Consumer Financial Protection Bureau

IN RE ZERO PARALLEL, LLC

2016-MISC-Zero Parallel-0001

DECISION ON REQUEST FOR CONFIDENTIAL TREATMENT OF PETITION TO SET ASIDE CIVIL INVESTIGATIVE DEMAND[1]

This matter comes before the Consumer Financial Protection Bureau (Bureau or CFPB) on a request by Zero Parallel, LLC for non-public treatment (Request) associated with a petition to set aside a civil investigative demand (Petition) issued by the Bureau. The civil investigative demand (CID) sought documents, written reports, and interrogatory responses, as well as oral testimony by a representative to be designated by Zero Parallel. For the reasons set forth below, the Request is granted in part and denied in part. There is good cause for omitting from the public record those portions of the Petition or the Director's order in response thereto that discuss settlement negotiations between the Bureau and a third party, but Zero Parallel has failed to demonstrate good cause for redacting from the public record its name or the names of third parties, as those names appear in the Request, Petition, or orders in response thereto.

STATEMENT OF FACTS

On April 25, 2016, the Bureau issued a CID to Zero Parallel seeking information about its products, services, and operations. On May 16, 2016, Zero Parallel filed its Petition, as well as the Request under consideration here, which sought non-public treatment of the Petition and Request under 12 C.F.R. § 1080.6(g) and advance notice should the Bureau deny the Request.[2] The CID did not reference or request any

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[1] This order is issued by the Associate Director for Supervision, Enforcement, and Fair Lending pursuant to delegated authority.

[2] Zero Parallel specifically sought advance notice "pursuant to 12 C.F.R. § 1070.46(b)." Req. at n.1. That regulation provides that, prior to disclosing confidential information, the Bureau may "provide written notice to the person to whom the confidential information pertains that the CFPB intends to disclose its confidential information." Zero Parallel's invocation of that regulation is inapt to the extent that the Bureau finds certain information in the Petition not entitled to non-public treatment. Under 12 C.F.R.

information about Zero Parallel's founder, David Gasparyan, or Gasparyan's prior company, T3Leads, Inc. The Bureau is currently engaged in civil litigation both with T3 Leads and with Gasparyan related to his involvement in T3 Leads.

Zero Parallel's proposed redactions of the Petition and Request would remove two categories of information. First, they would redact the Petition's description of settlement negotiations between the Bureau and Gasparyan, which were conducted in connection with the Bureau's investigation of Gasparyan related to his involvement in T3 Leads. Second, Zero Parallel's proposed redactions would strike uses of its name, Gasparyan's name, and the name of T3 Leads, in both the Petition and Request.[3]

LEGAL DISCUSSION

I. Under Bureau Regulations, Petitions To Modify or Set Aside a CID Are Public Unless a Petitioner Demonstrates Good Cause.

The Bureau's regulations governing investigations provide, in 12 C.F.R. § 1080.6(g), that a petition to modify or set aside a CID and the Director's order in response thereto are "part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown." A petitioner bears the burden of showing good cause for non-public treatment of its petition.[4] This standard mirrors that of the Federal Trade Commission (FTC or Commission)[5] and is consistent with the "general policy favoring disclosure of administrative agency proceedings."[6]

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§ 1070.2(e),(f), and (h), "confidential information" includes, *inter alia*, information that may be exempt from disclosure pursuant to the Freedom of Information Act (FOIA) and "confidential investigative information," which includes information produced to the Bureau "pursuant to a civil investigative demand." The Petition and Request were not produced pursuant to a civil investigative demand and as discussed *infra*, only the Petition's references to settlement negotiations are exemption from disclosure under FOIA. Nonetheless, as a matter of general practice, the Bureau typically provides advance notice of a denial of a request for non-public treatment prior to releasing the information at issue to the public. *See In re Great Plains Lending LLC*, 2012-MISC-Great Plains Lending-0001) (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_decision-on-confidentiality_greatplainslending-0001.pdf (*In re Great Plains Lending*), at n.15.

[3] Zero Parallel's proposed redactions retained one reference to T3 Leads, solely to note that the Bureau has previously taken action against lead generation companies.

[4] *In re Great Plains Lending* at 2; *cf. Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997) (in "reverse-FOIA" context, "the party seeking to prevent a disclosure the government itself is otherwise willing to make assumes that burden").

[5] *See* 16 C.F.R. § 4.9(b)(4)(i); ("the public record of the Commission includes . . . [p]etitions to limit or quash compulsory process and the rulings thereon," unless the FTC finds information is confidential under paragraph (c)); *id.* § 4.9(c)(1) (FTC finds information confidential "in light of applicable statutes, rules, orders of the Commission or its administrative law judges, orders of the courts, or other relevant authority"); *see*

In evaluating whether a petitioner has shown "good cause" to prevent public disclosure of petitions and responsive orders under 12 C.F.R. § 1080.6(g), the Bureau generally looks to the standards for withholding material from public disclosure established by Freedom of Information Act (FOIA) amendments to the Administrative Procedure Act.[7] Accordingly, the Bureau will publicly disclose a petition to modify or set aside a CID unless either the petitioner has made a factual showing that information in the petition falls within one of the FOIA exemptions or the Bureau determines that there exists other good cause to withhold all or a portion of the petition from public disclosure and the withheld information is not otherwise required by law to be made public.

It is appropriate for the Bureau to use FOIA as a guidepost for evaluating "good cause" in its own regulation because FOIA is a comprehensive, practical, and widely used statutory framework for assessing the confidentiality of information submitted to federal agencies, and it is already incorporated into the Bureau's disclosure regulations. For example, Bureau regulations look to FOIA for considering whether information meets the definition of "confidential information,"[8] as well as for evaluating whether information is "business information" such that the Bureau must notify submitters when a third party requests it.[9] Application of FOIA standards to requests for non-public treatment of petitions would also avoid potential inconsistencies where information in a petition deemed non-public using a different standard would nevertheless be subject to disclosure pursuant to a FOIA request.

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also 77 Fed. Reg. 59,294, 59,300 (Sept. 27, 2012) (FTC's reiteration of prior determination that "redaction of information that reveals the identity of a nonpublic investigation would 'impair the public's ability to assess and understand these important rulings' . . . . [T]he Commission has a compelling reason to continue its well-established practice of making petitions to limit or quash generally available unless a particularized showing is made that confidentiality should be granted") (quoting 42 Fed. Reg. 64,315 (Dec. 22, 1977)); 77 Fed. Reg. 39,101, 39,102 (June 29, 2012) (in promulgating Bureau rules governing investigations, noting that "[i]n light of the similarities between section 1052 of the Dodd-Frank Act and section 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, the Bureau drew most heavily from the FTC's nonadjudicative procedures in constructing the [investigation] rules").

[6] *FCC v. Schreiber*, 381 U.S. 279, 293 (1965) (affirming agency authority to promulgate rule generally requiring public disclosure of investigative information).

[7] *In re Great Plains Lending* at 2-3; *see generally* Consumer Fin. Prot. Bureau, Petitions to Modify or Set Aside, http://www.consumerfinance.gov/policy-compliance/enforcement/petitions/ (on webpage containing petitions to modify or set aside, linking to *In re Great Plains Lending* as "an example of the analysis we apply to determine good cause").

[8] 12 C.F.R. § 1070.2(f).

[9] *Id.* § 1070.20(b).

II. Zero Parallel Has Demonstrated Good Cause To Prevent Publication of Some Information Identified in the Request.

A. The Bureau Finds Good Cause To Redact Information About Settlement Negotiations.

Zero Parallel argues that FOIA Exemptions 4, 6, 7(A), 7(B), and 7(C) apply to the discussion of confidential settlement negotiations in its Petition and that there is other good cause to redact this information. Because Exemption 4 protects the discussion of confidential settlement negotiations, the Bureau declines to address the remainder of Zero Parallel's FOIA arguments.

Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[10] Where, as here, information is not purported to be a trade secret, this exemption has three prongs: to be protected from disclosure, records must be "(1) commercial or financial, (2) obtained from a person, and (3) privileged and confidential."[11] The term "commercial information" is to be construed broadly, and it includes "any information in which the submitter has a 'commercial interest,' such as business sales statistics, research data, overhead and operating costs, and financial conditions."[12] Information is "obtained from a person" if it was provided by individuals, corporations, or other entities, rather than a federal government agency.[13] When courts assess the applicability of the "confidential" prong of Exemption 4, they use a different inquiry depending on whether the submission of information is compulsory – such as pursuant to a CID or "as a condition of doing business" with the government[14] – as opposed to voluntary. With respect to information submitted to the government voluntarily, courts consider whether the information "is of a kind that would customarily not be released to the public by the person from whom it was obtained," for the purpose of encouraging cooperation with the government where such cooperation is not required.[15] This standard is more protective than the standard for information submitted involuntarily, which finds material "confidential" for purpose of the exemption only if it would either "impair the Government's ability to obtain necessary information in the future" or "cause

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[10] 5 U.S.C. § 552(b)(4).

[11] *COMPTEL v. FCC*, 910 F. Supp. 2d 100, 114-15 (D.D.C. 2012) (citing *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)). Zero Parallel has not asserted that any information in its Petition is a "trade secret," "financial information," or "privileged."

[12] *Id.* at 115 (internal question marks and citations omitted).

[13] *Id.*

[14] *Biles v. Dep't of Health and Human Servs.*, 931 F. Supp. 2d 211, 220 (D.D.C. 2013).

[15] *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878-79 (D.C. Cir. 1992) (en banc).

substantial harm to the competitive position of the person from whom the information was obtained."[16]

The description of confidential settlement negotiations meets all three prongs of Exemption 4. First, the description contains sufficient detail about the operation of Gasparyan's businesses to be considered "commercial" in nature under Exemption 4.[17] Second, it was "obtained from a person." Third, the description was submitted voluntarily,[18] and it is confidential because it is information of a kind that would ordinarily not be released to the public. In a court proceeding, as Zero Parallel notes, confidential settlement negotiations would be subject to Federal Rule of Evidence 408 and ordinarily not disclosed.[19] Furthermore, to release the description would discourage cooperation with the government in settlement negotiations, contravening the purpose of the exemption.[20]

In addition, the Bureau has discretion in determining whether to keep information confidential that is not otherwise required by law to be disclosed even if it does not fall under a FOIA exemption.[21] Here, even if Exemption 4 did not apply to the description of settlement negotiations in the Petition, the generally non-public nature of settlement negotiations would provide sufficient good cause to withhold the description.

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[16] *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

[17] *See M/A-Com Info. Sys., Inc. v. Dep't of Health & Human Servs.*, 656 F. Supp. 691, 692-93 (D.D.C. 1986) (confidential settlement documents deemed commercial because they contained accounting and internal procedures company was willing to undertake to settle matter).

[18] The Request corroborates this finding by citing the standard for voluntary submissions. *See* Req. at 5 ("The Petition contains confidential proprietary and commercial information – information that is 'of a kind that would customarily not be released to the public by the person from whom it was obtained,' *Judicial Watch, Inc. v. Dep't of Justice*, 306 F. Supp. 2d 58, 67 (D.D.C. 2004) (citation [to *Critical Mass Energy Project*] omitted).").

[19] *See* Req. at 4. This rule does not, however, mean that settlement negotiations are privileged. *See NAACP Legal Def. Fund & Educ. Fund, Inc. v. Dep't of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985) ("Although the intent of FRE 408 is to foster settlement negotiations, the sole means used to effectuate that end is a limitation on the admission of evidence produced during settlement negotiations for the purpose of proving liability at trial. It was never intended to be a broad discovery privilege.").

[20] *See M/A-Com Info. Sys.*, 656 F. Supp. at 692-93 (exempting settlement documents, obtained in confidence, where disclosure would discourage settlement negotiations).

[21] *See* 12 C.F.R. § 1080.6.

B. The Bureau Does Not Find Good Cause To Redact Identifying Information for Zero Parallel or Third Parties.

Zero Parallel also argues that there is good cause to redact its name and the names of Gasparyan and T3 Leads under FOIA Exemptions 4, 6, 7(A), 7(B), and 7(C), or for several other reasons. I disagree that either FOIA or Zero Parallel's other proffered reasons demonstrate good cause to redact this information from the Petition, Request, or orders in response thereto.

1. No FOIA exemptions provide good cause to withhold the relevant names from the public record.

a. Exemption 4

Once the Petition's description of settlement negotiations is redacted, no "commercial information" remains in the Petition, Request, or orders in response thereto. Notwithstanding the broad scope of the term "commercial information" in Exemption 4, it must have some limits if the exemption is to have any meaning; "not every bit of information submitted to the government by a commercial entity qualifies for protection under Exemption 4."[22] In particular, the name of a business "simply cannot be said to be information that falls within the ordinary meaning of the terms 'commercial' or 'financial.'"[23] Zero Parallel has not explained why its name or that of Gasparyan or T3Leads, standing alone, should be considered commercial information. And even if the names could be considered commercial information, they are not "confidential" within the meaning of the exemption, because they are not information "of a kind that would customarily not be released to the public."[24] Furthermore, if the mere name of a business in a petition did constitute "confidential" and "commercial" information within the meaning of Exemption 4, every petitioner would be entitled to redact its name, contrary to 12 C.F.R. § 1080.6(g)'s presumption that petitions are public.

b. Exemption 6

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[25] This exemption does not apply to Zero Parallel or T3 Leads, because Exemption 6 protects an "individual's right of privacy,"[26] rather than any corporate interest in confidentiality.

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[22] *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290.

[23] *British Airports Auth. v. Dep't of State*, 530 F. Supp. 46, 49 (D.D.C. 1981); *see also In re Great Plains Lending* at 4.

[24] *Critical Mass Energy Project*, 975 F.2d at 879.

[25] 5 U.S.C. § 552(b)(6).

[26] *FCC v. AT&T, Inc.*, 562 U.S. 397, 408 (2011) (citing *Dep't of State v. Ray*, 502 U.S. 164, 175 (1991), *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976), *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982)).

With respect to individuals, courts first consider whether the information is contained in personnel, medical, or "similar" files, which means "detailed Government records on an individual which can be identified as applying to that individual," regardless of whether the information could be deemed "intimate" or "highly personal."[27] If the information meets that standard, courts then assess whether disclosure "would compromise a substantial, as opposed to a *de minimis*, privacy interest"; if so, "the court then must weigh that interest against the public interest in the release of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy."[28]

Here, the mere disclosure of Gasparyan's name – with no additional personal information whatsoever and in the context of two documents submitted by Gasparyan's company, rather than a detailed government file – does not meet the first prong.[29] Even if it did, however, under the circumstances of the Petition, he has no more than a *de minimis* privacy interest in the release of his name. Gasparyan is a defendant in a Bureau lawsuit; as such, his name is already public, which diminishes any expectation of privacy he could have.[30] Additionally, while the Petition was filed by Zero Parallel, the inclusion of detailed information about Gasparyan's settlement negotiations with the Bureau suggests that Gasparyan himself had meaningful involvement in the Petition, even though the CID was not directed to him and did not seek information about him. In light of 12 C.F.R. § 1080.6(g)'s presumption that petitions to modify or set aside CIDs are public, Gasparyan's expectation of privacy is thus further diminished. This is not a case where, for example, disclosure would reveal the names of sources who had been promised confidentiality and could potentially result in "harassment, intimidation, or threats of physical harm."[31] Nor is Gasparyan's name coupled with the release of other highly personal information about him such that non-disclosure is necessary to protect his privacy.[32] Finally, even if Gasparyan's privacy interest were "substantial" rather than *de minimis*, application of a balancing test would favor disclosure because of the public interest in disclosure. Not only is there a basic policy of "pierc[ing] the veil of

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[27] *See Wash. Post Co.*, 456 U.S. at 601-02 (quoting legislative history).

[28] *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 33 (D.C. Cir. 2002) (internal citations and quotation marks omitted).

[29] *See id.* at 32-33 (courts apply Exemption 6 to "government files that were maintained on a specific individual or group").

[30] *See Davis v. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (no justification for withholding information that is already in the public domain, even if exemption would otherwise be valid).

[31] *See, e.g., Amuso v. Dep't of Justice*, 600 F. Supp. 2d 78, 93 (D.D.C. 2009).

[32] *See Ray*, 502 U.S. at 175-77 (releasing summaries of interviews with Haitian immigrants with names redacted, because to do otherwise meant that "highly personal information regarding marital and employment status, living conditions and attempts to enter the United States, would be linked publicly with particular, named individuals," resulting in a "significant" invasion of privacy for individuals who had been promised confidentiality).

administrative secrecy and open[ing] agency action to the light of public scrutiny,"[33] but "redaction of information that reveals the identity of the subject of a nonpublic investigation would impair the public's ability to assess and understand" the Bureau's rulings on petitions to modify or set aside CIDs.[34]

c. Exemption 7

Each of Exemption 7's subparts applies to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information" would have the effects enumerated in the subparts.[35] As the language of the exemption makes clear, information must meet the threshold criteria of being "compiled" for a "law enforcement purpos[e]."[36] The ordinary meaning of the term "compilation" is something "composed of materials collected and assembled from various sources or other documents."[37] And "law enforcement purposes" requires that the government have collected the documents "for adjudicative or enforcement purposes," regardless of whether an adjudicative or enforcement action is imminent or completed.[38] The Petition and Request do not meet these threshold requirements for the invocation of Exemption 7, because the Bureau has not "compiled" them from various other sources for law enforcement purposes. Instead, Zero Parallel submitted them to the Bureau for its own purposes.

Nevertheless, even if the Petition and Request did pass this threshold test, none of the Exemption 7 subparts that Zero Parallel cites justifies redaction of the relevant names. Exemption 7(A) protects records or information "compiled for law enforcement purposes [the disclosure of which] could reasonably be expected to interfere with enforcement proceedings."[39] Fundamentally, this exemption allows the government to prevent damage to *its own enforcement matter*. As the Supreme Court has noted,

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[33] *Nat'l Ass'n of Home Builders*, 309 F.3d at 32 (citation omitted).

[34] 77 Fed. Reg. 59,294, 59,300 (Sept. 27, 2012) (internal quotation marks omitted) (parallel FTC provision making petitions presumptively public).

[35] 5 U.S.C. § 552(b)(7).

[36] *FBI v. Abramson*, 456 U.S. 615, 622 (1982) ("[J]udicial review of an asserted Exemption 7 privilege requires a two-part inquiry. First, a requested document must be shown to have been an investigatory record 'compiled for law enforcement purposes.'"); *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982) ("[F]ederal agencies . . . must meet the threshold requirements of Exemption 7 before they may withhold requested documents on the basis of any of its subparts.").

[37] *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989).

[38] *Rural Hous. Alliance v. Dep't of Agric.*, 498 F.2d 73, 80 (D.C. Cir. 1974); *see also Sears Roebuck & Co. v. Gen. Servs. Admin.*, 509 F.2d 527, 529-30 (D.C. Cir. 1974) (records that government contractor was required to submit to agency for routine compliance monitoring "are not 'investigatory files' and are not exempt from disclosure under (b)(7)").

[39] 5 U.S.C. § 552(b)(7)(A).

Congress recognized that "law enforcement agencies ha[ve] legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case. Foremost among the purposes of this Exemption was to prevent 'harm [to] the Government's case in court.'"[40] When applicable, the government asserts this exemption by attesting to how disclosure could interfere with its law enforcement matter.[41] Accordingly, Exemption 7(A) is a discretionary privilege that belongs to the Bureau, and Zero Parallel has no standing to assert it to prevent disclosure of the relevant names.[42]

Exemption 7(B) protects "records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication."[43] This exemption requires a showing "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings."[44] Zero Parallel has satisfied neither element of this test. While T3 Leads and Gasparyan are involved in pending litigation – in addition to the Bureau's suits against T3Leads and Gasparyan, Gasparyan is also engaged in state-court litigation with the current T3Leads management – Zero Parallel does not indicate that trial or adjudication is pending or imminent. Nor does Zero Parallel explain how disclosure of the relevant identities could interfere with the fairness of those proceedings.

Exemption 7(C) applies to "records or information compiled for law enforcement purposes [the disclosure of which] could reasonably be expected to constitute an unwarranted invasion of personal privacy."[45] Like Exemption 6, Exemption 7(C) applies to individuals' privacy and not to the privacy of companies,[46] and therefore its application is relevant only for Gasparyan, not Zero Parallel or T3. It also does not protect information already in the public domain.[47] Here, because Gasparyan is already involved in litigation with the Bureau, the Petition's references to his interactions with the Bureau that preceded that litigation reveal no more than is already public. As a result, any balancing of the public interest in disclosure against the individual's privacy interest weighs in favor of disclosure.

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[40] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224-25 (1978) (citing legislative history).

[41] *See Carter, Fullerton & Hayes, LLC v. FTC*, 601 F. Supp. 2d 728, 743 (E.D. Va. 2009) (affidavit listed "several ways in which the FTC believes that the production of the documents at issue could potentially interfere with law enforcement proceedings").

[42] *See In re Great Plains Lending* at n.12.

[43] 5 U.S.C. § 552(b)(7)(B).

[44] *Wash. Post Co. v. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988).

[45] 5 U.S.C. § 552(b)(7)(C).

[46] *AT & T Inc.*, 562 U.S. at 408.

[47] *Davis*, 968 F.2d at 1279.

2. Zero Parallel has not demonstrated other good cause to withhold the relevant names from the public record.

Zero Parallel argues that, notwithstanding FOIA, it has demonstrated good cause to redact the relevant names for several other reasons. The Bureau declines to find that any of these rationales demonstrate good cause for redaction of the relevant names.

First, the decision of the District Court for the District of Columbia in *John Doe Company No. 1 v. Consumer Financial Protection Bureau*, No. 1:15-cv-1177 (RDM), 2015 WL 6317031 (D.D.C. Oct. 16, 2015), has no bearing on whether names should be redacted from a petition to modify or set aside a CID.[48] As that court made clear in a subsequent decision, a party seeking to modify or set aside a CID occupies a substantially different posture than a party seeking to remain anonymous in a court proceeding.[49] Even though subjects of government investigations may have some interest in preventing the investigation from becoming public, the weight of that interest "will vary with the relevant statutory and regulatory regime."[50] Here, that regime includes a regulation providing that petitions to modify or set aside a CID are generally part of the public record. When a party files a petition to modify or set aside a CID, it undertakes an "affirmative action" to "initiat[e] a formal process" that has the known effect of generally rendering those investigations public.[51] In contrast, the plaintiff in *John Doe Company* was not affirmatively filing a petition under 12 C.F.R. § 1080.6(g)[52]

Second, neither the *John Doe Company* decisions nor any other authorities Zero Parallel cites support its related contention that, standing alone, its "significant commercial and privacy interests in avoiding being identified as the target of a Bureau investigation" constitute good cause, within the meaning of 12 C.F.R. § 1080.6(g), to

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[48] *See* Req. at 2.

[49] *John Doe Co. No. 1 v. Consumer Fin. Prot. Bureau*, --- F. Supp. 3d ----, 2016 WL 3390677, at *7-8 (D.D.C. June 15, 2016).

[50] *Id.* at *7.

[51] *See id.* at *8.

[52] *See id.* Even when a party has not filed a petition, however, the Bureau's regulations do not provide that investigations must always remain non-public; 12 C.F.R. § 1080.14(b) is clear that "Bureau investigations *generally* are non-public" (emphasis added), thus allowing for circumstances where disclosure is appropriate. Indeed, in promulgating its rules on investigations, the Bureau rejected a commenter's argument that, because of "the potential reputation risk to an entity if an investigation is disclosed to the public," the non-public nature of investigations should be absolute. 77 Fed. Reg. 39,101, 39,107 (June 29, 2012). A party proceeding in litigation would also remain subject to the general rule, articulated in Fed. R. Civ. P. 10(a), that identities of the parties to a case are public. This rule reflects that the public has a strong "interest in knowing the names of litigants" before the federal courts, and pseudonymous treatment is therefore appropriate only in "exceptional circumstances." *Doe v. Pub. Citizen*, 749 F.3d 246, 273-74 (4th Cir. 2014).

redact the relevant names.[53] In contrast to the regulatory presumption of disclosure here, the interest in confidentiality in *In re Sealed Case* derived from a clear statutory mandate for Federal Election Commission (FEC) investigations that prohibited those investigations from being made public without express written consent of the investigated party.[54] Because of that statutory command, the court analogized the standard for disclosure of FEC investigations to that of grand jury proceedings, which are presumptively secret under Federal Rule of Criminal Procedure 6(e)(6).[55] Two other cases Zero Parallel cites, *Douglas Oil Co. v. Petrol Stops Northwest*[56] and *United States v. Johnson*,[57] also discuss secrecy of grand jury proceedings and are thus equally inapt.

Zero Parallel's citation to *GTE Sylvania Inc. v. Consumer Product Safety Commission* is similarly off the mark. In that case, the information subject to disclosure was not merely the name of the subject of an investigation and related third parties, but misleading safety information about companies' products that posed far more than a speculative risk to the companies' reputations.[58] Zero Parallel, in contrast, asserts only speculative reputational risk, and courts have rejected such conclusory assertions of remote prospects of competitive injury.[59] Furthermore, the speculative reputational risk Zero Parallel asserts from having its identity disclosed is identical to that of every recipient of a Bureau CID. If such purported risk, standing alone, were sufficient to demonstrate good cause to withhold names, the presumption of disclosure in 12 C.F.R. § 1080.6(g) would be meaningless.

Third, Zero Parallel's contention that disclosing its identity would violate its constitutional rights to due process and to petition the government is unavailing.[60] As noted above, the Bureau generally gives advance notice of its decision to deny a request for non-public treatment prior to making a petition public.[61] This procedure permits a petitioner whose request for non-public treatment has been denied to withdraw its petition or seek judicial review to prevent disclosure. As a result, nothing about the

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[53] *See* Req. at 3-4.

[54] 237 F.3d 657, 667 (D.C. Cir. 2001).

[55] *Id.*

[56] 441 U.S. 211, 219 (1979).

[57] 319 U.S. 503, 513 (1943).

[58] 404 F. Supp. 352, 373 (D. Del. 1975).

[59] *See, e.g., Pub. Citizen Health Research Grp.*, 704 F.2d at 1291 ("Conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable."); *Gen. Elec. Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1403 (7th Cir. 1984) (rejecting "speculative" assertion of competitive harm arising from release of single document); *Hodes v. Dep't of Hous. & Urban Dev't*, 532 F. Supp. 2d 108, 118-19 (D.D.C. 2008) (party seeking to withhold document must "demonstrate with sufficient specificity that substantial competitive harm . . . would result from disclosure").

[60] *See* Req. at 2, 7.

[61] *See supra* n.2.

Bureau's procedures chills, penalizes, or otherwise punishes a party who seeks to challenge a Bureau CID.[62] In contrast, where courts have found deprivation of constitutional rights based on penalties for seeking judicial review, they have required "fines so enormous . . . as to intimidate the [affected party] from resorting to the courts"[63] or "the prospect of debilitating or confiscatory penalties."[64]

CONCLUSION

For the foregoing reasons, the request for confidential treatment is granted in part and denied in part. The Petition and the Director's order in response thereto will be redacted to prevent disclosure of confidential settlement negotiations.

David Bleicken
Associate Director
Director of Supervision, Enforcement & Fair Lending

July 1, 2016

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[62] *See La. Pac. Corp. v. Beazer Materials & Servs., Inc.* 842 F. Supp. 1243, 1252 (E.D. Cal. 1994) (citing *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315 (2d Cir.1986)) (while "an administrative scheme which, through substantial penalty provisions, chills an affected party's right to seek judicial review is unconstitutional . . . an administrative scheme satisfies due process if it allows good faith challenges to be brought without the risk of incurring substantial penalties"); *see also In re Great Plains Lending* at 9-10.

[63] *Ex parte Young*, 209 U.S. 123, 147 (1908).

[64] *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975).