UNITED STATES OF AMERICA
BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU

IN THE MATTER OF
Firstsource Advantage, LLC

PETITION TO SET ASIDE OR MODIFY THE BUREAU'S SECOND CIVIL INVESTIGATIVE DEMAND

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Pursuant to 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e), Firstsource Advantage, LLC ("Firstsource") hereby petitions to set aside or modify the second civil investigative demand (the "Second CID") issued by the Consumer Financial Protection Bureau (the "Bureau") on September 28, 2017. [redacted]

Nonetheless, the Bureau has issued the Second CID, which asks that Firstsource rehash

[redacted]

the same information the Bureau has already received (or chosen not to receive) and undertake a burdensome, manual review of audio files. No Bureau representative disputed—and no one could dispute—the exemplary levels of transparency and responsiveness present in Firstsource's dealings with the Bureau. Furthermore, no Bureau representative has disputed Firstsource's assessment that [redacted] It appears that the Bureau, for reasons unknown, has omitted [redacted] from its analysis regarding whether the requests in the Second CID are appropriately tailored to find information "relevant to a violation." No explanation was provided for how this process is rational or consistent with the Bureau's enabling statute. For reasons described below, it is not.

Furthermore, the Second CID employs impenetrable review criteria, as key terms used in the Second CID are undefined. As such, the Second CID imposes an unreasonable burden on Firstsource. The Bureau should set aside the Second CID in its entirety, or—in the alternative—modify the Second CID to use an efficient and less burdensome protocol for Firstsource to provide any reasonably identifiable information that the Bureau believes it yet needs.

BACKGROUND

Firstsource supports fully the Bureau's [redacted] interest in regulating the debt-collection industry to prevent consumer abuse, and advances this mission through Firstsource's compliance protocols, business culture, and operations. Unlike other debt-collection investigations, however, this investigation matter reflects several peculiarities, each of which reveals important contextual information relevant to this Petition.

First, the Bureau prefaced the first civil investigative demand ("First CID") with correspondence and a verbal communication to Firstsource explaining that the genesis of this

investigation matter was [redacted] ("Legal Theory"). Such correspondence was sent in [redacted], and the verbal instruction was provided in April 2017.[2] As discussed with the Bureau on multiple occasions, however, the Bureau's belief that FDCPA violations had occurred was misplaced for several reasons.[3] The Bureau's Legal Theory was based on mistaken factual assumptions and hinged upon a reading of the FDCPA [redacted]. [redacted] The Bureau has had ample opportunities, [redacted] to digest the information that Firstsource produced, including information that the Bureau gathered through: [redacted] and its First CID, to which Firstsource responded in full.

Despite having been put on notice of multiple factual snafus and legal deficiencies destabilizing the Legal Theory in this investigation, the Bureau has not acknowledged or corrected its errors, [redacted] and has proceeded with issuance of burdensome CIDs. In doing so, the Bureau has not addressed the FDCPA's statutory

[2] *See* [redacted] and teleconference with E. Mothander and Firstsource representatives on Apr. 3, 2017.

[3] *See* 5/11/2017 Meet and Confer (M&C); 5/25/2017 Ltr. from J. Lee to E. Mothander and V. Assae-Bille; 6/16/2017 M&C; 7/26/2017 M&C; and 10/10/2017 M&C; [redacted]

provisions or the contents of the reams of documents that Firstsource already produced.

[redacted] To be sure, a company would not typically ask the Bureau, at the outset of an investigation, to set aside the inquiry because the company believes no violations have occurred. Here, however, the situation is different.

[redacted] The Bureau has not refuted the conclusions offered by Firstsource and provides no justification for why the Second CID ignores [redacted]. The documents obtained by the Bureau through the First CID [redacted] confirmed for the Bureau that it had no proper basis to issue the Second CID.

Finally, Firstsource has made clear to the Bureau that it would be amenable in principle to producing hearing testimony, policies and procedures, and call recordings generally—as

[redacted]

contemplated by the Second CID—so long as the Bureau can articulate a good-faith basis for the belief that Firstsource still has information relevant to a violation and is, at a minimum, willing to modify the Second CID to use a protocol for productions that is feasible and proportional. This, however, is something the Bureau was unable to do. The Bureau did not substantively engage with Firstsource regarding the basis for the Second CID. The Bureau indicated that, in theory, it could consider "reasonable modifications" of particular requests. However, the Bureau did not commit to any specific modifications and did not extend the deadline to file this Petition. Firstsource therefore filed this Petition by the existing deadline.

In fact, this Petition would have been unnecessary if the Bureau had followed the instructions of the United States Supreme Court, the wording of the Dodd-Frank Act, [redacted]. The Bureau did not do so. The Petition also could have been avoided if the Bureau had extended the deadline to file the Petition to allow the parties additional time to reach agreement. The Bureau did not do so. Additional background information necessary to decide this Petition is described below.

I. THE DODD-FRANK ACT PROSCRIBES ANY ATTEMPT, LIKE THE SECOND CID, TO ENGAGE IN INVESTIGATIONS THAT LACK MERIT.

Congress empowered the Bureau to issue civil investigative demands, but only if the Bureau has "reason to believe that" the recipient of the CID has information "relevant to a violation."[5] Through the communications of its staff, the Bureau confirmed that the intent of the Second CID is to investigate Firstsource.[6] Therefore, if the Bureau lacked reasonable grounds to believe that Firstsource has engaged in conduct in violation of the FDCPA when the Second CID was issued, the Second CID runs afoul of the Dodd-Frank Act's parameters for CIDs.

[5] 12 U.S.C. § 5562(c)(1).

[6] *See* 10/10/2017 M&C.

Here, the Bureau described how the Legal Theory at issue was based on the belief that there were issues harming consumers under the FDCPA. [redacted] As noted in this Section I, a review of [redacted] (B) the parties' conduct under the First and Second CIDs, and (C) the relevant Bureau materials demonstrate that the Bureau lacks a reasonable basis to believe FDCPA violations have occurred.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. The Bureau's Enforcement Probes Reveal an Absence of FDCPA Violations.

On April 28, 2017, the Bureau issued the First CID to Firstsource. Subsequently, the parties participated in a telephonic meet-and-confer discussion on May 11, 2017. [redacted] Firstsource also asked the Bureau to set aside the First CID in favor of informal discussions, [redacted]. The Bureau said that any discussions regarding the FDCPA could not occur, if at all, until after it obtained the information requested in the First CID. *See* Exh. A.

Firstsource did not object to the First CID. Firstsource believed that it had not committed

[redacted]

FDCPA violations, but gave the Bureau the benefit of the doubt as to the validity of the First CID. Firstsource complied fully with every request during the enforcement probe, [redacted]. On many occasions, Firstsource provided information above and beyond what the Bureau had requested. Moreover, Firstsource—on its own initiative—proactively undertook careful assessments and provided detailed analyses to the Bureau approximately five months *before* the issuance of the Second CID. These costly assessments would not have been necessary but for the Bureau's erroneous reading of the FDCPA.

On June 14, 2017, the Bureau issued a modification of the First CID. This modification did nothing to address the defects in the Bureau's Legal Theory [redacted] and preserved the burdensome nature of the First CID. It only [redacted] clarified the meaning of the term "dispute" as used in certain requests; and modified the Applicable Period for Responsive Materials to provide an ascertainable boundary for the review period, which the First CID lacked.

The parties participated in a second telephonic meet-and-confer discussion on June 16, 2017. During that discussion, Firstsource acknowledged the Bureau's proposal to remedy the demands' duplicative nature was to modify the First CID so as to require Firstsource to *identify and catalog* the previously-produced documents in lieu of re-producing them. Firstsource informed the Bureau that its requirements with respect to such an administrative project would actually impose a *more* onerous burden than the First CID's original requests. [redacted] Firstsource then

reiterated its request for clarification of the Bureau's position under the FDCPA and the topics in its May 25, 2017 letter, including the lack of basis for believing that any violation could have occurred. The Bureau declined this request and invitation.

On June 21, 2017, the parties participated in a third, telephonic meet-and-confer discussion to review additional modifications proposed by Firstsource. On June 27, 2017, the Bureau issued a second modification letter, which modified technical requirements of the First CID but did not address the lack of merit in the investigation or the FDCPA's statutory exemptions.

Through the protracted and expensive CID process described above, Firstsource has complied with numerous, burdensome requests in the First CID, culminating in the production of 4.45 gigabytes of data (including over 13,000 pages of documents), five lengthy written reports, and complete answers to 22 interrogatories (with 36 sub-parts, for a total of 58 discrete questions). Firstsource produced this data and information to the Bureau through the First CID [redacted]

After the Bureau received full compliance with the First CID, none of the parties involved in this matter—neither Firstsource nor the Bureau—could identify violations of the FDCPA at all, let alone based upon the documents that the First CID specifically had sought. Consistent with the parties' discussions in May 2017, Firstsource waited patiently until the First CID process was complete, which was burdensome and costly. After Firstsource complied with the First CID, Firstsource asked the Bureau, in July 2017, for an opportunity to hear the Bureau's position [redacted], to discuss the errors underlying [redacted]

[redacted] the First CID, [redacted] The Bureau rejected this request. *See* Exh. A.

The Bureau has not provided any reason for issuing the Second CID that reflects a proper purpose, in light of the facts and law before the Bureau. Further, the Second CID's requests are not traceable to any of the information Firstsource provided in response to the First CID. In fact, all of the information requested in the Second CID [redacted] Nonetheless, the Bureau issued the Second CID.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

II. [redacted]

The Second CID's lack of merit is highlighted by the fact that each of the debt-collection violations and acts of illegality targeted [redacted] have been confirmed as absent from the Firstsource business model. The Bureau and the Federal

[redacted]

Trade Commission have clarified that the following collections practices would be considered unlawful under federal consumer-financial law:

- Using improper affidavits to sue consumers in the course of collecting debts;[17]
- Having inadequate basic documentation to support collection activities by debt buyers;[18]
- Initiating or threatening to file a debt-collection lawsuit before obtaining account-level documentation;[19]
- Altering the dates of executed affidavits or the amounts of alleged debts that are attested to, and filing debt collection litigation in court based on such affidavits and amounts;[20]
- Assisting debt buyers in collecting on debts that were uncollectible or incorrect in their amounts;[21]
- Making statements to consumers alleging that debt was owed despite having performed an inadequate review of the underlying documentation;[22]
- Failing to review original account-level documentation before filing debt collection lawsuits;[23] and
- Using false threats to extract payments from consumers and willfully contacting third parties unlawfully about the debt.[24]

[redacted]

[17] *Consumer Fin. Protection Bureau v. Hanna*, 1:14-cv-02211-AT (N.D. Ga.).

[18] *Id.*

[19] *Id.*

[20] *In re Citibank, N.A., Department Stores National Bank, and CitiFinancial Servicing, LLC*, No. 2016-CFPB-0004.

[21] *In re Chase Bank, USA N.A. and Chase BankCard Services, Inc.*, No. 2015-CFPB-0013.

[22] *In re Pressler & Pressler LLP, Sheldon H. Pressler, and Gerard J. Felt*, No. 2016-CFPB-0009.

[23] *In re New Century Financial Services*, No. 2016-CFPB-0010.

[24] *FTC v. Premier Debt Acquisitions LLC*, No. 1:15-cv-00421-FPG (W.D.N.Y.).

[redacted]

III. THE BUREAU REJECTED FIRSTSOURCE'S REASONABLE REQUESTS IN RELATION TO THE SECOND CID.

On September 28, 2017, the Bureau issued the Second CID to Firstsource. The requests therein cover three categories. First, the Second CID sets forth topics for an investigational hearing of Firstsource. Second, it requests copies of "policies and procedures for preserving and maintaining call logs and recordings, including call logs and recordings relating to accounts that are the subject of Consumer or third-party complaints." Third, the Second CID asks Firstsource to identify and produce the audio files for the following categories of calls:

1. "All recordings of calls in which the Company discussed settlement options with an authorized user before obtaining a phone payment or payment agreement for [a Client A] account.";
2. "All recordings of calls in which the Company provided a credit bureau disclosure before obtaining a phone payment or payment agreement for [a Client B] account."; and,
3. "All recordings of calls relating to" 32 specific customer accounts and consumer complaint numbers "placed or received within 30 days prior to the Company receiving the complaint."

The Second CID also requests numerous interrogatories requiring Firstsource to prepare descriptions about the call recordings described above, with a written description to correlate to each and every single call. (*See* Second CID, Interrogatory Nos. 3, 4, and 5.)

[redacted] Firstsource expressed concerns to the Bureau that the Second CID may not be grounded in any cause to believe a violation has occurred. Nevertheless, Firstsource did not choose to challenge the Second CID outright.

Instead, on October 10, 2017, during the parties' meet-and-confer call, Firstsource expressed a willingness to cooperate and requested that the Bureau modify the Second CID to

allow for the following protocol: that the parties engage in a good-faith, substantive meeting to meaningfully discuss [redacted], and other issues relevant to this investigation matter, with a further discussion to be had regarding: a phone call sampling approach, an investigational hearing in Buffalo, New York, and additional document productions to follow, under a timeline and methodology that is mutually convenient for the parties.

The Bureau then explained that even if such a meeting were to occur [redacted], the Bureau could still find other bases to pursue Firstsource. This was a striking revelation. [redacted]

It appears that the additional expenditure of resources under the Second CID would be unwarranted. Fundamentally, the investigation itself is improper. In the view of Firstsource's counsel, the fact that SEFL has been unable to rebut Firstsource's position regarding the FDCPA's statutory provisions shows that the Bureau cannot articulate a proper basis for the investigation, because none exists. Although it was appropriate for Firstsource to give the Bureau the benefit of the doubt when facing the First CID, *see* Exh. A, the Second CID was markedly different—having been issued after Firstsource had already produced everything to the Bureau

[redacted] and the First CID. The Second CID has an even less credible basis than the First CID and verifies the hypothesis that the Bureau lacks a meritorious cause for issuing the demand.

After the October 10 meet-and-confer, the parties exchanged letters regarding the Second CID. Firstsource's counsel invited the Bureau to provide a rationale for the investigation. The Bureau declined, but cited case law in an October 13, 2017 letter. Although Firstsource was very interested in reviewing the judicial authorities set forth by the Bureau in the hope that they would—finally—shed light on the proper purpose of the investigation, the letter was very different than what was expected. The letter lacked any explanation of a valid purpose for the Second CID, and cited cases that actually support Firstsource's position. As discussed below, the cases set forth specific standards for proper civil investigative demands, which the Bureau has not met. (*See* Objections, Section I.B, below.)

Ultimately, since May 2017, Firstsource has met and conferred in good faith as to the requirements of the Bureau's investigative demands, even though the Bureau does not have any basis to believe that Firstsource committed a violation or possessed information relevant to a violation. Despite harvesting all of Firstsource's documents, complaints, data, and information, the Bureau could articulate no purpose of the investigation, as explained below. Firstsource also requested an extension to file the Petition until such time as the Bureau could provide the requested information. The Bureau rejected the extension request. This Petition followed.

OBJECTIONS TO THE SECOND CIVIL INVESTIGATIVE DEMAND

I. THE SECOND CID SHOULD BE SET ASIDE

A. The Bureau's Position Is Inconsistent with Applicable Law.

As explained above, the Second CID is rooted in erroneous factual and legal understandings as they pertain to Firstsource, the Dodd-Frank Act, and the FDCPA. Despite the

fact that Firstsource has repeatedly raised the Bureau's errors within the context of the investigation in the hope that the Bureau would respond to the information (or at least engage in a discussion about the information), the Bureau has not done so. *See* Exh. A. The Bureau has insisted on the steady pursuit of one fishing expedition after another.

Most recently, the Bureau cited case law in its October 13, 2017 letter, but that case law is inapposite. In those cases, subpoena recipients had challenged the jurisdiction of the agency to regulate them. Here, no one has challenged the authority of the Bureau to oversee the market for debt collection. Instead, the case is more analogous to *Freese v. FDIC*, in which the information sought in the FDIC's subpoenas was not relevant to the FDIC's purposes.[30] The Court held:

> [T]he FDIC has failed to make even a suggestion of wrongdoing, let alone present the specific facts necessary to support a motion to summarily enforce the subpoenas. . .[T]o allow the FDIC to conduct a fishing expedition through the plaintiff's private papers in the hope that some evidence of wrongdoing will surface flies in the face of the spirit, if not the letter, of the Fourth Amendment. . . [T]his shotgun approach to the use of the subpoena powers in a hubristic manner infringes upon fundamental constitutional rights. . .[I]ndividuals subject to the subpoena powers have incurred legal expenses, anxiety and trepidation in facing the shotgun method the defendant has used to expose putative violations of the law.[31]

Likewise, a "shotgun" approach is apparent in this investigation. For reasons discussed in this Petition, the Second CID is not proper because the disclosures sought are not based on a "reason to believe" that they will unearth information "relevant to a violation."[32] Furthermore, as illuminated during the parties' good-faith meet-and-confer discussion, it would be inappropriate to impose the burdens of the Second CID without first ensuring that the Bureau's mistakes and

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[30] *Freese v. FDIC*, 837 F. Supp. 22, 25 (D. N.H. 1993), *vacated as moot, Freese v. FDIC*, No. 94-cv-1025, 1994 U.S. App. LEXIS 40887 (1st Cir. Nov. 22, 1994) (quashing FDIC subpoenas).

[31] *Id.*

[32] *See Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Sch.*, 854 F.3d 683, 691 (D.C. Cir. 2017) ("The CFPB's ability to define the scope of its investigation broadly 'does not afford it unfettered authority to cast about for potential wrongdoing . . . .'") (quoting *In re Sealed Case*, 42 F.3d 1412, 1418 (D.C. Cir. 1994).

misunderstanding of Firstsource's business [redacted] do not improperly influence the investigation. Likewise, the Bureau should ensure that the investigation comports with the facts and applicable law in this matter.

As to the facts—after comprehensive review—[redacted] which courts have repeatedly held do not give rise to a violation of the FDCPA. For example, in *Berry v. Van Ru Credit*, a consumer brought suit against a third-party debt collector for violations of the FDCPA, alleging, *inter alia*, violation of 15 U.S.C. § 1692d(6) where a call representative had failed to identify himself as representing the debt collector during the initial call, naming only the company's client, the Department of Education.[33] In response, the debt collector argued that it should not be found liable for the stated conduct because (i) the violation was not intentional, (ii) the debt collector has specific policies and procedures in place to prevent such a violation, and (iii) the representative would have provided the required disclosure had he followed the mandatory training on those policies and procedures that the debt collector provides to its call representatives.[34]

Last month, the Court held that the violation had resulted from a bona fide error and dismissed the allegation pursuant to 15 U.S.C. § 1692k(c).[35] First, it found no evidence that the debt collector had intentionally violated the FDCPA through the call representative's failure to disclose that he worked for the debt collector.[36] Second, the Court noted that the call representative's identification of the debt collector's client demonstrated that "any error was in good faith, genuine, and bona fide," and pointed to the numerous procedures in place to prevent

[33] No. 2:15-cv-150, 2017 U.S. Dist. LEXIS 164266 (D. Utah Sept. 11, 2017).

[34] *Id.*

[35] *Id.*

[36] *Id.*

such errors.[37]

Here, the same reasoning applies. [redacted]

Similarly, in *Puncochar v. Revenue Mgm't of Ill. Corp.*, Plaintiff sued Defendant Revenue Management of Illinois Corporation (RMIC) for, *inter alia*, violation of § 1692e(2) of the FDCPA for making false representations concerning "the character amount, or legal status of any debt."[38] Specifically, Plaintiff claimed that RMIC acted unlawfully when it sent a debt validation letter to her regarding debt that was protected by a bankruptcy stay.[39] In response, RMIC claimed that this technical FDCPA violation was exempt as a bona fide error.[40]

The Court agreed because there was no evidence "showing that…RMIC employed any abusive tactics in its single attempt to collect or that they attempted to deceive or trick [Plaintiff] into paying the . . . debt."[41] Moreover, the Court noted that RMIC had ceased attempting to collect on the debt when it learned of Plaintiff's bankruptcy filing, and that Plaintiff had not produced any evidence demonstrating intent. Finally, the Court found that RMIC had extensive

[37] *Id.* See also *Turnbull v. Rancilio*, No. 16-cv-11971, 2017 U.S. Dist. LEXIS 35855 (E.D. Mich. Mar. 14, 2017) (holding that the violation of the FDCPA was a result of a bona fide error, because the Defendant had followed reasonable preventative procedures to avoid the violation, there was no evidence to indicate the Defendant's action was willful, and the Defendant undertook additional procedures the day after the incident to verify the accuracy of information).

[38] No. 15-cv-07089, 2017 U.S. Dist. LEXIS 49939 (N.D. Ill. Mar. 31, 2017).

[39] *Id.*

[40] *Id.*

[41] *Id.*

procedures in place to guard against the subject violation, including, for example, a policy of terminating all collection proceedings upon receiving bankruptcy notices. Accordingly, the Court attributed RMIC's FDCPA violation to bona fide error, and granted its motion for summary judgment.

Here, a decision maker would (and the Bureau should) reach the same conclusion where, as noted above [redacted], Firstsource had multiple procedures in place meant to guard against the alleged FDCPA violations; rectified any errors upon learning of the violations; and undertook other reasonable precautions prior to attempting to collect on the debts at issue.

The FDCPA bona fide error rule applies with equal force to government investigations, not just to private plaintiff litigation. In *FTC v. Rawlins & Rivers, Inc.*, the Federal Trade Commission ("FTC") filed suit against Defendant alleging violations of the Federal Trade Commission Act ("FTCA") and FDCPA.[42] Defendant asserted numerous affirmative defenses, including that "any violation of the [FDCPA] was not intentional and resulted from a bona fide error…"[43] The FTC countered that the bona fide error defense should not apply to its FTCA claims (conceding that the defense certainly applied to the FDCPA claims), and that Defendant was therefore barred from asserting it. The Court rejected the FTC's argument, noting that the FTC had not disputed that the bona fide error defense may apply to its other claims, and thus declined to strike the defense with respect to the FTCA claim. Here, the FDCPA's bona fide error rule applies with equal force to claims brought under the FDCPA by the Bureau, just as it applied to the FDCPA claims brought by the FTC.

[42] No. 6:07-cv-146, 2007 U.S. Dist. LEXIS 103935, at *8 (M.D. Fla. May 24, 2007) (alteration in original).

[43] *Id.*

[redacted] As such, the Bureau has no reasonable basis to believe there exists a violation of the FDCPA, or that the contents of the Second CID could lead to information "relevant to a violation." During the meet-and-confer process, the Bureau has not shown otherwise.

B. The Bureau's October 13, 2017 Letter Does Not Change Anything.

On October 13, 2017, the Bureau explained that the Second CID is proper simply because the Bureau has "wide latitude" to issue CIDs and "fact-based arguments" about compliance with "a law's substantive provisions are not valid defenses to the enforcement of a CID." These conclusions are legally and logically flawed for the reasons discussed below.

The law does not permit the Bureau to continue issuing iterative requests to Firstsource while refusing to discuss the purpose of its investigation. It is well-established that "[o]f course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter under inquiry as to exceed the investigative power."[44] To determine whether to enforce a CID or other investigative inquiry, a federal court will consider three key factors: (1) "if the inquiry is within the authority of the agency," (2) if "the demand is not too indefinite," and (3) if "the information sought is reasonably relevant."[45]

Here, the Bureau cannot meet the three *Morton Salt* elements. As to the first element, the parties certainly agree that the FDCPA is among the authorities that the Bureau can enforce. However, the Bureau does not have "unfettered authority to cast about for potential

[44] *United States v. Morton Salt*, 338 U.S. 632, 652 (1950).

[45] *Id*. at 652-53. *See also Resolution Trust Corp. v. Feffer*, 793 F. Supp. 11, 14 (D.D.C. 1992) (quashing subpoena when the requests were "irrelevant to the RTC's stated inquiry.")

wrongdoing."[46] The Bureau must have a "reason to believe" that a federal consumer protection law was violated.[47] Here, the Bureau has not identified (and cannot identify) any legally cognizable reason to believe that Firstsource violated the FDCPA. Therefore, the issuance of the Second CID is not within the Bureau's authority under the Dodd-Frank Act. As to the second and third elements, the demands of the Second CID are "indefinite" and do not seek information that is "reasonably relevant."[48] The Second CID ostensibly contains a Notification of Purpose, but it is written in a vague and formulaic fashion, and it is identical to the Notification of Purpose previously set forth in the First CID. The Second CID also does not set forth information to show its contents are relevant to a proper purpose. Instead, the Bureau continues to maintain that its reasons, if any, are confidential or above scrutiny.

The Bureau is incorrect. The Bureau must show that its inquiry meets the *Morton Salt* standard.[49] The Bureau cannot meet that burden if the Bureau refuses to reveal the rationale, if any, for its iterative requests. For example, in *Sealed Case*, the Court of Appeals rejected the OTS' conclusory argument that the purpose of its subpoena was to uncover "other wrongdoing, as yet unknown."[50] As the Court explained, "the broad language used to describe this purpose makes it impossible to apply the other prongs of the *Morton Salt* test."[51] In other words, "[a] reviewing court will be unable to determine whether the information demanded is 'reasonably relevant' and 'not too indefinite' when the agency describes its purpose as the investigation of

[46] *See Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Sch.*, 854 F.3d 683, 691 (D.C. Cir. 2017).

[47] 12 U.S.C. § 5562(c)(1).

[48] *Morton Salt*, 338 U.S. at 652-53.

[49] *See Morton Salt*, 338 U.S. at 652-53.

[50] *In re Sealed Case*, 42 F.3d 1412, 1418 (D.C. Ct. App. 1994).

[51] *Id*.

'other wrongdoing, as yet unknown.'"[52]

Similarly, in *Civil Aeronautics Bd. v. United Airlines, Inc.*, the Seventh Circuit quashed a Civil Aeronautics Board subpoena because the Board refused to identify a reason for the subpoena, other than claiming that "it is entitled to unlimited access to all the carrier's records."[53] As the Court held:

> Determining the relevancy of the documents sought is the agency's responsibility in the first instance. . . . . Given the requirement that a demand be reasonably relevant to a proper investigative purpose, the Board must of course have such a purpose to make the necessary determination of relevance itself. Further, the Board must disclose its purpose to enable a court to make a determination of relevance. Otherwise, no inquiry "into the underlying reasons for the examination," . . . is possible.[54]

As the Court elaborated:

> This obligation is of course not satisfied by the recital that the purpose of the investigation is to determine compliance with the law. The same could be said for any general warrant.[55]

Likewise, in *Sunshine Gas Co. v. U.S. Dep't of Energy*, the district court refused to enforce a Department of Energy investigative order because the DOE refused to "give Plaintiff Sunshine Gas more than a general statement of purpose regarding the reason for its investigation."[56] As the Court explained:

> The reasonableness of the order under review is dependent upon the relevancy of the information sought. Yet, a failure to state the purpose precludes a determination of the relevancy.[57]

The Court further noted:

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[52] *Id*.

[53] *See Civil Aeronautics Bd. v. United Airlines, Inc.*, 542 F.2d 394, 396 (7th Cir. 1976).

[54] *Id*. at 402.

[55] *Id*.

[56] *Sunshine Gas Co. v. U.S. Dep't of Energy*, 524 F. Supp. 834, 837 (N.D. Tex. 1981).

[57] *Id*. at *838*.

> In conclusion, this Court will not allow the Department of Energy to bootstrap itself when justifying an investigation into every record and document plaintiff possesses. A legitimate, proper purpose and relevancy are required. The burden lies with the Department of Energy.[58]

Here, the Bureau has not even asserted that the purpose of the investigation is to uncover "other wrongdoing, as yet unknown." The Bureau simply has not engaged in a meaningful dialogue with Firstsource about the purpose of the investigation. The Bureau position, as we understand it, is such a dialogue would be premature and/or that the Bureau has no obligation to engage in such a dialogue. As discussed above, the Bureau's position is not well-founded in law.

The judicial decisions cited in the Bureau's letter of October 13, 2017 do not suggest otherwise. Each judicial decision cited by the Bureau endorses the *Morton Salt* test discussed above.[59] Under *Morton Salt*, as summarized by the Second Circuit in *Construction Prods.*—one of the decisions cited in the Bureau's letter—an agency may not "conduct any investigation it may conjure up."[60] Instead, "the disclosure sought must always be reasonable."[61]

Despite the parties' multiple and fulsome meet-and-confer discussions in 2017, the Bureau has not refuted the increasingly apparent conclusion that the Bureau lacks a proper basis for the investigation. The Second CID should be set aside without further delay.

II. IN THE ALTERNATIVE, THE SECOND CID SHOULD BE MODIFIED.

Considerable, unnecessary expense and burden to Firstsource may be avoided if the parties engage in substantive, meaningful discussions regarding the FDCPA and the

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[58] *Id*. at 841. *See also Freese v. FDIC*, 837 F. Supp. 22, 25 (D.N.H. 1993), *vacated as moot*, *Freese v. FDIC*, No. 94-cv-1025, 1994 U.S. App. LEXIS 40887 (1st Cir. Nov. 22, 1994) (quashing FDIC subpoenas because "the FDIC has failed to make even a suggestion of wrongdoing, let alone present the specific facts necessary to support a motion to summarily enforce the subpoenas.")

[59] *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001); *United States v. Construction Prods. Research*, 73 F.3d 464, 471 (2d Cir. 1996); *EEOC v. Karuk Tribe House. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001).

[60] *Construction Prods.*, 73 F.3d at 471.

[61] *Id*.

investigation. Such a meeting would enable the parties to tailor the Second CID's requests to information the Bureau reasonably requires. Therefore, on October 10, 2017, Firstsource proposed that the Bureau send representatives to attend a meeting, where such representatives are authorized to discuss: [redacted] (2) the FDCPA provisions and their application to the facts relevant to the Firstsource matter within SEFL, (3) the appropriate protocol that should be used for reviewing and producing call recordings, including an objective sampling approach, (4) the position of Firstsource relative to other debt-collection market participants from the standpoint of risk of consumer harm, and [redacted]

That day, the Bureau staff explained, as described above, that even if the Bureau's original basis for opening this investigation were incorrect [redacted] the Bureau could still choose to point to other issues to justify the investigation. *See* Exh. A. This response, coupled with the documents produced to date, seemed to underscore the fact that the Bureau did not have a basis for the investigation. Therefore, Firstsource asked the Bureau to articulate a convincing rationale for the investigation, [redacted] The Bureau did not provide this information, and chose to refrain from modifying the Second CID notwithstanding the issues of burden and impropriety that were discussed.

Accordingly, Firstsource respectfully requests—in the alternative of setting aside the Second CID in its entirety—that the Bureau state its rationale for the investigation, including a response to the issues raised regarding the lack of basis to believe violations occurred. Thereafter, if the Bureau still wishes to do so, the parties could discuss a date for an

investigational hearing of Firstsource to occur in Buffalo, NY; additional document productions; and the production of any additional, relevant call recordings [redacted], subject to reasonable parameters needed to address the problems in the Second CID, as described below.

A. The Second CID Seeks Non-Existent Information.

The Second CID is ostensibly limited to information within Firstsource's possession, custody or control. *See* Second CID at 7. This limitation comports with Section 1052(c)(12) of the Dodd-Frank Act, which restricts the scope of CIDs to material or information "in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted."[62] The Bureau has noted that the definition of possession, custody, and control under the Federal Rules of Civil Procedure is a useful point of reference in this regard.[63] The Federal Rules of Civil Procedure do not require parties to "create documents" or to generate calculations that "do not already exist in any form."[64]

As relevant here, the Second CID asks Firstsource to identify and provide (1) "[a]ll

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[62] *See* 12 U.S.C. § 5562(c)(12); *see also* 12 C.F.R. § 1080.6 (calling for "all of the information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed.")

[63] *See* Apr. 25, 2016 Decision and Order on Petition by Assurant, Inc. to Modify or Set Aside CID ("As with discovery requests governed by the federal rules, the Bureau's CID requires an entity to produce documents and information within its possession, actual or constructive custody, or control.") (http://files.consumerfinance.gov/f/documents/201604_cfpb_decision-and-order-on-petition-by-assurant-inc-to-modify-or-set-aside.pdf.)

[64] *See Wagener v. SBC Benefit Plan-Non-Bargained Program*, No. 1:02-cv-00769, 2007 WL 915209, at *4 (D.D.C. Mar. 26, 2007). *Accord Dearborn Tree Service, Inc. v. Gray's Outdoorservices, LLC*, No. 13-cv-12584, 2014 WL 6886407, at *6 (E.D. Mich. Dec. 4, 2014) ("Defendants cannot be compelled to create a non-existent document in response to a Rule 34 request."); *Seed Research Equip. Solutions, LLC v. Gary W. Clem, Inc.*, No. 09-1282, 2011 WL 3880895, at *1 (D. Kan. Sept. 1, 2011) ("Second, and more importantly, although Mr. Unruh testified regarding the potential for certain reports to be *generated* by Plaintiff's computer system, the Court has not been presented with any evidence that the documents actually have been created.") (emphasis in original); *Mon River Towing, Inc. v. Indus. Terminal and Salvage Co.*, No. 06-01499, 2008 WL 2412946, at *2 (W.D. Pa. Jun. 10, 2008) ("Hence, the Court finds that Rule 34 does not require a responding party to create or generate responsive materials in a specific form requested by the moving party. However, to the extent that Defendant merely requests a computer print-out of the information at issue in its 'discovery requests,' the Court finds that the same falls within the bounds of Rule 34.")

recordings of calls in which the Company discussed settlement options with an authorized user before obtaining a phone payment or payment agreement for [a Client A] account," and (2) "[a]ll recordings of calls in which the Company provided a credit bureau disclosure before obtaining a phone payment or payment agreement for [a Client B] account."

This aspect of the Second CID is problematic because Firstsource does not have, and does not have the ability to create, a list of calls that meet the above criteria. First, in the ordinary course of business, Firstsource does not label or segregate audio files to indicate whether the Bureau's criteria are met. Thus, Firstsource cannot ascertain from the face of a given audio file whether it is responsive to the Second CID. Therefore, there is no existing list of audio files that are responsive to this aspect of the CID and there is no way to readily assemble such a list.

[redacted]

Second, the content of Firstsource's database of audio files cannot be searched in an automated fashion and cannot realistically be converted into a searchable format. [redacted] Voice-recognition technology is not available to reliably search audio files or create searchable transcripts of the files sought by the Bureau. As such, the files can only be listened to manually. [redacted]

[65] *See* Oct. 17, 2017 Ltr. from E. Mothander to J. Lee.

[redacted]

Third, the Second CID does not actually define the terms "settlement options" or "credit bureau disclosure." Although Firstsource is aware of industry terms that might be relevant to consumers' settlement of debts or statements related to credit bureau information, and although the parties have exchanged correspondence regarding the meaning of these terms, the Bureau has not provided definitions of these terms sufficient to allow Firstsource to reasonably respond to the Second CID, nor has the Bureau agreed to an extension of the deadline to file this Petition to allow the parties to reach an understanding. Depending on what the Second CID intends to seek, the requests themselves could implicate a manual review of hundreds of thousands of audio files. Ultimately, even if Firstsource's database of audio files could be searched in an automated fashion, or could be manually reviewed without undue burden, the Bureau must clarify the Second CID before Firstsource would be in a position to determine whether or not a given audio file is or is not responsive to the Second CID.

After Firstsource raised this concern during the October 10, 2017 call, the Bureau provided an email stating as follows:

> "For Request for Tangible Things 1, FSA00002591 includes examples of settlement (or payment) discussions with authorized users of [Client A] accounts. For Request for Tangible Things 2, FSA00001886 includes guidance on credit bureau disclosures for [Client B] accounts. Firstsource uses the term 'credit bureau disclosure' in its regulatory trainings as well. *See* FSA00009397."

While Firstsource appreciates the Bureau's response, it does not reduce the burden of the Second CID or clarify the intended scope of the Second CID. FSA00002591 does not refer to the term "settlement options" or the term "credit bureau disclosure." FSA0001886 refers to the term "credit bureau disclosure," but it does not provide a definition of that term. Similarly, FSA

00009397 refers to the term "credit bureau disclosure," but it does not provide a definition of that term. As a result, even if it were technologically possible to review Firstsource's database of audio files without undue burden, Firstsource's counsel would not know how Firstsource is meant to determine whether they are responsive to Tangible Requests 1 or 2. While the Bureau provides further discussion regarding the cited documents in its October 17, 2017 letter, this discussion does not resolve the problem. In addition, because the Bureau has not extended the deadline to file this Petition, the parties were unable to continue discussing potential modifications before the deadline to file this Petition.

Firstsource also understands that the Bureau had provided the exemplars described above in an attempt to better understand how the Bureau could modify the Second CID. But the Bureau provided its responses with respect to the Second CID on October 10 and 13, 2017. Firstsource reviewed the information and promptly responded to the Bureau's follow-up questions regarding the Second CID on October 16, 2017. As of the date of the Petition, the Bureau has not provided any modification to the Second CID. The Bureau's timing did not offer ample opportunity to come to an agreement regarding the Second CID, because although Firstsource sought an extension of the October 18, 2017 deadline for this Petition, the Bureau did not extend the deadline.

Moreover, even if the Bureau could modify the Second CID eventually to clarify its meaning, the only way to identify potentially responsive calls would be to manually listen to the audio files. Depending on the review criteria the Bureau chooses to impose, this manual work could take potentially several years—just to listen to the files, let alone to determine their responsiveness, record those determinations, and write descriptions about each call.

In sum, this aspect of the Second CID seeks information that does not exist and that

Firstsource does not have the practical ability to create. As a result, it would be unreasonable to require compliance with this aspect of the Second CID. The Second CID should be modified, as noted below, to address these concerns.

B. The Request for Audio Files is Disproportionate.

Under the Federal Rules of Civil Procedure, proportionality is a core principle of discovery. In particular, a discovery demand must be:

> proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[66]

In numerous cases, federal courts have applied the concept of proportionality to requests for audio files and other database information that cannot be searched in an automated fashion. For example, in one case, General Steel Domestic Sales, LLC ("General Steel") sued Atlantic Building Systems, LLC ("Atlantic") for unfair competition, and Atlantic counterclaimed for commercial disparagement.[67] Atlantic demanded that General Steel produce "all audio recordings of any sales calls, or other communication by phone, between General Steel employees and General Steel customers or potential customers since January 2009."[68]

General Steel contended that the request was unduly burdensome in light of Atlantic's "thin allegations of commercial disparagement."[69] General Steel noted that Atlantic had identified "only two persons who allegedly were the recipients of disparaging statements [made] by General Steel," and had not "specified any damages incurred as a result of the alleged

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[66] Fed. R. Civ. P. 26(b)(1).

[67] *Gen. Steel Domestic Sales, LLC v. Chumley*, No. 10-cv-01398, 2011 U.S. Dist. LEXIS 63803, at *3 (D. Colo. Jun. 15, 2011).

[68] *Id*. at *3.

[69] *Id.*

commercial disparagement."[70] In addition, General Steel noted that its database of calls contained over 463,000 audio files, and that "the only method of sorting [its] recorded call database . . . is by listening to every recorded call."[71]

The Court agreed that "the audio recordings sought by [Atlantic] are not reasonably accessible because of undue burden."[72] As the Court explained:

> Assuming that each recorded call in [General Steel's] database is just one minute long, listening to 463,000 calls would require 7,716 hours. . . . Thus, working 40 hours per week, a person would need 193 weeks – nearly four years – to listen to every recorded call. . . Accordingly, the Court finds that [General Steel] has adequately demonstrated that listening to its entire database of recorded calls would be unduly burdensome. Moreover, although Plaintiff does not specifically address the cost of listening to all of its recorded calls, the Court finds that such cost is prohibitive. Even assuming that an individual could be hired at minimum wage ($7.36 per hour in Colorado, see 7 Colo. Code Regs. § 1103-1) to listen to the calls, a simple calculation shows that the cost of this project in wages alone would be more than $56,000.00.[73]

Therefore, the Court concluded, "the recorded sales calls sought by [Atlantic] are not reasonably accessible because of undue burden and cost."[74]

The Government often wields the concept of proportionality in objecting to FOIA requests and other discovery requests that call upon the Government to conduct a file-file-file,

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[70] *Id*. at **3-4 (internal quotations omitted) (alteration in original).

[71] *Id*. at **4-5.

[72] *Id*. at *6.

[73] *Id*. at *7

[74] *Id*. Many other cases similarly draw a distinction between discovery demands that can be met through an automated database query and, on the other hand, discovery demands that in effect require a labor-intensive, manual review of database information. *See, e.g.*, *Liberty Mut. Fire Ins. Co. v. J&S Supply Corp.*, No. 13-cv-4784, 2015 U.S. Dist. LEXIS 177124, at *38 (S.D.N.Y. Jun. 29, 2015) (quashing discovery demand that would have required "a manual review of approximately 2,775 electronic files," which would have taken "approximately 694 to 925 hours."); *A&R Body Specialty & Collision Works, Inc. v. Progressive Cas Ins. Co.*, No. 3:07-cv-929, 2014 U.S. Dist. LEXIS 159184, at *12 (D. Conn. Nov. 10, 2014) (quashing discovery demand that would have required a "file-by-file review of claims information"); *Gucci Am. v. Guess? Inc.*, 790 F. Supp.2d 136, 141 (S.D.N.Y. 2011) (quashing discovery demand that would have required a party to "manually compile lists of potentially hundreds or thousands of product styles, and then conduct lengthy financial analyses to determine the necessary sales and costs information.")

manual review of large volumes of database information. *See, e.g., Ayuda, Inc. v. FTC*, (agreeing with the FTC that "the FTC can withhold the entire universe of information contained in the data fields when only a small percentage of that information is exempt but redacting the exempt information requires an unreasonably burdensome manual review.") [75]; *Int'l Counsel Bureau v. United States DOD* ("[T]he Court agrees with the Department that enlisting a full-time staff of twelve for a year to review hundreds of thousands of unsorted images would impose such an undue burden.") [76]; *Wolf v. CIA* ("Armed with only an approximate date and excerpt of the field reports, [the CIA] averred that a researcher would be forced to review the reels on a frame-by-frame basis, which would take approximately 3,675 hours and cost about $147,000."). [77]

Here, the Second CID's request for audio files is disproportionate for several reasons. First, as previously discussed, the request would impose an extraordinary burden on Firstsource. In effect, the request calls for a manual review of audio files. Depending on the meaning of the terms used in the Second CID, such a review could encompass hundreds of thousands of calls and take an individual several years to complete. This burden would go well beyond the burden that the court deemed excessive in *Chumley*.

Second, the request is unlikely to serve an investigatory purpose. At a minimum, in issuing a CID, the Bureau must have "reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation" of a federal consumer-protection law. 12 U.S.C. § 5562(c)(1). *See also Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Sch.*, ("The CFPB's ability to define the scope of its investigation broadly 'does not afford it unfettered authority to

[75] 70 F. Supp. 3d 247, 276 (D.D.C. 2014).

[76] 723 F. Supp. 2d 54, 59 (D.D.C. 2010)

[77] 569 F. Supp. 2d 1 (D.D.C. 2008)

cast about for potential wrongdoing . . . .'") (quoting *In re Sealed Case*, 42 F.3d 1412, 1418 (D.C. Cir. 1994)).[78]

Based on the Bureau Report and the other documents and information produced by Firstsource subsequent to the examination, as discussed above, there is no objective reason to believe that Firstsource is in possession of any information relevant to a violation of a consumer protection law. [redacted]

As discussed above, federal courts routinely find that unintentional, isolated errors of this nature do not violate the FDCPA. *See Berry v. Van Ru Credit* (dismissing FDCPA claim based on the bona fide error defense)[79]; *Turnbull v. Rancilio* (same)[80]; *Puncochar v. Revenue Mgm't of Ill. Corp.* (same).[81] *See also FTC v. Rawlins & Rivers, Inc.* (noting the FTC's concession that the FDCPA bona fide error defense was equally applicable to private lawsuits as well as actions brought by the FTC).[82]

Third, imposing this burden on Firstsource is unnecessary. In the supervision context, and in other contexts, the Bureau routinely analyzes large volumes of database information without imposing an undue burden on itself or third parties. [redacted]

[78] 854 F.3d 683, 691 (D.C. Cir. 2017)

[79] No. 2:15-cv-150, 2017 U.S. Dist. LEXIS 164266 (D. Ut. Sept. 11, 2017).

[80] No. 16-cv-11971, 2017 U.S. Dist. LEXIS 35855 (E.D. Mich. Mar. 14, 2017).

[81] No. 15-cv-07089, 2017 U.S. Dist. LEXIS 49939 (N.D. Ill. Mar. 31, 2017).

[82] No. 6:07-cv-146, 2007 U.S. Dist. LEXIS 103935, at *8 (M.D. Fla. May 24, 2007).

[redacted]

Here, a similar approach should be used. The Bureau can provide Firstsource with criteria for assembling a manageable, statistically representative sample set of calls to [Client A] and [Client B] customers. If the Bureau provides a workable definition of the terms "settlement options" and "credit bureau disclosure," Firstsource can then apply those definitions to identify any calls within the sample set in which those topics arose.

At a minimum, the Bureau should attempt to work with Firstsource on designing a statistically sound sampling approach before requiring Firstsource to manually review audio files individually. Currently, because the viability of a sampling approach has not been explored, it is premature for the Bureau to require Firstsource to conduct a comprehensive review.

C. The Second CID Improperly Targets Time-Barred Accounts.

The Second CID also is improper because any FDCPA claim asserted by the Bureau on the basis of the call recordings sought in the Second CID would be time-barred. The FDCPA is governed by a one-year statute of limitation. *See* 15 U.S.C. § 1692k(d) ("An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, *within one year from the date on which the violation occurs*.") (emphasis added). Federal courts

[83] The Bureau used a similar sample-testing technique in its Arbitration Study and numerous other studies. *See* Arbitration Study, Mar. 2015, at 80 n. 82 ("Given the volume of credit card cases we identified, we coded the complaints for a random sample of the individual credit card cases that were not filed in or transferred to MDLs to obtain a 95% confidence level with a 5% margin of error."). *See also* Analysis of Differences between Consumer and Creditor-Purchased Credit Scores, Sept. 2012, at 7 ("Each of the three larger nationwide CRAs, Equifax, Experian, and TransUnion, provided the CFPB with a random sample of 200,000 consumer reports and credit scores calculated on such reports."); Report on the Use of Remittance Histories in Credit Scoring, Jul. 2014, at 6 ("To construct this dataset, the CFPB partnered with a large remittance transfer provider . . . that selected a random sample of 500,000 anonymous consumers.)

routinely dismiss FDCPA claims that are brought more than one year after the alleged violation. *See, e.g., Shetiwy v. Midland Credit Mgm't* (dismissing FDCPA claims as time-barred).[84]

Here, under the FDCPA's one-year statute of limitation, any FDCPA claim brought by the Bureau as to Firstsource would be time-barred. [redacted]

In addition, of the 32 specific consumer complaints listed in Request for Tangible Things No. 3, no fewer than 28 of those complaints were submitted over a year ago, according to the Second CID. The filing dates of these 28 complaints range from August 15, 2014 through September 23, 2016. Given that these complaints were filed (beginning in 2014) with the Bureau, the Bureau cannot credibly assert that it did not discover them until now.

Moreover, the Bureau provides no justification for why, [redacted] the Bureau belatedly seeks such recordings now. The Bureau does not explain why they were not mentioned in the First CID. The previous eighteen months of probing has yielded no evidence of wrongdoing. The Bureau now appears to be pivoting to begin a new investigation of stale claims. Although Firstsource would be happy to discuss any consumer experience that is of interest to the Bureau, the Bureau should

[84] 980 F. Supp. 2d 461, 473-74 (S.D.N.Y. 2013).

not be permitted to suddenly launch a new fishing expedition in the hope of finding violations, where numerous productions show none exist.

D. The Second CID Should Be Modified.

Federal courts often encourage parties to agree, at the outset of the discovery process, on reasonable criteria for sample testing large volumes of information when such information realistically does not lend itself to a comprehensive production or review. *See, e.g.*, *Smith v. Lowe's Home Ctrs.*, ("This Court agrees that limiting discovery to a statistically significant representative sampling, at this juncture, will both reasonably minimize the otherwise extraordinary burden imposed on the plaintiffs and their counsel and yet afford the defendant a reasonable opportunity to explore, discover and establish an evidentiary basis for its defenses.")[85]; *Res. Co., LLC v. Guaranty Bank*, ("There are significant benefits that can be derived from this early ruling on the use of the sampling protocol to identify the loan sample size and the method of identifying a breach rate for a defined population of loans sold by a defendant to RFC.").[86]

Analogously, the Bureau can confer with Firstsource to design a workable procedure for sample testing those categories of audio files that are of interest to the Bureau, in lieu of requiring Firstsource to undertake a manual review of tens of thousands of audio files. For the time being, if the Bureau decides not to set aside the Second CID in its entirety, then—in the alternative—the Bureau should modify the Second CID to delete the existing Request for Tangible Things Nos. 1, 2, and 3 and Interrogatory Nos. 3, 4, and 5. Once the Bureau and Firstsource have had an opportunity to agree on an appropriate sample testing protocol, however,

[85] 236 F.R.D. 354, 357-8 (S.D.Oh. 2006).

[86] No. 13-cv-3451, 2015 U.S. Dist. LEXIS 50138, at *8 (D. Minn. Apr. 16, 2015).

the Bureau should issue a revised Second CID to reflect that agreed-upon approach, including a methodology that will ensure that the Bureau does not attempt to sweep time-barred accounts into the investigation to manufacture additional varieties of attenuated FDCPA theories.

The Bureau also should modify the Second CID to define the terms "settlement options" and "credit bureau disclosure." Currently, the Bureau has left the meaning of these terms ambiguous. As a result, it is unclear how Firstsource should go about determining whether a given audio file is responsive to the Second CID. In the alternative to defining those terms, the Bureau should provide different review criteria that do not use those undefined terms as review filters.

REQUEST FOR CONFIDENTIAL TREATMENT

Pursuant to 12 C.F.R. § 1080.6(g), Firstsource requests confidential treatment of this Petition, the Second CID, the First CID, [redacted] and the Bureau's response to this Petition ("Confidential Petition Information"). The Bureau should treat these matters as confidential for several reasons. First, the Petition reveals Confidential Supervisory Information ("CSI").[87] [redacted] Second, the Petition reveals Confidential Investigative Information ("CII") related to the investigation of Firstsource and other supervised financial institutions. Third, the Second CID reveals sensitive personally identifiable information ("PII") regarding individual consumers, including consumers' names and complaint identification numbers.[88] Fourth, the Confidential Petition

[87] *See* 12 C.F.R. § 1070.2.

[88] *See* Second CID at 2.

Information reveals sensitive commercial information regarding the business relationships between Firstsource and other supervised financial institutions.[89]

The Bureau therefore should treat the Confidential Petition Information as confidential. In the alternative, if the Bureau decides to reject the Request for Confidentiality, the Bureau should (i) afford Firstsource a reasonable amount of time to inform [redacted], consumers, and the other supervised financial institutions of the Bureau's intent to publish their information, including CSI, CII, PII, and sensitive business information, on the Bureau's website, and (ii) agree to at least refrain from posting the confidential information online until after each one has provided consent and input as to redactions.

CONCLUSION

For the reasons set forth above, the Bureau should set aside the Second CID in its entirety. In the alternative, the Bureau should modify the due dates of the Second CID to allow time for candid discussions regarding the rationale for the investigation [redacted], with further discussions to follow regarding the potential for producing a witness(es) for an investigational hearing, additional documents, and/or a sampling of call recordings thereafter, subject to reasonable parameters described above. This protocol would be the most efficient, sensible, and effective approach to serve the mutual interests of the parties.

[89] *See id*. at 1.

Dated: October 18, 2017

Respectfully submitted,

By: _____

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EXHIBIT A: STATEMENT OF COUNSEL PURSUANT TO 12 C.F.R. § 1080.6(E)(1).

Prior to filing this Petition, counsel for the petitioner, Firstsource Advantage, LLC, has conferred with counsel for the Consumer Financial Protection Bureau ("Bureau") regarding the CID at issue in this Petition (the "Second CID"). The parties met and conferred on October 10, 2017 by telephonic conference from 1:00 pm to 2:10 pm Eastern. Those in attendance on October 10, 2017 for Firstsource included: J.H. Jennifer Lee, Eric Epstein, and Kathryn Johnson and for the Bureau included: Eric Mothander, E. Vanessa Assae-Bille, Chelsea Peter, and Michael Williams. The same group of individuals met and conferred again through email and letter communications on October 10, 11, 12, 13, 16 and 17, 2017—each of which is in the Bureau record.

In addition, many substantive meet-and-confer discussions relevant to this Petition occurred earlier this year. On April 28, 2017, the Bureau issued the first Civil Investigative Demand to Firstsource ("First CID"). Counsel for Firstsource have participated in numerous meet-and-confer discussions arising out of the Bureau's First CID and Second CID. These good-faith discussions are described, in pertinent part, below:

On May 11, 2017, Ms. Lee held a telephonic meet-and-confer discussion with multiple representatives of the Bureau, including Mr. Mothander, Ms. Assae-Bille, Mr. Williams, and Ms. Peter. During the course of this meet-and-confer, [redacted]

[redacted] Mr. Mothander indicated that the Bureau welcomes any such submission, but that the investigation would continue regardless.

On May 25, 2017, as discussed during the May 11, 2017 meet-and-confer, Firstsource submitted two detailed letters to the Bureau regarding this matter. Firstsource raised a number of issues, including: (1) Firstsource's relative size in the debt-collection market; [redacted] and (6) the significant overlap between the records requested by the First CID [redacted] Firstsource concluded its letter by requesting that the First CID be set aside in favor of informal discussions and resolutions. Nonetheless, Firstsource agreed to respond to the First CID, in deference to the Bureau, if the Bureau so requires.

On June 16, 2017, Ms. Lee and Mr. Epstein held another telephonic meet-and-confer discussion with representatives of the Bureau, including Mr. Mothander and Ms. Assae-Bille. During the course of this meet-and-confer, counsel again expressed Firstsource's desire and willingness to discuss in good-faith [redacted]

That day, Ms. Lee asked whether the Bureau would meet with Firstsource; in response, Mr. Mothander stated that he passed on Firstsource's May 25, 2017 letter and briefed his supervisors, but that at this point, the Bureau wanted to obtain full compliance with the First CID

and not engage in any discussions regarding the FDCPA. Ms. Lee then asked whether the Bureau would be amenable to such discussions after Firstsource fully complied with the First CID. Mr. Mothander indicated that the Bureau is always open to a meeting in concept, but that he could not commit either way.

In the months that followed, Firstsource timely submitted numerous document and data productions in response to the First CID's burdensome and duplicative requests, at great expense to Firstsource. Productions under the First CID were completed by July 2017.

On July 26, 2017, Ms. Lee and Ms. Johnson held another telephonic meet-and-confer discussion with Mr. Mothander. After the parties agreed that Firstsource had fully complied with the First CID, Ms. Lee asked whether Mr. Mothander could provide any response or other information from the Bureau regarding Firstsource's May 25, 2017 letter [redacted]. Mr. Mothander stated that it was too early to convey any information [redacted] because the Bureau had not made any determinations about Firstsource, and that the letter had been considered by various individuals at the Bureau.

On October 10, 2017, following the issuance of the Second CID, Ms. Lee, Mr. Epstein and Ms. Johnson held a telephonic meet-and-confer discussion with Mr. Mothander, Ms. Assae-Bille, Mr. Williams, and Ms. Peter, as noted above. During this meet-and-confer, Ms. Lee again raised concerns regarding the basis for, and course of, the Bureau's investigation of Firstsource. Ms. Lee again requested that the Bureau meet to discuss these issues, including, among other things, [redacted]. However, the Bureau did not commit to such a meeting and did not otherwise explain the basis or purpose of its investigation

as a whole or the Second CID in particular. Ms. Assae-Bille further stated that, even if the Bureau were to agree that [redacted], ultimately the Bureau could identify or may have identified some other reason for the investigation. Ms. Assae-Bille did not specify any such reason or purpose.

To give the Bureau the benefit of the doubt, following the October 10, 2017 meet-and-confer, and at the Bureau's request, Firstsource's counsel prepared a letter. On October 11, 2017, Firstsource's counsel submitted this letter to the Bureau requesting an extension of the deadline to submit this Petition, and requesting that the Bureau articulate a cognizable legal and factual rationale for its investigation of Firstsource prior to Firstsource's compliance with the Second CID. This request was made within the context of the parties' meet-and-confer discussions and Firstsource's document productions, dating back to April 2016. During this period, Firstsource complied with all requests from the Bureau and remained open to collaboration with and instruction from the Bureau, despite Firstsource's position that the Bureau lacks a cognizable basis for asserting liability under the FDCPA or any other federal consumer-financial law.

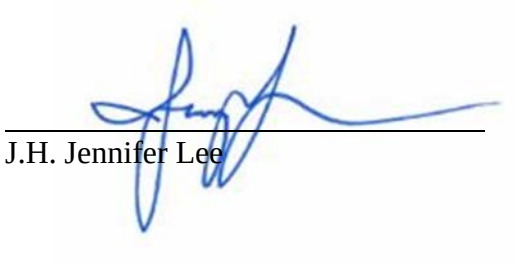
On October 13, 2017, the Bureau responded to Firstsource's October 11, 2017 letter by declining to extend the deadline to submit this Petition and declining to describe the legal and factual basis for its investigation, asserting that the Bureau has "wide latitude to gather information."

On October 16, 2017, Firstsource responded to the Bureau's October 13, 2017 letter, providing, among other things, detailed, applicable case law explaining why the Bureau's legal position was incorrect and inviting the Bureau to provide a good-faith response that would obviate the need for this Petition. In its October 17, 2017 response, the Bureau opted not to

provide the requested information regarding the basis for the investigation. In addition, while the Bureau provided additional explanation and demonstrated a willingness to work with Firstsource to obtain assistance from Firstsource in how to define the terms in the Second CID, the Bureau did not provide an extension of the due date for this Petition, foreclosing the opportunity to resolve these matters short of a Petition.

In sum, the parties met, pursuant to 12 C.F.R. § 1080.6(c), on the above-described occasions in a good-faith effort to resolve by agreement the issues raised by the Petition and have been unable to reach such an agreement.

Date: October 18, 2017

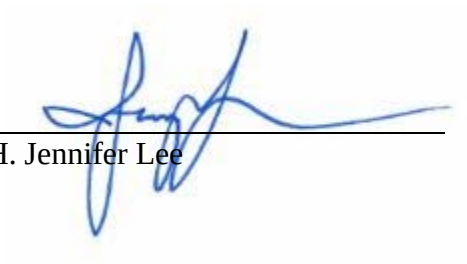


J.H. Jennifer Lee

CERTIFICATE OF SERVICE

I hereby certify that on the October 18, 2017, pursuant to 12 C.F.R. § 1080.6(e), I caused the foregoing Petition to Set Aside or Modify the Second Civil Investigative Demand to be served via email upon the Executive Secretary of the Consumer Financial Protection Bureau and the Assistant Director for the Bureau's Office of Enforcement.

Date: October 18, 2017



J.H. Jennifer Lee