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CONFIDENTIAL TREATMENT REQUESTED

May 16, 2016

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Via Email and Federal Express

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Re: Petition to Set Aside or Modify the Civil Investigative Demand Issued to Zero Parallel[1]

Dear Ms. Jackson and Mr. Ehrlich:

This firm represents Zero Parallel, LLC ("Petitioner" or "Company") in connection with the Civil Investigative Demand ("CID") issued to it by the Consumer Financial Protection Bureau ("Bureau" or "CFPB"). Pursuant to §1052(f) of the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank Act"), 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(d), we respectfully petition the Bureau to set aside, or, in the alternative, to modify the CID issued to Petitioner.

By the accompanying letter, we formally request confidential treatment of this Petition pursuant to 12 C.F.R. §§ 1080.6(g) and 1080.14, and for advance notice, pursuant to 12 C.F.R. § 1070.46(b), should the Bureau determine that it will release the Petition, CID, and any other response thereto, and any other communications related to the inquiry, including the existence of

[1] This Petition submitted today and any other communications relating to this inquiry constitute personal, privileged, sensitive and proprietary business information of Petitioner and are intended to be confidential. All such materials are intended only for review by Bureau staff. Accordingly, we request that they receive the highest level of protection for confidentiality available under the Bureau's Rules of Practice, 12 C.F.R. Pts. 1070 and 1080; the Freedom of Information Act, 5 U.S.C. § 552, 12 C.F.R. § 1070.10-1070.23; the Consumer Financial Protection Act, 12 U.S.C. § 5512(c)(6); and any other applicable statutes, regulations, and rules.

the inquiry. This request for confidentiality is not a waiver of any other protection from disclosure or confidential treatment afforded by law. A redacted copy of this Petition, which redacts references to the identity of the Petitioner and third party entities, is enclosed.

INTRODUCTION

As set forth below, the Bureau's issuance of the CID under the circumstances constitutes an improper use of its investigatory authority. Moreover, the stated purposes of the investigation as set forth in the CID itself, which are vague and generic, are inadequate in light of the significant amount of information, testimony, and documents the Bureau already has collected about lead generation for payday loans and the Petitioner specifically.

The CID issued to Petitioner appears to have been issued for the sole purpose of punishing the Company's owner, Mr. David Gasparyan, for not acquiescing to the Bureau's unreasonable demands during settlement negotiations in a separate matter stemming from his prior employment. The Bureau—in fact the same enforcement attorneys—already has brought an enforcement action against the Company's owner, and is now seeking to use the CID process to freely gather evidence without any encumbrances and to increase the Bureau's leverage in that litigation. There simply is no other way to explain the CID issued to Petitioner, in particular given that the injunctive relief the Bureau is seeking in the pending litigation would apply to Mr. Gasparyan's lead generation activities at the Company. The use of the Bureau's information gathering authority in these circumstances is improper and constitutes an abuse of power.

As the Bureau is well aware and as discussed below, Mr. Gasparyan has been more than willing to engage in a dialogue with the Bureau and provide information and cooperation regarding the Bureau's investigations. The only exception to this, until now, has been the Bureau's CID demanding *all* information regarding Mr. Gasparyan's personal assets as well as the personal assets of his wife and family. The CID issued to Petitioner here is unduly onerous and burdensome and has not been tailored to seek particularized categories of documents or information as would be required under the Federal Rules of Civil Procedure ("FRCP"). Indeed, viewed from the responding party's perspective, as the law requires, the CID is overwhelmingly broad and simply asks for every document or thing as well as testimony.

We are of course more than willing to continue to meet and confer regarding these issues to reach a resolution. As the Bureau has seen in the past, Mr. Gasparyan is willing to invest significant time, energy, and capital into resolving these types of issues and would welcome an opportunity for resolution of this too. However, these circumstances raise significant procedural due process concerns. As such, Petitioner is left with no choice but to file this Petition.

RELEVANT BACKGROUND

Between 2005 and mid-2014, Mr. Gasparyan operated D and D Marketing dba T3Leads ("T3"), a company engaged in online lead generation. He was responsible for T3's marketing activities and served as its Chief Marketing Officer.

On or about September 27, 2013, the Bureau issued a CID to T3 seeking information and documentation relating to its operations and, specifically, its purchase and sale of payday loan leads. T3, under Mr. Gasparyan, fully cooperated with the investigation and made several productions to the Bureau. The last production Mr. Gasparyan was involved in preparing was dated February 3, 2014. Several months later, as a result of a fall out between Mr. Gasparyan and Grigor and Marina Demirchyan, the individuals that now purport to own T3, Mr. Gasparyan was involuntarily shut out of the company. The parties have since been engaged in litigation over the matter.

Since that time, Mr. Gasparyan has not directly interacted with the Demirchyans and has had absolutely no involvement in or knowledge of T3's operations.

On or about November 4, 2015, completely out of the blue, Mr. Gasparyan received a CID from the Bureau requesting information and documentation relating to his and his family's personal finances. Mr. Gasparyan, through counsel, attempted to understand why the Bureau was seeking such personal information. Staff informed us that the requests pertained to the ongoing investigation of T3 but would not disclose any information about the status of the investigation, whether Mr. Gasparyan was a target, or what concerns the Bureau had with T3 or Mr. Gasparyan. Several weeks later, on December 17, the Bureau filed a lawsuit against T3 in federal district court, and, a few days after that, staff notified Mr. Gasparyan that they intended to recommend that the Bureau take action against him in connection with his involvement in the operation of T3.[2]

Following the submission of our NORA response on January 19, 2016, [redacted]

[2] On December 22, 2015 we received notice that the CID issued to Mr. Gasparyan was withdrawn.

[redacted]

a. [redacted]

- [redacted]

[redacted]

[redacted]

Four days later, the same enforcement attorneys working on the T3 case served a CID to Petitioner with the stated purpose 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 . . . . [and] whether Bureau action to obtain legal or equitable relief would be in the public interest.

[3] An Internet-based lender may be subject to regulation under various laws, and potentially, by multiple jurisdictions. Generally, an Internet-based consumer lending program will be subject to federal and state regulation or tribal law and may, in certain instances, be able to rely upon federal or tribal law to preempt state laws that would otherwise apply. As a result, federal or tribal laws governing consumer lending activities may preempt state laws that impose usury caps and/or licensing requirements.

The CID includes five interrogatories, two requests for reports, and fifteen document requests, covering all aspects of Petitioner's business. It also requires Petitioner to designate a company representative to appear and give oral testimony regarding ten designated topics covering everything from the Company's ownership and organizational structure, the products and services offered by the Company, the Company's policies and procedures, vetting and oversight of affiliates and lead purchasers, and "any information produced in response to this CID."

THE CID IS OBJECTIONABLE

Under the long-standing *Morton Salt* standard, in evaluating a CID, courts look at whether (1) the agency has the authority to make the inquiry and to proceed with the investigation, (2) the information sought is reasonably relevant, and (3) the demand is not too indefinite. *United States v. Morton Salt, Co.*, 338 U.S. 632, 652 (1950); *United States v. Powell*, 379 U.S. 48, 57–58 (1964); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977); *CFPB v. Accrediting Council for Independent Colleges and Schools*, Case 1:15-cv-01838 (D.D.C. April 21, 2016). For the reasons set forth below, the CID issued to Petitioner does not meet prongs 1 or 3 of this standard.

A. The Bureau Does Not Have Authority to Issue the CID Because Petitioner is Neither a Covered Person Nor a Service Provider

The CFPB was established in 2010 by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("CFPA"), which tasked the CFPB with regulating the offering and provision of consumer financial products or services under the federal consumer financial laws. 12 U.S.C. § 5491(a). To that end, the CFPB is authorized to take action "to prevent a covered person or a service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." *Id.* § 5531(a).

Petitioner does not engage in offering or providing a consumer financial product or service and is thus not a "covered person." 12 U.S.C. § 5481(6). It is a business-to-business marketing company that operates an affiliate network, or marketplace, that connects affiliates and lenders.[4]

[4] https://www.zeroparallel.com/.

Nor is it a service provider to 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 "a support of a type provided to businesses generally or a similar ministerial service," or providing "time or space for an advertisement*." 12 U.S.C. § 5481(26) (emphasis added).

The Bureau appears to believe that it has authority over any company that transacts business with a financial institution. This expansive reading of its authority contradicts the express exclusions written into the statute and Congress's intent when granting such authority. Moreover, the CFPB's broad reading of "service provider" runs the risk of ensnaring companies that provide a host of support services, especially those providing highly technical services, without advanced notice and sufficient due process.

To begin with, Petitioner does not design, operate, or maintain the loan products offered to consumers by the lenders participating in the marketplace. In fact, Petitioner has no knowledge of the specific loan terms offered to consumers and has no involvement in designing or applying the underwriting criteria, or in originating and servicing of these loans. Nor does it process payments or other transactions in connection with those loans.

As the operator of the platform connecting affiliates/lead generators and lead buyers, Petitioner's services clearly constitute "support" services "of a type provided to businesses generally," as contemplated by the exemption to the definition of service provider in the CFPA. Petitioner does not directly interact with consumers. Importantly, it also does not engage in activities that are core financial functions, such as underwriting, credit reporting, or collecting payments from consumers. Instead, its services are purely supportive: giving lenders one more way to identify prospective customers. Moreover, the company's services are product neutral, meaning Petitioner could provide the exact same services to other online merchants selling different products and services, and thus are the type of services that are provided to businesses generally.

The meaning of "service provider" under the CFPA and, in particular, what constitutes "ministerial" or "support" services "of a type provided to business generally," has only been considered by a couple of courts. In *CFPB v. Universal Debt & Payment Solutions, LLC*, the district court determined that an independent sales organization that marketed a payment processor's services to the perpetrators of an alleged debt-collection scheme was a service

provider.[5] In dismissing defendant Pathfinder Payment Solutions, Inc.'s arguments that it only provided "ministerial" or "support" services "of a type provided to business generally," the court looked at the company's heavy involvement in the underwriting and screening of merchants and its role in monitoring risk on behalf of the payment processor.

Similarly, in *CFPB v. ITT Educational Services, Inc.*, the court found that ITT qualified as a service provider under the CFPA because, according to the CFPB's pleading, ITT was "heavily involved in operating and maintaining the loan program" of the third-party originators where it pre-qualified students for the loans, developed the underwriting criteria, paid credit union fees on behalf of the student lenders, and provided stop-loss guarantee to the lenders.[6]

Unlike the companies in the Universal Debt and ITT cases, however, Petitioner does not support the lenders' core business function—lending. Nor does it exercise judgment or discretion in the operation of the matching platform. It programs the lenders' instructions regarding what types of leads they want to be offered and presents the leads to them. It also is important to note that these lenders market their products in a variety of ways and purchase leads from multiple sources. In other words, the Petitioner's marketplace is part of a larger marketing strategy employed by lenders and not the exclusive source of the lenders' customers.

This reading of the term "service provider" is consistent with the legislative history of the CFPA. When granting the CFPB authority to regulate "service providers," Congress intended to ensure that financial institutions did not shroud their consumer financial operations from scrutiny by outsourcing core functions to third parties. For example, the Senate Committee on Banking, Housing, and Urban Affairs' report recommending passage of the CFPA explained the limited reach of the term:

> Paragraph 24 defines the term "service provider" and is designed to create authority that is generally comparable to the authority that federal banking regulators have under the Bank Service Company Act. It is included in this Act in order to ensure that material outsourced services by a covered person in connection with the offering or provision of a consumer financial product or service are subject to the regulation and supervision of the CFPB for the activities that could be done directly by the covered person. *Without such authority, covered persons could remove many*

[5] Case No. 1:15-CV-00859-RWS (N.D. Ga. Sept. 1, 2015) (order denying defendants Pathfinder Payment Solutions, Inc., Global Payment, Inc., and Frontline Processing Corp.'s motions to dismiss).

[6] Case No. 1:14-cv-00292-SEB-TAB, 2015 WL 1013508, at *24 (S.D. Ind. Mar. 6, 2015).

> *important functions that bear directly on consumers from the CFPB's oversight simply by contracting those functions out to service providers, thereby escaping the jurisdiction of the CFPB and leading to significant regulatory arbitrage.* Companies that merely provide general support or ministerial services to a broad range of businesses, or space for advertising either in print or in an electronic medium, are not intended to be defined as service providers for the purposes of this Act.

S. Rept. No. 111-176, 160–61 (2010) (emphasis added). Importantly, the Bank Service Company Act, upon which this provision of the CFPA is modeled, only permits federal banking agencies to regulate third parties with whom banks contract to *perform core banking functions* expressly enumerated in the statute (marketing and advertising services not being one of those enumerated functions). 12 U.S.C. § 1867(c); 12 C.F.R. § 225.28.

Although the Notification of Purpose suggests that the Bureau is investigating whether "unnamed persons" are violating consumer financial laws in connection with their marketing, selling, or collection of payday loans, the CID requests themselves do not seek such information. Rather, they are focused on Petitioner's business practices, which are limited to lead generation. These business practices are wholly unrelated to the selling or collection of payday loans, and only marginally related to the marketing of such loans. And, for the reasons set forth above, these marketing services are not material services to a covered person in connection with the offering of a financial product or service.

Because Petitioner is neither a covered person nor a service provider, the Bureau does not have jurisdiction over it, and therefore it does not have the authority to bring an enforcement action against it. As such, the CID itself is improper.

B. The CID Does Not Meaningfully Advise Petitioner of the Conduct Under Investigation

12 U.S.C. § 5562(c) requires a CID to "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of the law applicable to such violation." This statutory requirement is necessary so the respondent is able to understand and respond to the CID. The CID issued to Petitioner fails to state the nature of the conduct at issue. Rather, the CID elusively states that the purpose of the 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 the CFPA, Fair Credit Reporting Act and Regulation V, the Truth in Lending Act, the Electronic

Fund Transfer Act and Regulation E, the Telemarketing and Consume Fraud and Abuse Prevention Act and the Telemarketing Sales Rule, *or any other consumer financial law*" (emphasis added).

This Notification of Purpose is too indefinite and broad given the history of this matter, outlined above. The Bureau has been investigating lead generation in the payday space for years, as evidenced by the T3 lawsuits and the CIDs issued to the Selling Source, among others. More specifically, it has been investigating and pursuing Mr. Gasparyan individually and his lead generation activities since at least November 2015.

The CID issued to Petitioner was not issued in a vacuum, and should not be scrutinized in one either. At this point in time, the CFPB has amassed significant documentation, information, testimony, and data in connection with its ongoing investigation of lead generators and other "unnamed persons" involved in marketing, selling, or collecting payday loans. Using this information, it has methodically pursued an enforcement strategy targeting various participants in the payday loan ecosystem, including marketers. It also has collected significant information about Petitioner. During our settlement negotiations relating to the T3 matter, we provided staff information about Zero Parallel and answered staff's questions about its practices.

Accordingly, the Bureau should be able to specify in the Notification of Purpose the nature of the conduct it is investigating and therefore continued reliance on the generic, unspecific "catch-all" language in the Notification of Purpose is inadequate.

C. The Use of a CID To Continue to Collect Evidence At This Stage Is Improper Use of Bureau's Investigatory Powers

It is clear that the Bureau has placed a target on Mr. Gasparyan's back.

Under the Dodd-Frank Act, the Bureau is allowed to use CIDs "before the institution of any proceedings under the Federal consumer financial law." 12 U.S.C. § 5562(c)(1). The Bureau already has initiated a proceeding against Petitioner's owner in connection with his involvement at T3.

Although it is not *per se* improper for the federal government to initiate parallel proceedings against the same or related persons, such actions are objectionable where there are substantial prejudices to the rights of the parties involved. *United States v. Kordel*, 397 U.S. 1 (1970); *United States v. Stringer*, 535 F.3d 929 (9th Cir. 2008); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376-77 (D.C. Cir. 1980) (en banc). When determining whether it appropriate to

quash a CID or stay civil proceedings in the face of criminal proceedings, courts consider, among other factors, the burden on the defendant, including whether the civil case would permit the government to engage in broad discovery that it otherwise would not be entitled to in the criminal proceeding. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 325 (9th Cir.1995), *cert. denied*, 516 U.S. 827 (1995).

Other factors include agency bad faith, discovery abuse, and malicious government tactics. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987) (citing *Dresser*, 628 F.2d at 1375). The Supreme Court has recognized that a court should refuse to enforce a government subpoena that was issued for an improper purpose, "such as to harass the . . . [subject of the investigation] or put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Powell*, 379 U.S. at 58. And, in *Kordel*, the Supreme Court made clear that bringing an action against a person in bad faith could violate due process. *Kordel* at 11. For example, district courts have suppressed evidence or dismissed indictments on due process grounds where the government made affirmative misrepresentations or conducted a civil investigation solely for purposes of advancing a criminal case. *See, e.g., United States. v. Tweel, 550 F.2d 297 (5th Cir. 1977); United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. Apr. 15, 2005); *United States v. Rand*, 308 F. Supp. 1231, 1233, 1237 (N.D. Ohio 1970).

Although that facts here do not involve a parallel civil and criminal proceeding, the use of the investigatory process to compel testimony and the production of materials under oath from Petitioner while simultaneously pursing an enforcement action in federal court against Petitioner's owner in connection with ostensibly similar businesses presents the same issues. *First*, the Bureau's rules governing the investigatory process are significantly more liberal in favor of the Bureau than the federal rules of procedure that govern the T3-related litigation. Therefore, regardless of whether that is the Bureau's intent, the potential for that outcome remains the same. *Second*, at this stage, we do not know what motivated the Bureau to issue the CID to Petitioner, how the decision was made, and, ultimately, whether the decision was made in good faith. What we do know is that the issuance of the CID following the filing of the lawsuit against Mr. Gasparyan raises legitimate questions.

Although Petitioner and T3 are separate and different companies, there is sufficient overlap between Mr. Gasparyan's roles, employees, and practices at the two companies that complying with the CID could severely compromise Mr. Gasparyan's defense in the T3 litigation, thus prejudicing him. For example, the topics identified by the Bureau for investigational hearings undoubtedly would require Mr. Gasparyan to be designated as a representative to testify. The Bureau's rules governing investigational hearings are markedly

more pro-Bureau than rules of procedure that govern discovery in federal court; they provide very few protections to respondents and place virtually no limits on the Bureau.[7] Such testimony by Mr. Gasparyan or his employees could provide the Bureau information that it can use against Mr. Gasparyan in the ongoing litigation, and vice versa.

Moreover, it appears that the Bureau set its sights on Petitioner after learning about the company from Mr. Gasparyan. [redacted] We provided this information to staff as part of *bona fide*, confidential settlement negotiations in an attempt to be transparent, credible, and, ultimately, to reach a resolution. The Bureau's use of that information to now target Petitioner is inappropriate and raises several flags; but, on a more practical level, it also has a chilling effect on the ability to engage in frank, transparent discussions necessary to potentially resolve the T3 matter short of protracted litigation.

D. The Instant CID Appears to Be An Unauthorized End Run Around the Federal Rules of Civil Procedure Governing Discovery and Which Are Subject to Judicial Oversight.

It appears that the CID issued to Petitioner seeks to skirt the restrictions and formal discovery requirements of the FRCP that govern discovery in the pending litigation.

The Bureau will presumably argue that the interrogatories propounded here, which seek evidence related to the ongoing litigation, should not count against the interrogatory cap imposed upon litigation interrogatories by FRCP 33(a), which governs discovery in the ongoing litigation between the Bureau and Mr. Gasparyan. Such a position would result in the Bureau propounding interrogatories in excess of the statutory limit without leave of Court.

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[7] *See* 12 C.F.R. §§ 1080.6 to 1080.10. For example, under the rules governing investigational hearings, only objections relating to the protection of a constitutional or other legal right or privilege are permissible, whereas the federal rules governing depositions in civil litigation are significantly broader. 12 C.F.R. § 1080.9.

Similarly, the Bureau's Requests for Documents ignore FRCP 34(b)(1), which requires that each request "must describe with reasonable particularity each item or category of items to be inspected." The Requests for Documents are an attempted end-run around the rules of discovery; many of them are overly broad and unduly burdensome including, *inter alia*, Request 3, which seeks "[a]ll strategic plans, projections, and presentations" without any limit or qualification, and therefore likely would be limited by the Court because. Had this Request been propounded in the instant litigation against Mr. Gasparyan, the Court likely would sustain Plaintiff's objection for the Bureau's failure to state a category of documents with any specificity. *See Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008) (holding objections to requests for "all correspondence" or "all financial records" were proper as the propounding party's requests lacked the requisite specificity).

The Bureau's demand for a hearing in which Mr. Gasparyan would provide sworn testimony also is an attempt to obtain unauthorized discovery in violation of the one deposition rule articulated in FRCP 30(a). This de-facto deposition of Mr. Gasparyan related to the process by which Petitioner collects, filters, purchases, and sells leads will cover substantially the same subject matter as any deposition of Mr. Gasparyan in the ongoing litigation brought by the Bureau, which seeks an order prohibiting him from conducting business at the Company or any other company. Finally, the Bureau, pursuant to the FRCP, would be required to demonstrate a particularized need for the testimony, which is unduly burdensome, overbroad, and does not comply with the FRCP requirements regarding discovery and therefore would not be authorized in the pending litigation.

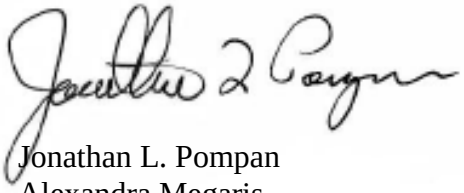
While Mr. Gasparyan and Petitioner are absolutely willing to work with the Bureau to reach an agreement, it appears that the instant CID is an attempt to obtain unauthorized, overly broad, and therefore abusive discovery in the ongoing litigation without any oversight by the Court.

Under these circumstances, the continued use of the CID process, which is one-sided and exempt from reciprocal discovery rules and the basic procedural protections afforded parties in formal legal proceedings, is outside the permitted use of the Bureau's investigatory powers. It also likely will have the perverse effect of making it more difficult to resolve these matters.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the CID be set aside or held in abeyance until such time as the pending litigation against Mr. Gasparyan has been resolved.

Respectfully submitted,



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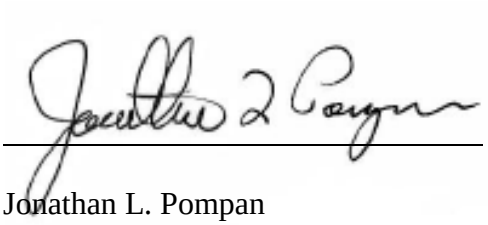
Enclosures: Certification (Unredacted)
Petition to Modify or Set Aside Civil Investigative Demand, with Certification (Redacted)

cc: Enforcement Attorneys Kara Miller, Meghan Sherman, and Barry Reiferson (via Email)

CERTIFICATION

Consistent with 12 C.F.R. § 1080.6(d)(1), counsel for Zero Parallel, LLC hereby certifies that they have conferred with counsel for the Bureau, Kara Miller, Meghan Sherman, and Barry Reiferson, via phone, a telephonic meeting on May 5, 2016, and correspondence dated May 10, 2016 in a good-faith effort to resolve by agreement the issues raised by this Petition but have been unable to reach an agreement.



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