

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

IN RE: THE MATTER OF

WESTGATE RESORTS, LTD.

**WESTGATE RESORTS, LTD.'S PETITION TO MODIFY OR
SET ASIDE CIVIL INVESTIGATIVE DEMAND**

Petitioner WESTGATE RESORTS, LTD. (“Westgate”), pursuant to Rule 1080.6(e) of the Rules Relating to Investigations, files its Petition to Modify or Set Aside the Civil Investigative Demand served by the Consumer Financial Protection Bureau (“CFPB”) upon Westgate on September 30, 2015 (the “CID”).¹

The CID should be set aside, or at the very least, modified, because (1) the CFPB is not validly constituted and is without authority to conduct this investigation as Title X of the Dodd-Frank Act grants the CFPB virtually unlimited power without the benefit of any checks and balances in contravention of the Constitution’s separation of powers; (2) the CID is invalid as it fails to notify Westgate of the violation that the company is alleged to have committed; (3) the CID seeks irrelevant documents and is unduly burdensome; and (4) the CFPB’s investigative powers are limited to the offering and provision of consumer financial products or services under the Federal consumer financial laws and the CID far exceeds the limitations of the Consumer Financial Protection Act (“CFPA”). In the context of investigations being generally limited to the offering and provision of financial products, the CID demands information and documents that go to the heart of non-financial matters in what is, in essence, a real estate development and

1. Many of the matters addressed herein specifically related to individual discovery requests have been addressed in Westgate’s modification request letter to the CFPB dated October 15, 2015 which supplemented the parties’ October 8, 2015 meet and confer. If the parties are able to resolve certain matters, we will correspondingly amend this Petition to focus on any remaining matters.

management company that develops, markets, sells and operates timeshare resorts, where financing a consumer transaction is merely a piece of a much larger vertically integrated operation.

I. INTRODUCTION AND BACKGROUND

Westgate is an integrated timeshare and resort company involved in the development, construction, marketing, sale, management and operation of hospitality and resort properties. Westgate owns and operates, among other things, hotel properties, restaurants, retail stores and a travel agency. Notwithstanding its expansive operations, Westgate's primary business is the development and operation of timeshare resorts, of which there are 28 resorts in seven states. Many of Westgate's timeshare resorts were purpose built, which means that Westgate acquired the undeveloped or partially-developed land, and through state-licensed contractors, developed the land and constructed the buildings. Westgate created the legal regime, dictated by the governing state law of the state in which the resort is located, which created the individual timeshare interests that Westgate thereafter marketed and sold. All the while, Westgate operates and manages each of the resort properties.

Westgate is actively involved in all aspects of projects, from initial planning, to development, sales and continued management, to ensure that it markets and sells a branded deeded real estate timeshare interest to its customers, most often families from all over the world who enjoy travel to popular family vacation destination cities. Through state licensed real estate brokers and real estate salespersons engaged by Westgate's sales and marketing arm, Westgate sells a deeded real estate interest to its customers. To do so, Westgate directly extends credit to its customers to finance the timeshare purchases in the form of purchase money mortgages. When Westgate sells a timeshare interest, it uses conveyance, mortgage, disclosure and other

documents strictly comporting with all federal consumer laws and, in each instance, approved by the state regulatory agency regulating timeshare development and sale. Indeed, without question, timeshare development and sale is, at the state and local governmental levels, one of this country's most heavily regulated businesses.

Westgate's diversified hospitality operations – licensed in each of the states in which the resorts are located - then manage the resorts in a manner akin to any traditional hospitality operation, operating a network-wide reservations system and managing the resort properties (*e.g.* front desk, concierge, housekeeping, engineering, room service, *etc.*). Unique to the timeshare component of the operation (*vs.* traditional hospitality), Westgate collaborates with exchange organizations and services its purchase money mortgages.

It is within the context of the everyday business that the requests set forth in the CID clearly delve into non-financial matters that must be limited. For instance, a consumer who stays at a Westgate resort and is unhappy with the receptionist at check-in, may lodge a complaint with the company, but such complaint theoretically falls within the requests in the CID notwithstanding that the investigative authority of the CFPB is lacking in that non-financial context. And since Westgate has various means of marketing its timeshares, in most cases—especially at the stage of simply bringing consumers to a property to take a tour—such marketing would not touch upon any financial aspects of the transaction. That is, the vast majority of marketing occurs when the company rents out any excess inventory so that the consumers can experience staying at a property in which they may be interested later in purchasing an interest. In other instances, Westgate markets directly to current owners who may be interested in owning another timeshare unit or who may have friends who might be interested in touring the facility.

After all, such owners have experienced the brand and can make an informed decision and describe their positive experiences to their friends.

Without conceding that the CFPB is constitutionally empowered to conduct this investigation or that the CID properly specifies the violation of the law to which this investigation is directed, Westgate intends to cooperate and provide documents and information relating to the consumer financial services that it provides. While there may be some seeming overlap—especially in providing some context for the transactions—between the financial and non-financial elements of its business, the CFPA clearly separates the two matters.

II. ARGUMENT

A. Standard For The Enforcement Of An Administrative Subpoena

Congress has authorized the CFPB to issue CIDs, and the CFPB has implemented its own rules governing the process to be utilized when issuing a CID.² The CFPB’s authority, however, is not unbridled and, to be enforceable, a CID must comply with statutory and judicial requirements.³ Indeed, the federal courts are utilized to police these administrative agencies and prevent them from abusing power, abusing process and otherwise depriving the subjects of such administrative action of their constitutional rights.⁴ In *Arthur Young & Co.*, the United States Court of Appeals, District of Columbia Circuit, described the limits imposed by the courts as follows:

2. 12 U.S.C. § 5562; 12 C.F.R. § 1080, *et seq.*

3. *United States v. Markwood*, 48 F.3d 969, 975 (6th Cir. 1995); *United States v. Powell*, 379 U.S. 48, 58 (1964).

4. *See, e.g., United States v. Powell*, 379 U.S. 48, 58 (1964) (“it is the court’s process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.”); *Securities and Exchange Commission v. Arthur Young & Co.*, 584 F.2d 1018, 1028 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) (“... so long as the courts retain their power of individual inquiry prior to enforcement of administrative subpoenas, there is relatively little for anyone to fear”).

There are, of course, limits; to begin with, “a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.” Moreover, while the statutory powers of federal regulatory agencies to investigate have traditionally been extensive, . . . “the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” The federal courts stand guard, of course, against abuses of their subpoena-enforcement processes but constitutional mandates aside, “(t)he gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.” Resultantly, it has long been clear that “it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.”⁵

Administrative agencies must not only demonstrate that the subpoena or investigation is within the scope of its authority, that the information sought relates to the scope and subject of the investigation, and that the agency acts reasonably and follows its own rules,⁶ but also that any such agency—including the CFPB—cannot abuse its powers or process and cannot issue subpoenas which impose an undue burden upon the recipient.⁷ Similarly, administrative

5. 584 F.2d 1018, 1023-24 (D.C. Cir. 1978); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (“a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.”); *See v. City of Seattle*, 387 U.S. 541 (1967); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Powell*, 379 U.S. at 58; *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003) (“[t]he Fourth Amendment has been held to limit the scope of investigatory power exercised by federal and state agencies[]” and “. . . investigations premised solely upon *legal* activity are the very type of “fishing expeditions” that were the target of Justice Holmes’s assault in *American Tobacco*”).

6. *See Securities and Exchange Comm’n v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980) (“[t]o obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has the authority to conduct, and all administrative prerequisites have been met.”) *quoting Morton Salt Co.*, 338 U.S. 632.

7. *See, e.g., Arthur Young & Co.*, 584 F.2d at 1023-24, 1028, 1031; *RNR Enterprises, Inc. v. S.E.C.*, 122 F.3d 93, 97 (2nd Cir. 1997) (finding that even if the administrative agency satisfies its burden of proof for enforcement, the party opposing enforcement may show that “the subpoena is ‘unreasonabl[e]’ or was issued in bad faith or for an ‘improper purpose,’ or that compliance would be ‘unnecessarily burdensome.’”); *Federal Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) (finding that a party may prevail in an enforcement proceeding if it makes “an adequate showing that the

agencies may not use their subpoena powers to engage in fishing expeditions.⁸ “Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the *possibility* that they may disclose evidence of crime.”⁹ Indeed, *an administrative subpoena should be based upon “a realistic expectation rather than an idle hope that something may be discovered.”*¹⁰

B. The CFPB is not Validly Constituted and is Without the Authority to Investigate Westgate as Title X of the Dodd-Frank Act Authorizes Virtually Unlimited Power to the CFPB Without the Benefit of Any Checks and Balances in Contravention of the Constitution’s Separation of Powers.

If its creation fails constitutional muster, the CFPB has no authority to conduct this investigation. The Dodd-Frank Act was enacted in 2010 in response to the housing crisis and economic recession. The President in a press release stated that “we passed financial reform a year ago. It was a common-sense law . . . it put in place the stronger -- the strongest consumer protections in history.”¹¹ The President accurately described the Dodd-Frank Act as creating an exceedingly strong agency, but the Act is anything but commonsensical.

agency is acting in bad faith or for an improper purpose, such as harassment.”); *see also See In Re PHH Corporation*, 2012-MISC-PHH Corp-0001, Decision And Order On PHH Corporation’s Petition To Modify Or Set Aside Civil Investigative Demand at p. 5 (the “PHH Order”).

8. *See, e.g., Peters v. U.S.*, 853 F.2d 692, 700 (9th Cir. 1988) (“an administrative subpoena thus may not be so broad so as to be in the nature of a ‘fishing expedition’”); *Federal Deposit Ins. Corp. v. Garner*, 126 F.3d 1138 (1997).

9. *Federal Trade Comm’n v. American Tobacco Co.*, 264 U.S. 298, 305-06, J. Holmes Dissent (1924) (emphasis added).

10. *Equal Employment Opportunity Comm’n v. United Air Lines, Inc.*, 287 F.3d 643,653 (7th Cir. 2002).

11. Press Release, White House Office of the Press Secretary, Remarks by the President in Nominating Richard Cordray as Director of the Consumer Financial Protection Bureau (July 18, 2011), *available at*: <http://www.whitehouse.gov/the-press-office/2011/07/18/remarks-president-nominating-richard-cordray-director-consumer-financial> (last visited Oct. 12, 2015).

Title X of the Dodd-Frank Act (“Title X”) provides sweeping power to the CFPB Director to regulate financial and nonfinancial banking institutions under the auspices of supporting consumer protection. The vast and virtually limitless power, however, violates the Framers’ careful construction of the Constitution’s separation of powers, which would normally limit the agency’s use of that power.

Once the CFPB Director is appointed by the President with the “advice and consent of the Senate,” he may only be removed by the President for “inefficiency, neglect of duty, or malfeasance in office.”¹² If the President believes that the CFPB Director has acted improperly, the President may not be able to remove the Director unless the action is so unreasonable as to satisfy the high “for cause” standard. While it is constitutionally permissible for the tenure of an appointed official to be protected by a “for cause” requirement for removal,¹³ such insulation from accountability violates the separation of powers when combined with other provisions further isolating the officials from oversight. For example, two levels of “for cause” insulation, where one official can only be removed for cause by another official who in turn can only be removed for cause by the President, gives the official too much protection from accountability to the President and is therefore impermissible.¹⁴ Here, there are also multiple provisions insulating the Director for accountability or permitting the Director to act independently of any oversight or institutional constraint.

The Director’s unconstitutional freedom from accountability is compounded because Congress has no authority to impose financial constraints on the CFPB. The Act authorizes the

12. 12 U.S.C.A. § 5491 (West).

13. *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

14. *Free Enterprise Fund v. Public Company Acctg. Oversight Bd.*, 130 S.Ct. 3138 (2010) (considering portions of the Sarbanes-Oxley Act).

CFPB to fund itself by simply requisitioning funds from the Federal Reserve Board.¹⁵ The Federal Reserve Board must honor the requisition, and the CFPB is also completely insulated from the Federal Reserve’s supervision and control.¹⁶ Moreover, Title X explicitly prohibits the House and Senate Appropriations Committee from even attempting to review the CFPB’s self-imposed budget.¹⁷ The ability to control an agency’s purse strings is an important check and balance. Even the dissent in *Free Enterprise* noted that control of the budget imparts control of the office.¹⁸ The CFPB and its Director pose the converse case. Without any budgetary control, the Director’s lack of accountability is compounded, to the point of unconstitutionality.

The CFPB is headed by a single Director who, once approved by the Senate, receives tenure protection and a five-year fixed term.¹⁹ Independent regulatory agencies like the CFPB are typically headed by a multi-member commission whose members serve for fixed terms. That is the structure of the Federal Deposit Insurance Corporation, the Federal Reserve System, the

15. 12 U.S.C.A. § 5497 (West) (“Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law . . .”).

16. 12 U.S.C.A. § 5492 (West) (“Notwithstanding the authorities granted to the Board of Governors under the Federal Reserve Act, the Board of Governors may not--(A) intervene in any matter or proceeding before the Director, including examinations or enforcement actions, unless otherwise specifically provided by law; (B) appoint, direct, or remove any officer or employee of the Bureau; or (C) merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors or the Federal reserve banks.”).

17. 12 U.S.C.A. § 5497 (West) (“Notwithstanding any other provision in this subchapter, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.”)

18. *Free Enterprise*, 130 S.Ct. at 3170, 3173. The majority also recognized the effect of financial control, but considered it too cumbersome to be an effective restraint so as to preserve the constitutionality of that portion of the statute. *Id.* at 3158, 3159.

19. 12 U.S.C.A. § 5491 (West).

National Credit Union Administration, the Federal Trade Commission, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Communications Commission, and numerous other agencies.²⁰ Unlike some other agencies, the CFPB is not subject to annual congressional appropriations,²¹ and its regulations are not subject to stringent interagency review by the Office of Information and Regulatory Affairs within the Office of Management and Budget.²² These structural differences allow the CFPB to regulate consumer financial products and services with free reign.

Title X grants the CFPB broad authority to regulate and investigate consumer financial product and service firms, including nonfinancial banking institutions. Significantly, while “unfair” and “deceptive” practices have been defined and interpreted for years by the FTC,²³ to guide the CFPB rulemaking on these two terms, the CFPB will have sole discretion to interpret the “abusive” standard without any legislatively enacted limits.²⁴ Contrary to the purpose of Title X, it does not provide any transparency or certainty to institutions such as Westgate because the agency is subject to no effective checks or balances by other branches of government. This is significant, because all of the important powers of the CFPB are vested in the Director, without the moderating influence of other officials on the decision of the CFPB, as is the case with other

20. See Staff of H.R. Comm. on Oversight and Gov’t Reform, 112th Cong., *The Consumer Financial Protection Bureau’s Threat to Credit Access in the United States*, available at <http://oversight.house.gov/wp-content/uploads/2012/12/Access-to-Credit-Report-12.14.12.pdf> (last visited October 12, 2015).

21. 12 U.S.C. § 5491 (West).

22. See Curtis W. Copeland, Cong. Research Serv., *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Regulations to be Issued by the Consumer Financial Protection Bureau* 15 (Aug. 25, 2010).

23. FTC, Policy Statement on Deception (Oct. 14, 1983), appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), and available at: <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> (last visited October 13, 2015).

24. 12 U.S.C.A. § 5511 (West).

administrative agencies.²⁵ Furthermore, the judicial branch’s oversight is also reduced because Title X requires courts to grant the same deference to the CFPB’s interpretation of consumer financial laws that they would “if the [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.”²⁶ In effect, the Director is permitted to define the critical standards virtually by fiat.

In sum, since Title X effectively removes any possibility of an appropriate check and balance on the CFPB, it violates the Framers’ carefully constructed separation of powers and should therefore be declared unconstitutional. “These circumstances have created the conditions for the CFPB to become a run-away financial regulator that is poised to add uncertainty and illiquidity to domestic credit markets.”²⁷ Stated differently, Title X delegates so much of the executive and legislative power to a single, unelected, tenured individual, who is for various reasons unaccountable for his or her actions, that the checks and balances of the separation of powers are eliminated. “The diffusion of power [to unaccountable officers] carries with it a diffusion of accountability”²⁸ in violation of constitutional provisions vesting power in politically accountable persons. Whatever may have been the motivation for ceding so much authority to the Director, it cannot pass constitutional muster.

Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting

25. See Staff of H.R. Comm. on Oversight and Gov’t Reform, 112th Cong., *The Consumer Financial Protection Bureau’s Threat to Credit Access in the United States*, at pp. 5-6 available at <http://oversight.house.gov/wp-content/uploads/2012/12/Access-to-Credit-Report-12.14.12.pdf> (last visited October 13, 2015).

26. 12 U.S.C.A. § 5512(b)(4)(B) (West)

27. See Staff of H.R. Comm. on Oversight and Gov’t Reform, 112th Cong., *The Consumer Financial Protection Bureau’s Threat to Credit Access in the United States*, at p. 1, available at <http://oversight.house.gov/wp-content/uploads/2012/12/Access-to-Credit-Report-12.14.12.pdf> (last visited October 13, 2015).

28. *Free Enterprises*, 130 S.Ct. at 3155.

forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear “formalistic” in a given case to partisans of the measure at issue, because such measures are typically the product of the era’s perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.²⁹

Most recently, the District of Columbia Circuit Court reopened the constitutional arguments addressed above in *State National Bank*, noting in a July 2015 Order that, “the Bank has standing to challenge the constitutionality of the Consumer Financial Protection Bureau, and that claim is ripe. We therefore reverse the judgment of the District Court on that claim and remand for it to consider in the first instance the Bank's constitutional challenge to the Bureau.”³⁰ The CFPB’s existence will be scrutinized in the *State National Bank* case. An adverse decision, when final, will potentially prospectively dissolve the Bureau and retrospectively invalidate, *inter alia*, the CID here. Until this threshold issue is decided, the CID should be held in abeyance and these proceeding adjourned.

C. The CFPB Has Failed To Notify Westgate Of The Alleged Violation of Law.

Section 1080.5 provides:

Any 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.*³¹

29. *New York v. United States*, 505 U.S. 144, 187 (1992).

30. *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 57 (D.C. Cir. 2015).

31. 12 C.F.R. § 1080.5.

A similar provision is contained within Section 1052(c)(2) of the Dodd-Frank Act, requiring any CID to “state the nature of the conduct constituting the violation which is under investigation.”³²

The CID does not contain a proper “notification of purpose.” Despite the requirement of the Dodd-Frank Act and the CFPB’s own Rules, the CID simply states that:

The purpose of this investigation is to determine whether persons involved in the sale and financing of timeshares have engaged in, or are engaging in, acts or practices in violation of Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, 12 U.S.C. §§ 5531 and 5536, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, et seq., the Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq., the Fair Credit Billing Act (FCBA), 15 U.S.C. 1666 et seq., their implementing regulations, or any other Federal consumer financial law. The investigation also seeks to determine whether the Bureau action to obtain legal or equitable relief would be in the public interest.³³

The foregoing hardly advises Westgate of the nature of conduct constituting the alleged violation. Rather, it merely enumerates the potential legal bases for unspecified claims that could theoretically be asserted against nearly any lender or creditor.

While an administrative agency has the power to conduct investigations and issue subpoenas, its power has limits. The CFPB must comply with the law and the constitutional framework upon which this Country is based. The recipient of the subpoena is entitled to due process, which includes, among other things, the right to know the charges being made against him.³⁴ The “charge requirement evidences Congress’ desire to prevent the [CFPB] from exercising unconstrained investigative authority.”³⁵ The very purpose of this requirement is to reign in the CFPB’s authority and prevent fishing expeditions that would otherwise deprive the

32. 12 U.S.C. § 5562(c).

33. See CID at cover page.

34. *Equal Employment Opportunity Comm’n v. Maryland Cup Corp.*, 785 F.2d 471, 475 (4th Cir. 1986) (“the issuing agency must make a threshold showing that . . . **the agency has satisfied statutory requirements of due process**, . . .”).

35. *Equal Employment Opportunity Comm’n v. United Air Lines, Inc.*, 287 F.3d 643,652 (7th Cir. 2002).

CID recipient, such as Westgate, of its constitutional rights.³⁶ The “investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury’s, or the court’s in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be ‘limited . . . by . . . forecasts of the probable result of the investigation . . .’.”³⁷ According to the United States Supreme Court, “[p]ersons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has given.”³⁸

Without a proper notification of purpose, the CID fails. Not only does it constitute a violation of the CFPB’s own rules and practices, but it clearly constitutes an abuse of process and, in fact, deprives Westgate of its fundamental right to due process of law in that Westgate has no notice of the claims being made against it. This is not a case like *Material Handling Institute, Inc.*, where “there could be no doubt that the [subject] understood what conduct was under investigation” after “a two-year history of correspondence and telephone conversations as well as one other CID, all of which sought information concerning the anticompetitive effects of the Institute’s restrictive membership practices.”³⁹ Here, there is doubt about the alleged conduct given the total absence of any communication that may have otherwise put Westgate on notice of what the CFPB’s concerns are as they relate to Westgate. Westgate is, in fact, very much in doubt as to its alleged violative conduct and very much doubts that the CFPB has any

36. *Id.* at 653; *see also Major League Baseball*, 331 F.3d at 1189 (invalidating a subpoena where the Attorney General failed to show that there was an alleged violation of law and the purported conduct was legal).

37. *Oklahoma Press Pub. Co.*, 327 U.S. at 217.

38. *Id.*

39. *Material Handling Institute, Inc. v. McLaren*, 426 F.2d 90, 92 (3d Cir. 1970).

authority to investigate most of Westgate’s business. As such, the CID should be set aside or, at the very least, modified, to provide Westgate with proper notice of the alleged violation and the conduct Westgate has supposedly engaged in which constitutes such a violation.

D. The CID Seeks Irrelevant Documents And Information, Is Unduly Burdensome And Constitutes An Abuse Of Process.⁴⁰

The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. “It created safeguards . . . against arbitrary official encroachment on private rights.”⁴¹ While Congress has endowed the CFPB with broad power to conduct investigations, there are limits to what the agency may demand. A government’s investigation into corporate matters, for example, may not be of such “a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.”⁴²

In *See*,⁴³ the United States Supreme Court articulated the constitutional requisites for enforceable administrative subpoenas. When an administrative agency subpoenas corporate books or records, the subpoena must be “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.”⁴⁴ The

40. On October 15, 2015, Westgate submitted a Letter Request for Modification of a number of aspects of the CID. To the extent that the CFPB agrees to the modifications Westgate has requested, those matters also addressed in this Section D can be deemed moot.

41. *Morton Salt Co.*, 338 U.S. at 644.

42. *Id.*

43. 387 U.S. 541.

44. *Id.* at 545. Other courts following the *Morton Salt Co.* standard have recognized that the disclosure sought by an agency must be both relevant to the inquiry and reasonable. *See Invention Submission Corp.*, 965 F.2d at 1089 (CID enforced only if the “information sought is reasonably relevant”); *Blackfoot Bituminous, Inc.*, 622 F.2d at 514. (“To obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too

requirement of relevance is designed to contain an agency’s authority and prevent unauthorized and arbitrary fishing expeditions.⁴⁵ Although the legitimate scope of the subpoena power includes information that “might throw light upon” the inquiry raised by the complaint, “the might” is intended to be “an indication of a realistic expectation rather than an idle hope that something may be discovered.”⁴⁶ Absent a finding that the material sought is relevant, a court may not enforce a subpoena.⁴⁷ Similarly, “[b]efore an agency subpoena may be enforced, the Agency must prove, inter alia, that the documents sought in a subpoena are ‘relevant to the purpose’ of the matter under investigation.”⁴⁸ The requirement of reasonableness comes down to “specification of documents to be produced adequate, *but not excessive*, for the purposes of the relevant inquiry.”⁴⁹

In *Blue Cross Blue Shield of Ohio v. Klein*,⁵⁰ Blue Cross Blue Shield of Ohio (“BCBS”) claimed that the government’s investigation into BCBS was not legitimate because BCBS could not have violated antitrust laws. The Sixth Circuit Court of Appeal agreed with BCBS and stated that “[i]f, as Blue Cross asserts, the MFN clauses could never violate antitrust laws, then the investigation is not legitimate While the government may need compliance with the CID

indefinite, is *reasonably relevant to an investigation* which the agency has authority to conduct, and all administrative prerequisites have been met.”) (emphasis added).

45. *E.E.O.C. v. K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir. 1982).

46. *Harrington*, 388 F.2d at 524.

47. See *E.E.O.C. v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002), citing to *S. Farm Bureau Ins.*, 271 F.3d at 211; *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir.1994).

48. *Arthur Young & Co.*, 584 F.2d at 1029 (D.C. 1978).

49. *Oklahoma Press Pub. Co.*, 327 U.S at 208. (emphasis added).

50. 117 F.3d 1420 (unpublished disposition), 1997 WL 400095 at 3 (unpublished disposition) (6th Cir. 1997).

before it can show the investigation is legitimate, this does not provide a license to pursue documents not relevant to its investigation.”⁵¹

Applying the teachings of *See* and *Klein*, the CFPB appears to be conducting an unreasonable and arbitrary “fishing expedition” into Westgate’s *non-financial* activities which fall outside of the scope of its authority to see if the CFPB by some happenstance can come up with something that it actually has authority to investigate.

As is explained in the following section, the CFPA, itself, unambiguously dictates that where there are non-financial and financial aspects to a business, the CFPB is limited to those matters that exclusively bear weight on consumer financing. One such example may be found in the 12 U.S.C.A. § 5519 auto dealer exclusion, which excepts from the CFPB’s rulemaking and investigatory authority the sale, servicing and leasing of motor vehicles. Notably, there is a limited exception to the exemption set forth at § 5519(b)(1)(2) which provides that the exclusion doesn’t apply to dealerships “*to the extent*” that it provides consumers with any services related to residential or commercial mortgages or self-financing transactions involving real property, or to that line of business that involves the extension of retail credit or credit leases involving motor vehicles where such credit is provided directly to consumers. Similarly Section (3) provides an exception to the exemption but only “*to the extent*” that the auto dealer offers or provides a consumer financial product or service not involving or related to the sale, financing, leasing, rental, repair, serving, etc. of motor vehicles. That is to say that car dealerships are exempt from the CFPB’s oversight except for the specific matters relating to financial products and services which may be offered to consumers. Those limited items potentially fall within the agency’s circumscribed regulatory authority.

51. *Id.* at 3.

Car dealerships have a similar framework in marketing and sales as a timeshare company. In fact, in stark contrast to Westgate, specifically, and timeshare generally, car dealerships arguably market financing from the get-go where their advertisements frequently show financing offers (i.e. \$299/month, with \$3,500 down). Those financing arrangements draw consumers into the dealership. When a consumer visits a showroom, he or she talks to a sales person and talk about what they are looking for both in style of the car and in monthly payments. The salesperson will show them around the cars, explaining the benefit of owning/leasing the car. It is then that a manager must be brought in and go over the potential financing terms. Once the general terms have been agreed upon, the car buyer meets with a financing representative. The CFPB couldn't specify every industry where there are businesses offering both financial and non-financial products/services. However, the Section 1029 exclusion provides some clarity in how to make a bright line where an investigation might otherwise encroach on non-financial matters.

Despite the foregoing, the CFPB demands documents and information that precede the first contact with a consumer, before he shows up at one of nearly 30 different sales locations, well before financing the purchase of a timeshare would be mentioned. More importantly, Westgate cannot ascertain whether any particular Interrogatory or Document Request is relevant or reasonable without the CFPB providing a more specific, narrowly-tailored "notification of purpose." The CID commands Westgate to produce documents, information, emails, and records of Westgate in multiple subject areas. Yet, as explained herein, much of the inquiry focuses on matters prior to financing and the CFPB makes it clear that there must be a divide between the sale of non-financial products/services and the sale of financial products/services.

Another precondition to judicial enforcement of an administrative investigative subpoena is that the documents requested are not unduly burdensome.⁵² “An administrative subpoena may be deemed unduly burdensome if ‘compliance threatens to unduly disrupt or seriously hinder normal operations of a business.’”⁵³ A court has the authority to make orders to prevent oppression and to avoid undue expense, and “where the burden is heavy, where a segregation and analysis of a great mass of material is necessary, or where data and information must be compiled and collated, some, and perhaps the greatest share, of that burden and effort should fall on the party seeking the information.” The court should weigh the annoyance and expense involved against the value of the information sought.⁵⁴ In *First Multiple Listing Serv., Inc. v. Shenefield*,⁵⁵ the recipient of a CID urged that in order to respond to the requests for information, the company must spend “at least 55 productive hours collecting information and documents and that counsel for FMLS must spend at least \$4,700 in time reviewing documents and drafting responses to interrogatories.”⁵⁶ The court found the requests, under these circumstances, to be unduly burdensome. In this matter, some of the requests require each of 28 properties to review their internal employment files and marketing records, policies and procedures for a period of either 4 or 10 years which could amount to specifically reviewing anywhere from 3,000 to 8,000 files when reviewing employment matters. Moreover, certain requests seek information on how

52. See *Invention Submission Corp.*, 965 F.2d at 1089.

53. *Id.* at 1090 citing *FTC v. Texaco, Inc.*, 555 F. 2d 862, 882 (D.C. Cir. Feb. 23, 1997).

54. *E.E.O.C. v. Prestolite Battery Div. of Eltra Corp.*, 23 Fed. R. Serv. 2d 587 (decision unreported) 1976 WL 728 at *4 (W.D. Okla. 1976).

55. 1980 WL 1962 (N.D. Ga. Sept. 3, 1980).

56. *Id.* at 3; see also *U.S. Commodity Futures Trading Com'n v. McGraw Hill*, 390 F.Supp.2d 27, 36 (D.C. 2005) (finding an administrative subpoena requesting “all documents” as to particular areas of the business to be unduly burdensome); *Prestolite Battery Div. of Eltra Corp.*, 1976 WL 728 at *4-5 (finding a request for “all sources of information and records” was found to be unduly burdensome).

and whether a loan was refinanced, which would require looking into every paid off loan file to see if there was any payoff request from a bank.

In *Arthur Young & Co.*, the SEC ordered a private investigation into possible violations by SCA services (“SCA”) of the antifraud provisions of the federal securities law. To carry out its investigation, the SEC issued a “broad administrative subpoena” Arthur Young & Company (a certified public accountant firm), and demanded 14 different categories of documents relating to SCA over a six year period, and within these 14 categories, it calls for documents pertaining to 29 individuals and entities to all officers, directors and employees (present and past) of SCA, and to any special engagements, projects or management consulting services, performed by Arthur Young & Company for SCA.⁵⁷ The SEC’s “stated purpose was to inquire into possible infringements of the securities laws by SCA, its officers, directors and employees, or by any other persons.”⁵⁸ Arthur Young & Company complained that “the subpoena imposed an unconscionable burden, in the constitutional as well as the ordinary sense.”⁵⁹ The court ultimately modified the district court’s enforcement order permitting Arthur Young & Company to seek reimbursement for any unduly burdensome requests.

The Document Requests in the CID are overly burdensome as they seek a list and description of all methods of advertisement employed to solicit buyers of its timeshares (Interrogatory 5), each location where Westgate engaged in the offering of timeshares (Interrogatory 6), all forms of compensation paid to personnel for offering and selling timeshares (Interrogatory 8), specific information pertaining to the number and amount of mortgages for timeshares that borrowers refinanced or otherwise obtained loans on the past 10 years

57. *Arthur Young & Co.*, 584 F.2d at 1022.

58. *Id.* at 1024.

59. *Id.* at 1031.

(Interrogatory 15), and all former employees who participated in the offering or sale of deeded timeshares, their employment dates, positions held and, if terminated, reason for such termination (Interrogatory 25). They also request all final versions of policies and procedures, guidelines, scripts, promotional materials and training materials relating to the offer, sale, and servicing of timeshares (Document Request 3) as well as all complaints from consumers relating to Westgate's offering or sale of the deeded timeshares (Document Request 9). Each of the referenced requests is extremely expansive since the offering of the timeshares can be traced back to marketing that does not even reference financing the transactions. The sales start with simply bringing consumer to the properties to visit and marketing plans have distinct differences based on where the property is located and how prospective purchasers are brought in. Similarly, with thousands of employees that may simply work to bring in prospective purchasers (without delving into matters of cost of a timeshare), there would be thousands of employee files to review and describe reasons for termination where employment records are retained in the respective location where an employee worked.

The overly broad nature of the Document Requests and the burden of collecting such information is exacerbated since it is unclear what laws the CFPB contends Westgate has violated. The CID sought information about employment, complaints, and transaction conducted by Westgate over a 4 to 10-year period, regardless of geographic origin, regardless of the identity of the persons involved, and regardless of the legality of the transaction(s) and—most important—*regardless of whether the requests were even directed to investigating financial matters*. Compliance with the CID will be very expensive and disrupt Westgate's normal business operations, requiring many of its management team, officers, and employees from being prevented from working on their day-to-day activities in order to review and search through

company information locating responsive documents, emails, correspondence and transactional data to the CID.

While an agency “is entitled to great freedom in conducting its investigations, it is not at liberty to act unreasonably.”⁶⁰ The CID states nothing that suggest reasonableness into such a reach, and Westgate has been charged with the responsibility of producing what may be hundreds of thousands of documents, requiring thousands of man hours, in what appears to be a fishing expedition into possible (unspecified) violations of the listed Acts. Accordingly, the CID should be set aside or modified, and similar to *Arthur Young & Company*, Westgate should be reimbursed for the unconscionable requests.⁶¹

E. The CFPB’s Investigative Authority Over Westgate Is Limited To Those Matters Involving Financing the Sale of Timeshare Interests and Specific Requests Must Be Tailored Accordingly.⁶²

1. As it offers only purchase money financing, Westgate is subject to CFPB investigative authority only to that extent.

The Dodd-Frank Act provides the CFPB supervisory authority over three classes of nonbank covered persons: (1) participants in certain enumerated consumer financial markets including consumer mortgages; (2) larger participants in other consumer financial markets; and (3) other nonbanks engaging in “conduct that poses risks to consumers with regard to the

60. *Arthur Young & Co.*, 584 F.2d at 1031.

61. *Arthur Young & Co.*, 584 F.2d at 1031 (“[I]n formulating protective conditions for administrative subpoenas, courts may . . . appropriately insist upon a reasonable measure of reimbursement . . . [T]he power to exact reimbursement as the price of enforcement is soundly exercised only when the financial burden of compliance exceeds that which the party ought reasonably be made to shoulder”).

62. On October 15, 2015, Westgate submitted a Letter Request for Modification of a number of aspects of the CID. To the extent that the CFPB agrees to the modifications Westgate has requested, those matters also addressed in this Section E can be deemed moot.

offering or provision of consumer financial products or services.”⁶³ Presumably, the CFPB places Westgate in the third bucket, based on its offering purchase money mortgage financing to its own timeshare purchasers.

The Bureau’s supervisory and enforcement authority, and ergo its investigative authority, is severely circumscribed by the implementing provisions of the CFPB. 12 U.S.C.A. § 5491 (a) limits the Bureau’s view to the “offering and provision of consumer financial products or services under the Federal consumer financial laws.” The familiar definition of “financial product or service” is found § 5481(15), while the equally familiar array of “Federal consumer laws” is enumerated in § 5481(12). Section 5511(b)’s general statement emphasizes the Bureau’s limited and focused objectives – “to exercise its authorities under the Federal consumer financial law ... *with respect to consumer financial products and services*” The bright line between where the Bureau can go and where it cannot go in this case is drawn by § 5517(a)(1):

The Bureau may not exercise any rulemaking, supervisory, enforcement or other authority ... with respect to ... a merchant, retailer, or seller of any nonfinancial good or service and is engaged in the sale or brokerage of such nonfinancial good or service ...

and by § 5517(b)(1):

... the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority ... with respect to a person that is licensed or registered as a real estate broker or real estate agent, in accordance with State law

Westgate’s hospitality, travel and vacation products and services, especially its branded deeded real estate timeshare interests, are classic nonfinancial goods and services, placing these aspects of Westgate’s business on the far side of the regulatory bright line these statutes draw. The carve-outs to these two otherwise absolute statutory proscriptions are carefully crafted to restrict the Bureau’s scrutiny only to a consumer financial product or service that may be coupled with

63 § 12 U.S.C.A. 5514.

the nonfinancial good or service or the real estate brokerage activities which themselves remain wholly outside the Bureau’s jurisdiction:

§ 5517(a)(1): The Bureau may not exercise any rulemaking, supervisory, enforcement or other authority ... with respect to ... a merchant, retailer, or seller of any nonfinancial good or service and is engaged in the sale or brokerage of such nonfinancial good or service, *except to the extent that such person is engaged in offering or providing any consumer financial product or service or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under Subtitle F or H,*

and

§ 5517(b)(2): The Bureau may exercise rulemaking, supervisory, enforcement, or another authority ... with respect to a person described in [§ 5517(b)(1)] when such person is –

- (A) engaged in an activity of offering or providing any consumer financial product or service, *except that the Bureau may exercise such authority only with respect to that activity;* or
- (B) otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H, *but the Bureau may exercise such authority only with respect to that law.*

The latter section of the Code, especially, makes clear that the Bureau can look no further than the consumer financial product or service over which it already had authority and that Congress would not interfere with areas not already well defined as “consumer *financial* goods or services”.

The arcane way in which the CFPA creates tiny niches to which the Bureau’s enforcement powers extend is best exemplified, as pertinent to Westgate, by § 5517(a)(2)(A)(i), which begins by reiterating § 5517(a)(1)’s broad safe harbor for nonfinancial goods and services, then carving out narrowly defined exceptions which permit the Bureau to continue to exercise regulatory authority over those consumer financial goods and services *over which it already has regulatory authority under the enumerated Federal consumer laws:*

... the Bureau may *not* exercise any rulemaking, supervisory, enforcement, or other authority ... with respect to a merchant, retailer, or seller of nonfinancial goods or services only to the extent that such person –

- (i) extends credit directly to a consumer, in a case in which the good or service being provided is not itself a consumer financial product or service (other than credit described in this subparagraph), ***exclusively for the purpose of enabling that consumer to purchase such nonfinancial good or service directly from the merchant, retailer, or seller,***

which, at least as it pertains to Westgate, is then qualified by § 1027(a)(2)(B)(iii) which reinstates but expressly trims the Bureau's authority to the credit transaction only, keeping the rest of the transaction on the other side of the bright line:

[§ 1027(a)(2)(A)] does not apply ***to any credit transaction or collection of debt*** ... arising from a transaction described in [§ 1027(a)(2)(A)] –

* * *

- (iii) in which the merchant, retailer, or seller of nonfinancial goods or services regularly extends credit and the credit is subject to a finance charge.

Westgate offers its customers purchase money mortgages, on which it collects interest. That credit transaction—but not the sales process or the actual conveyance of real estate—falls within the Bureau's purview. It is clear that nothing endows the Bureau enforcement authority over the nonfinancial goods and services such as the deeded real estate timeshare interests that Westgate sells, and its construction, marketing, sales and management of them, simply because these sales are coupled with consumer financial products or services over which the Bureau (or its predecessors) had historically exercised regulatory authority. Indeed, virtually every aspect of the process by which Westgate offers nonfinancial goods and services (*i.e.* deeded real estate timeshare interests, hospitality, travel and vacation products and services) is extensively regulated by prudential regulators in each jurisdiction in which Westgate does business (not only where its resorts are located). That comprehensive state regulatory oversight by prudential state

agencies trumps the Bureau’s interest in nonfinancial goods and services, as Congress specifically did not have the CFPA pre-empt state law as to these matters.⁶⁴

Based on the strict divide between the consumer financial products and services over which the CFPB has license to investigate and those non-financial matters over which it does not have such delegated authority, the discovery requests must be modified to limit the investigation to the purchase money mortgages that Westgate offers and services. Such matters that must be modified and carved out pertain to the marketing, offer and sale of deeded timeshare interests. Moreover, Westgate objects to Definition O (purporting to define “Westgate Resorts”, “Westgate”, “You” or “Your”) as encompassing persons and/or entities over which Westgate does not exert or maintain control. Further, in many instances, the applicable time period is too expansive for the company to be required to manually review its thousands and even hundreds of thousands of records.

2. The CFPB doesn’t have the authority to investigate Westgate’s solicitation of a Westgate affinity MasterCard where Westgate neither offers nor extends credit of its own to consumers.

Interrogatories 18 through 21 inquire into open-end credit plans, including credit cards that Westgate offered, arranged for or sold. While the CFPB has the authority to investigate matters pertaining to open-end credit, the coverage of the part, as set forth at 12 CFR § 1026.1(c), notes that it applies to “each individual or business that offers or extends credit” when the following four conditions are met:

- i. The credit is offered or extended to consumers;
- ii. The offering or extension of credit is done regularly;
- iii. The credit is subject to a finance charge or is payable by a written agreement in more than four installments; and

64. 12 U.S.C.A. § 5552.

iv. The credit is primarily for personal, family, or household purposes.

Notably, the regulations do not define what it means to “offer” credit. However, based on a reading of the entirety of 12 CFR § 1026.1(c), it is apparent that simply providing an application for a credit card where credit is actually extended by a third party would not impose the burdens on a company to share every instance where it supplied the application or where a consumer signed up.⁶⁵ Such would be similar to a consumer sitting on an American Airlines flight and filling out a credit card application. The airline is not extending the credit and does not determine who qualifies. Indeed, Westgate is simply an intermediary that presents the option to a consumer to sign up for a credit card. Westgate does not determine whether or not the consumer will qualify for the offer. Accordingly, it does not fall within the purview of the CFPB, where it neither offers nor extends its own credit.

3. Various requests for documents and interrogatories must be modified to limit the information that they seek.

The CFPA strictly limits the CFPB’s authority to investigate matters outside of those specifically pertaining to financing transactions. While Westgate and the CFPB, during the October 8 meet and confer, discussed ways to tailor the scope of the requests propounded on the company, and on October 15, 2015 Westgate submitted its Letter Request for Modification, the CFPB has not yet modified the requests. As set forth below, the CFPB did provide information on what it is looking for in the responses, but Westgate must present those matters through this petition to be modified since it has not yet received a modified CID.

65. 12 CFR § 1026.1(c) 3 refers to providing applications for home-equity plans to consumers. It is telling that the provision did not use the phrase “offer home-equity plans to consumers”. Similarly, 12 CFR § 1026.1(c) 1 could have referenced providing applications for credit, but chose, instead, to refer to use the word “offer”. Accordingly, offering credit is separate and unique from providing an application for credit.

Interrogatories:

Interrogatory 5 requests a list and description of each method of advertisement that the Company employed to solicit buyers for nearly 30 timeshare resorts and sales locations. This request asks for the specifics of each street solicitation, phone call, electronic mail, published advertising, online advertisement and direct mail Westgate has used over the past four (4) years.

Aside from not relating to consumer financial products about which you will note Westgate's continuing objection,⁶⁶ we explained that researching every method of advertising in specific terms would be unduly burdensome where advertisements evolve over time. There are five (5) main avenues of advertising: (1) advertising accommodations as part of a vacation package to get consumers to the property where they will hopefully enjoy their stay enough to be interested in purchasing a unit; (2) reaching out to existing owners or friends of current owners; (3) off-premises contact at 1,000-2,000 locations (it varies dramatically by geographic locale and season) which include restaurants, hotels, gift shops, and kiosks in shopping malls to get consumers to tour (attend as sales presentation); (4) outside lead generators; and, (5) internet marketing.

The Bureau confirmed that the request was not intended to launch a Company-wide inquiry and merely seeks a description of the marketing channels. Without a waiver of the Company's jurisdictional objection the Company will respond with a general summary of its marketing channels. Please confirm that this is acceptable.

Interrogatories 7 through 9 seek information pertaining to the personnel engaged in the offering and sale of the timeshares, including, but not limited to, employees, independent

⁶⁶ I do not recall whether it was mentioned during our conversation, however, no advertisement nor marketing material that the Company uses provides pricing, let alone financing terms.

contractors, managers, supervisors, loan officers and sales representatives, as well as how each is compensated and their state and federal licenses.

We explained that there are three types of individuals who work in marketing and sales: (1) solicitors/brokers who book tours and get consumers to the resort or sales center. In-house solicitors/brokers are salaried whereas outside brokers receive compensation based upon volume or commissions; (2) brokers/sales agents who present the product to the customer and are paid commissions based entirely on the sale of real estate and not on financing; and (3) sales employees who are not yet licensed and receive a salary. Aside from the jurisdictional issues (a real estate timeshare interest is not, itself, a consumer financial product or service), we noted that it would be burdensome to investigate every financial arrangement and license held by the thousands of individuals who would fall within the expansive category of offering or selling the timeshares.⁶⁷ We understand from our call that the CFPB is simply seeking a background understanding and that the Company need not provide the extensive detail that these requests seeming seek that would require researching each of the many thousands of individuals encompassed by the request. Without waiving its jurisdictional objections, the Company will generally outline the manner in which personnel are compensated and licensed. Please confirm that this is acceptable.

Interrogatory 11 requests an explanation of the differences between the rights of a consumer who purchased a timeshare directly from the Company as compared to a consumer who purchased it from another party.

⁶⁷ After all, as we explained, the Company employs greeters who are simply at tour locations to welcome visitors.

While the Company objects to the interrogatory on the basis of lack of jurisdiction since the rights of owners of the real estate timeshare interests are ownership rights governed by a deed which is, itself, governed by the state approved regime documents. However, without waiving its jurisdictional objection, the Company will explain the limited differences that exist. As we noted, the Company has the first right of refusal if an owner tries selling a unit that is subject to a mortgage. However, the Company does not offer any resale financing. In addition there are a few differences in the reservation windows for resale buyers versus consumers who purchase directly from the developer.

Interrogatory 14 requests a list and description of all documents provided to consumers in the course of the sale of a timeshare, including a description of when and how the Company provided a copy of the completed contracts for the purchase and sale, mortgage agreement and other relevant disclosures to the consumer.

To the extent that the request seeks marketing, advertising or promotional documents or the like which may have been provided to the consumer in an effort to have the consumer tour the facility and purchase a timeshare, the request is overly broad. Without waiving its continuing jurisdictional objection, the Company will respond and provide copies of exemplars applicable form documents approved by the state regulatory agencies in each state in which Westgate markets and sells.

Interrogatory 15 seeks information concerning the total number of mortgages for timeshares that borrowers refinanced over the last 10 years, by year, and also requests the total number of mortgages that the Company originated for timeshares during the same time period.

While such a request may seek information within the ambit of the CFPB's authority under the CFPB (Westgate preserves its continuing objection), the 10 year period far exceeds a

reasonable timeframe or any time period that the CFPB may have, if it has any, regulatory authority. The Company does not offer refinancing (although it is willing to modify loan terms if someone falls behind on his or her payments, but no new or amended loan documents are signed or recorded). It would be an onerous task and require someone to look through thousands of account records to locate checks that paid off purchase money mortgages. Even then, it would be difficult, and in most cases impossible, to discern where funds came from that were used to pay off the remaining balance on a loan. It could be that a check written from a consumer's account came from a home equity line of credit or was a private loan that must be paid off separately. It may have been from funds taken from an owner's savings. Westgate cannot conceivably ascertain this. Westgate, during that time period, had thousands of pay-offs and cannot possibly differentiate between those that were "refinanced" and those that were paid in some other fashion. As for the number of loans that the Company originated during the time period, it never originated loans on behalf of anyone or any entity but itself. Accordingly, we request modification of this request to simply allow Westgate to respond that reviewing its files would be burdensome and even then it would be difficult if not impossible to determine whether a refinancing occurred. The CFPB said that it would get back to us with what specifically it would want from the Company in response to Interrogatory 15 given the expansive timeframe and necessity to manually parse through all of the consumer files to see how payoffs were completed.

Interrogatory 16 seeks information concerning how the mortgages for timeshares were funded and the total amount funded, total number funded as well as the timeframe.

We explained that all timeshare mortgages are purchase money mortgages which are not separately or independently funded. Westgate, as the seller, conveys its property to its purchaser in exchange for which the purchaser agrees to make periodic payments of principal and interest;

that is the consideration for the mortgage transaction. This extremely standard form of purchase money financing is widely accepted and used for generations. We will confirm this information.

Interrogatory 17 seeks information concerning whether the Company itself held mortgages for the timeshares, or whether those mortgages were assigned or sold to another party. Correspondingly, it seeks the name of each Company entity that held mortgages, the total amount of the mortgages held by each entity, and the number of mortgages held by each entity. It also wanted the Company to identify all parties to whom the Company assigned or sold mortgages, the total amount of the mortgages assigned or sold to each party, and the number of the mortgages assigned or sold to each party.

We explained that the Company is the mortgagee on all of its transactions, but may use the mortgages as collateral while remaining responsible for servicing the loans. If there are any issues in collecting on a loan, the Company trades out the particular loan that is part of collateral and replaces it with a performing loan. Westgate also securitizes loans which requires that the Company open itself up to close scrutiny by other federal and state prudential regulatory authorities to ensure that it has properly loaned funds to consumers. The Company objects to the requested information as it has securitized many mortgages and used mortgages as collateral thousands of times over the years. Additionally, since the Company always remains the mortgagee and services all purchase money mortgages, the financial arrangements that the Company has with others relating to the purchase money mortgages are not consumer financial products or services and do not implicate any of the enumerated Federal consumer laws. Accordingly, the Company objects to those aspects of the request. With that said, the CFPB advised that it simply wants to understand what the general process for making loans and the

Company agreed to generally describe such loan process. Please confirm that the interrogatory will be modified to seek such limited information.

Interrogatories 18 through 21 inquire into the open end credit plans, including credit cards, that the Company offered, arranged for or sold.

Based on our initial explanation of how the Company offers a Company branded credit card through Alliance Data and also works with the “Bill Me Later”/PayPal Credit, the CFPB agreed to accept a general description of products. Please confirm that the interrogatory will be modified to seek such limited information.

Interrogatories 22 and 23 inquire into the card, code, and other device that the Company offered or provided to consumers in the course of offering or selling timeshares.

Based on our initial explanations, the parties agreed that the Company will describe the preloaded cards used as premium incentives, and the Company branded Cruise and Travel Collection membership with \$500-\$1,000 discount cards. The CFPB wants to know if all purchasers get them and wants the Company to explain the characteristics of each card. Please confirm that the interrogatory will be modified to seek such limited information.

Interrogatory 25 requests that the Company identify all former employees who participated in the offering or sale of timeshares and left the company during the past 4 years, including their employment dates, location of employment, positions held and reason for termination.

Aside from our continuing jurisdictional objection, the overwhelming majority of these individuals are not involved in offering financial products or services. As we explained, this request is overbroad and encompasses thousands of individuals. The Company has seasonal marketing, which intentionally includes growth and contraction of its marketing team. Moreover,

while the Company codes the reasons for termination of employees, it is done on a more micro level in each location where the employee worked, requiring coordinating with each separate property. Pulling records of departed employees or independent contractors would potentially involve 3,000-8,000 individuals, the substantial majority of which have nothing to do with consumer financial products. As we further explained, there are sales managers who do discuss financing as well as agents involved in the execution of financing documents numbering in the hundreds rather than the thousands, and we are willing to provide information relating to these individuals. As we explained, while the Company's sales agents tour the property with customers they are not trained on matters relating to financing and are not involved in offering financing.. Accordingly, the Company objects, as unduly burdensome, to having to locate the records of the thousands of former sales agents who likely never discussed or offered financing. The Company requests that the interrogatory be modified to seek the requested information pertaining to managers and closing agents are involved in financing discussions or in the document execution process.

Interrogatory 26 requests that the Company identify all investigations, government or private litigation, or administrative proceedings in which the Company is a named defendant, including pending or settled/resolved matters.

The Company explained that it deals with many types of disputed or contested matters, most of which are not related to financial services. For example, since it has thousands of employees it has dealt with the full panoply of employee and labor disputes: EEOC, minimum wage, workers compensation disputes, *etc.* And since it has hosted hundreds of thousands of guests at its resorts, the Company has dealt with every manor of hospitality related claim. These matters are as far afield of the CFPB's jurisdiction as can be imagined. Accordingly, the

Company requests that the interrogatory be more narrowly tailored to matters relating to consumer financial products and services. Even then, we noted that there are law firms/companies that are notorious for promising that for a fee of several thousand dollars they will get a timeshare owner out of an otherwise valid timeshare transaction. We expect that the CFPB has seen almost generic renditions of documents of this sort originating from these firms. Please confirm that the interrogatory will be modified to seek such limited information pertaining to financial products/services.

Requests for Documents:

Request for Documents 1 seeks exemplars of contracts that demonstrate differences described in the rights of consumers who purchase directly from the Company versus a resale from a third party.

The Company will provide exemplars of documents the consumers sign.

Request for Documents 2 seek exemplars of each document provided to consumers during the offering and sale of timeshares.

We explained that depending on the laws of the state governing the transaction, the Company may not have provided certain documents in printed form, but rather on a disk. We noted that we would work to place all of the documents to be reviewed electronically, but that we will provide a portfolio as a consumer would receive it, too. The CFPB also noted that they would like to know which documents are provided on a c.d. versus in tangible form and which documents are contained within the portfolio specifically.

Request for Documents 3 seeks all final versions policies and procedures, guidelines, scripts, promotional materials, and training materials relating to the offering, sale, and servicing of the timeshare.

The Company objects to this request to the extent that the documents sought do not pertain to consumer financial products and services. Likewise, many of these documents inevitably evolve over time and “final” is not generally associated with these type of materials. Requiring the Company to locate every version of such documents that may, for a time, have been “final” for each of its projects would be unduly burdensome.

The Company does not advertise how it finances the purchases of the timeshare or even that any financing is available. Indeed, any general marketing materials would not mention pricing or financing. Training materials exist at all levels of the company for sales and marketing; however, the Company objects to providing training materials to the extent such materials do not involve the offer of a consumer financial product. Further, such training materials are confidential and proprietary and to the extent provided must be held under confidentiality and, for instance, excluded from a possible FOIA request. The Company requests a modification to produce all final versions policies and procedures, guidelines, scripts, promotional materials, and training materials relating to the offering and servicing of consumer financial products.

Request for Documents 9 seeks all complaints from consumers relating to the Company’s offering or sale of timeshares and seeks the complaint text and any documents that the consumer provided in connection with the complaint.

This request is overbroad to the extent it seeks complaints not related to consumer financial products and services. The Company has no objection to responding but will limit production to documents related to consumer financial products as opposed to and consistent with Westgate’s continuing objection complaints relating to the marketing or sale of deeded real estate. The Company proposes to produce only those complaints that relate to the offering or

sale of the consumer financing aspect of the Company's business and requests modification of this CID to limit the request in this regard.

III. CONCLUSION

Westgate is not seeking to avoid its obligations or even avoid demonstrating to the CFPB that Westgate is and always has been compliant with any rule or regulation it may be subject to follow. However, Westgate is simply asking that any such investigation be reasonable, narrowly-tailored and limited in scope so as to address only those violations of law the CFPB actually believes Westgate is guilty of committing and limited to financial products and services that it offers. As drafted, the CID fails in that regard and does nothing more than impose hefty obligations, in many instances unrelated to financial products or services (i.e. the purchase money mortgages that it provides and services).

The CID should be set aside, or, at the very least, modified to provide Westgate with a proper and specific notification of purpose and requests for documents and information confined within the contours of that particular purpose.

STATEMENT PURSUANT TO RULE 1080.6(e)(1)

Pursuant to Rule 1080.6(e)(1) of the Rules Relating to Investigations, the undersigned counsel hereby states that, prior to the filing of this Petition, the undersigned attempted to engage in good faith efforts to resolve the issues raised in this Petition but, as of the date of the filing of this Petition, has been unable to reach any agreement with the CFPB.⁶⁸ Specifically, the undersigned immediately called CFPB Enforcement Attorney, Joshua Orenstein, to coordinate a

68. The parties were able to tentatively agree to some matters during the October 8 meet and confer, as described more specifically above, but we have not yet received modifications in writing. More specific objections may be mandated in the event the CID is not set aside as requested, to the extent Westgate is unable to provide the requested documents, does not have the technical ability to search for the documents or other more specific objections that may be appropriate in response to a particular Interrogatory or Document Request.

