violation of the 1934 Act by aiding and abetting requires the "existence of a securities law violation by the primary (as opposed to the aiding and abetting) party;" knowledge [or now, reckless disregard] of the primary violation; and "substantial assistance" in the primary violation. *Bloor v. Carro, Spanback, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985). Negligence is *not* sufficient, and neither is a "bare inference" that the alleged aider and abettor "must have had knowledge" of the primary violation. *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991). Selling Source cannot be held liable by the CFPB as an "aider and abettor" for its general involvement with payday lending, but only for fundamentally participating in and assisting a specific violation by a specific primary violator: "[I]n order to allege substantial assistance, the SEC must plead . . . that the defendant associated himself with a violation of the Act, participated in it as something that he wished to bring about, and sought by his actions to make the violation succeed." *In re Amaranth Natural Gas Commodities Litigation*, 730 F.3d 170, 182 (2d Cir. 2013), *citing U.S. v. Peoni* 100 F.2d 401, 402-403 (2d Cir. 1938) (producer of counterfeit bills did not aid and abet individual who later passed the bills, where producer's actions were "indeed

a step in the causal chain" of passage but where producer had no involvement or interest in the passage itself).

Neither the Notification of Purpose nor the scope of CFPB's investigation of Selling Source meet the criteria for an investigation whether Selling Source provided "substantial assistance" to a primary violator. The Notification of Purpose includes no reference to a specific primary violator alleged to have a committed a specific violation, let alone the "nature of conduct" allegedly engaged in by Selling Source which is deemed to constitute "substantial assistance." Likewise, CFPB's scope of investigation has focused on Selling Source's overall business operations and practices, not on its relationship with any identifiable primary violator and primary violation. Consequently, the Notification of Purpose is inadequate to permit the ongoing investigation under the "substantial assistance" rubric, and given the scope of the investigation to date, it would not be proper to simply amend it. Moreover, as described above, a serious question exists whether CFPB could lawfully assert a "substantial assistance" case for generic lead generation services given the development of leads is not lender-specific and given the other facts described above concerning Selling Source's lack of involvement with any lender/consumer relationship or agreement beyond lead generation itself.

THE CONTINUING USE OF CIDS IS OBJECTIONABLE

As stated by Selling Source's counsel during the meet-and-confer, and not actually denied by CFPB's staff counsel, it is evident that (a) CFPB already has decided – and likely decided some time ago – to initiate a proceeding against Selling Source, and (b) has delayed doing so in order to continue gathering "evidence" by CID. CFPB is allowed to use CIDs "until the institution of any proceedings under the Federal consumer financial law." 12 U.S.C. § 5562(c)(1). As you know, the CID process significantly restricts the protections afforded during discovery undertaken in the course of an actual proceeding. The purpose of using CIDs is only to enable the government to determine whether there is enough evidence to warrant the expense of filing suit. *U.S. v. Witmer*, 835 F. Supp. 201, 203 (M.D. 1993). To delay initiating a proceeding solely for the purpose of continuing to use the CID process is inconsistent with that purpose, and therefore improper.

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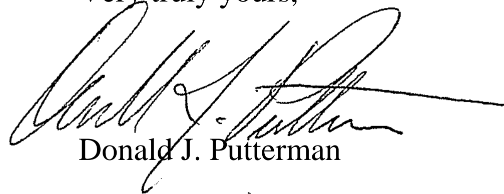
2015-MISC-Selling Source, LLC-0001 Received 6/10/2015 7:44 p.m.

On a final note, Selling Source is ready, willing and able to further engage with CFPB to discuss the foregoing issues and other matters which may be of mutual interest. We respectfully suggest that plunging into a protracted struggle may not be in either party's long-term interest.

Very truly yours,



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