

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NEXUS SERVICES, INC., *et al.*,

Plaintiffs,

v.

CONSUMER FINANCIAL  
PROTECTION BUREAU, *et al.*,

Defendants.

CONSUMER FINANCIAL  
PROTECTION BUREAU,

Petitioner,

v.

NEXUS SERVICES, INC., *et al.*,

Respondents.

Case No. 1:17-cv-02215-ABJ

Case No. 1:17-cv-02238-ABJ

**CONSUMER FINANCIAL PROTECTION BUREAU’S OPPOSITION TO  
MOTION TO ENFORCE THE MODIFIED CIVIL INVESTIGATIVE DEMAND**

As this Court is aware, the Consumer Financial Protection Bureau (CFPB or Bureau) and Nexus Services, Inc. and Libre by Nexus, Inc. (collectively Nexus) resolved these cases in December of 2018. The parties agreed, and the Court ordered, that Nexus would comply with a Bureau civil investigative demand (CID) as modified and that Nexus’s suit against the Bureau seeking, among other things, to prevent the Bureau from acquiring information from third parties would be dismissed with prejudice. Nexus has now filed what it styles a “Motion to Enforce the Modified Civil Investigative Demand” that seeks the same relief as the now-dismissed suit: it wants the Court to

prevent the Bureau from asking for certain information from third parties. But since the parties' agreement and the Court's order do not restrain the Bureau from doing so, the motion is meritless and must be dismissed.

Nexus also asserts that the Bureau has acted in bad faith and that its attorneys have engaged in misconduct. Since Nexus's underlying argument is baseless, these attacks are a fortiori baseless as well. They are also completely wrong—the Bureau's attorneys have acted with good faith and professionalism throughout these proceedings, and Nexus adduces nothing in support of its extraordinary allegation.

## **I. BACKGROUND**

In August of 2017, the Bureau issued a CID to Nexus. Rather than comply with this CID, Nexus filed suit against the Bureau in October of that year, arguing, among other things, that the Bureau lacked enforcement authority over it. *See* Case No. 17-2215, Compl. ¶¶ 65-80.<sup>1</sup> Nexus's complaint argued that it was inappropriate for the Bureau to contact third parties, *see id.* ¶ 4 (referring to such contacts as "inappropriate, nefarious tactics"), and expressed concern about its clients' personal information, *see id.* ¶ 95 (stating that Nexus would be irreversibly harmed if the Bureau sought information that "would lead to disclosure of the identities" of its clients). The Bureau then petitioned to enforce the CID. *See* Case No. 17-2238, Pet. to Enforce Civil Investigative Demand.

After Nexus sought a preliminary injunction barring the Bureau from investigating it or engaging in third-party discovery, *see* Mem. in Supp. of Pls. Mot. for

---

<sup>1</sup> Though most documents in this litigation were filed on the dockets for both Case No. 17-2215 and Case No. 17-2238, some were only filed on one or the other docket. Unless otherwise noted, all citations are to documents in Case No. 17-2215.

Prelim. Inj. at 35, the Bureau agreed to “suspend taking any additional steps to enforce its CID against Nexus or engage in third party discovery concerning Nexus pending the resolution of the case on the merits,” Dec. 4, 2017 Min. Order, in order to moot the motion. In the briefing on the merits, the parties argued whether Nexus could use its suit to block the Bureau’s third-party discovery. *Compare* CFPB Consolidated Memo. in Supp. of Mot. to Dismiss, Opp. to Mot. for Summ. J., and Further Supp. of Pet. to Enforce Civil Investigative Demand at 22-26 (arguing Nexus lacked standing to challenge third-party contacts), *and id.* at 29-32 (arguing Nexus failed to state a claim based on third-party contacts) *with* Pls. Opp. to Defs.’ Mot. to Dismiss, Further Opp. to Defs. Pet. to Enforce, and Reply in Supp. of Mot. for Summ. J. (Nexus Second Brief) at 23-28 (arguing Nexus had standing to challenge third-party investigation), *and id.* at 30-32 (arguing Nexus stated a claim based on third-party contacts). And Nexus raised concerns about the confidentiality of its clients’ information. *See* Nexus Second Brief at 16-17 (“reserv[ing] the right to file an appropriate motion for protective order” concerning client information); *id.* at 27-28 (arguing the importance of protecting Nexus’s clients’ identities); *id.* at 31 (same).

After briefing was completed, the parties agreed, at the Court’s suggestion, to engage in mediation. Ultimately, the parties reached a settlement memorialized in a Stipulation, which the Court adopted in an Order entered on December 11, 2018. *See* Stipulation and Proposed Order; Dec. 11, 2018 Order. The Order granted the Bureau’s petition to enforce the CID as modified during the mediation and directed Nexus to comply with it. Dec. 11, 2018 Order ¶¶ 1, 2. And the Order also dismissed with prejudice Nexus’s claims against the Bureau, including its claims about the Bureau’s contacts with third parties. Dec. 11, 2018 Order ¶ 3 (dismissing claims in Case No. 2215).

## II. ARGUMENT

Nexus seeks relief without any basis whatsoever in the Court's Order of December 11, 2018. The Court should accordingly deny Nexus's Motion.

Nexus asks the Court to enter an order "preventing the Bureau from issuing CIDs to any third-party requesting Nexus' Program Participants' addresses and telephone numbers." Memo. in Supp. of Mot. to Enforce at 7, Case No. 17-2238 (Mar. 15 Memo.). But Nexus also predicts the Bureau's response and concedes it: "The Bureau will likely argue it never made an agreement with Nexus respect [sic] to third-party CIDs. This is correct." Mar. 15 Memo. at 6 n.3.

Nexus's admission is fatal to its motion. The Court's Order does not preclude the Bureau from acquiring any type of information from third parties. So the Bureau cannot violate the Order by doing so. Nonetheless, Nexus claims that while the Bureau is not violating the text of the Order, it is violating "the purpose of the Stipulation and Order." Mar. 15 Memo. at 6. But settlement agreements "cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant [stipulation] embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) (explaining that consent decrees result from careful negotiations and embody compromises). For this reason, the scope of the Stipulation "must be discerned within its four corners and not by reference to what might satisfy the purposes of one of the parties to it." *Id.* at 682; see also *Montgomery v. Internal Revenue Service*, 292 F. Supp. 3d 391, 397 (D.D.C. 2018) ("When interpreting a settlement agreement, a court must honor the intentions of the parties as reflected in the settled usage of the terms" they used in the agreement and "[p]articularly where, as here, two sophisticated

parties negotiated the terms, the Court will not look beyond the language to deduce their intent.” (citations omitted)). The Stipulation and Order are simple documents with no ambiguity; nothing in them prevents the Bureau from seeking any category of information from third parties.

Nexus could have bargained in mediation for the relief that it now seeks. It raised the issue in its Complaint and repeatedly thereafter. *See supra* 2-3. A settlement resolving the Bureau’s CID enforcement proceeding and Nexus’s suit conceivably could have granted Nexus this relief, especially since it sought such relief in its suit against the Bureau. *Cf.* L. Civ. R. 84.2(a) (“A hallmark of mediation is its capacity to expand traditional settlement discussion, and broaden resolution options, often by exploring litigant needs and interests that may be independent of the legal issues in controversy.”). But what Nexus actually agreed to, and what the Court ordered, was that its claims concerning third-party discovery be dismissed with prejudice. Dec. 11, 2018 Order at ¶ 3.

Since its argument is meritless as a matter of textual interpretation, Nexus repeatedly asserts that the Bureau has proceeded in bad faith. *See, e.g.*, Mar. 15 Memo. at 4 (“end-around”); *id.* at 5 (same); *id.* at 6 (“This sleight-of-hand intentionally defies the purpose of the Stipulation and Order.”); *id.* at 6 (“work-around”); *id.* at 6 (“under-the-table dealing”); *id.* at 7 (“For the Bureau to now pursue an end-around to this Stipulation (without full disclosure to the Court and Nexus) by seeking the same sensitive information from a third-party obliterates its duty under the Modified CID to act in good faith.”). It even asserts that the Bureau’s counsel has engaged in some sort of misconduct. *See id.* at 6-7. But the purported support for these allegations is vanishingly

thin and all depends on Nexus's underlying theory that the Bureau is violating a secret agreement that is not reflected in the Stipulation or Order.

The key piece of evidence in Nexus's story about nefarious Bureau activity is a CID that the Bureau issued to Statewide Bonding, Inc. on October 24, 2017—*before Nexus sued the Bureau*.<sup>2</sup> Having agreed to suspend third-party discovery pending the resolution of the cases, the Bureau took no action to enforce the Statewide Bonding CID until after these suits were resolved. They were resolved with a Stipulation and an Order that did not limit the Bureau's right to issue CIDs to any other entity, so the Bureau resumed enforcement of the Statewide Bonding CID. This is not an "end-around,"<sup>3</sup> and the Bureau has no obligation to notify Nexus of its third-party discovery efforts, *see SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984) (holding that the SEC is not required to notify the "targets" of investigations of third-party subpoenas).

The case that Nexus cites adds nothing to its unsupported insinuations. In *American Hospital Association v. Sullivan*, 938 F.2d 216 (1991), the D.C. Circuit held that an agency acted in "bad faith," such that a fee award was appropriate, when it

---

<sup>2</sup> Nexus also claims that the Bureau's previously-issued CID to Statewide Bonding was "[u]nknown to Nexus." Mar. 15 Memo. at 4. This is hard to credit, since Nexus attached the Statewide Bonding CID as an exhibit to its complaint, *see* Compl. Ex. J, and at a hearing on December 4, 2017, counsel for Nexus introduced counsel for Statewide Bonding to the Court, stating that Statewide intended to intervene in this action, *see* Dec. 4, 2017 Tr. at 12 ("Your Honor, I just wanted to alert the Court that there is an intervening party of Statewide Bonding, which is one of the parties that received a third-party CID.").

<sup>3</sup> In the Introduction and Background section of its Memorandum, Nexus recounts the procedural history of these cases and makes much of the Bureau's statement, when it appeared that the parties were at an impasse, about the importance of third-party contacts in law enforcement investigations. *See* Mar. 15 Memo. at 2-3. It is unclear what relevance Nexus ascribes to this. But in any event, it is irrelevant to the present dispute concerning the meaning of the parties' agreement and the Court's Order.

entered into a stipulation with a plaintiff in lieu of a preliminary injunction and then, while the suit was still pending, issued regulations overriding the stipulation, *id.* at 218-20. This set of facts is nothing like the present dispute. There the plaintiff sued to enforce its “plain legal rights defined by the Stipulation,” *id.* at 220, whereas here, Nexus seeks to invoke “rights” that are not provided by the Stipulation. Because the Bureau is not violating the Stipulation and Order, it is not causing Nexus to sue to enforce its legal rights under that Stipulation and Order, and it is not acting in bad faith.<sup>4</sup>

Nexus’s Motion is meritless and its suggestion that the Bureau’s attorneys have engaged in prosecutorial misconduct is simply outrageous.<sup>5</sup> The Court should deny Nexus’s motion.

March 29, 2019

Respectfully submitted,

Mary McLeod  
*General Counsel*  
John R. Coleman  
*Deputy General Counsel*  
Steven Y. Bressler (D.C. Bar No. 482492)  
*Assistant General Counsel*

/s/ David A. King Jr.  
David A. King Jr. (Maryland Bar, member in  
good standing)  
Consumer Financial Protection Bureau  
1700 G Street, NW

---

<sup>4</sup> The Bureau did agree to “suspend taking any additional steps to . . . engage in third party discovery concerning Nexus pending the resolution of the case,” Dec. 4, 2017 Min. Order, but since the case has been resolved, that agreement is no longer operative.

<sup>5</sup> In fact, it is Nexus who is in violation of the Court’s December 11, 2018 Order—it failed to produce documents due on March 1 and has not yet agreed to produce them in accordance with the modified CID. If the parties are unable to resolve this issue, the Bureau may file its own motion to enforce the Court’s Order.

Washington, D.C. 20552  
(202) 435-9289  
david.king@cfpb.gov  
*Counsel for Consumer Financial Protection  
Bureau in Case No. 17-2215*

Kristen A. Donoghue (D.C. Bar No. 456707)  
*Enforcement Director*  
Jeffrey Paul Ehrlich (D.C. Bar No. 439088)  
*Deputy Enforcement Director*  
Kara K. Miller  
*Assistant Litigation Deputy*

/s/ Hai Binh T. Nguyen  
Hai Binh T. Nguyen (CA Bar No. 313503)  
Donald R. Gordon (D.C. Bar No. 482384)  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, D.C. 20552  
(202) 435-7251 (Nguyen)  
haibinh.nguyen@cfpb.gov  
(212) 328-7011 (Gordon)  
donald.gordon@cfpb.gov  
*Counsel for Consumer Financial Protection  
Bureau in Case No. 17-2238*