

**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

**RESPONDENTS NEXUS SERVICES, INC. AND LIBRE BY NEXUS, INC.’S
STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO
ENFORCE THE MODIFIED CIVIL INVESTIGATION DEMAND**

Nexus Services, Inc. and Libre by Nexus, Inc. (collectively, “Nexus”), by and through counsel, move this court to enforce the Modified Civil Investigative Demand agreed to by Nexus and the Bureau of Consumer Financial Protection (“Bureau”) as evidenced in the parties’ Stipulation and the Court’s Order (ECF Nos. 43, 44, respectfully).¹ In support thereof, Nexus states as follows.

¹ For sake of clarity, ECF references will only be to the older case in this matter, Case No. 1:17-cv-02215, filed October 25, 2017. Case No. 1:17-cv-02238 was filed on October 30, 2017. While never officially consolidated, the facts of the two cases are similar.

I. Introduction and Background

On or about August 21, 2017, the Bureau served Nexus with a Civil Investigative Demand (the “Original CID”) demanding, among other items, personal information of approximately 17,000 immigrants (Nexus “Program Participants”). August 21, 2017 CID, at 4-7, ECF No. 1-3. *See id.* at 6, Request for Written Report 4(b) (requesting Nexus provide all current and former clients name, address, telephone number, and email address). Concerned about Program Participants’ safety, Nexus opposed the Original CID as overly broad and dangerous because it subjected Program Participants to at best deportation and at worst death. Jan. 29, 2018 Decl. of Erik Schneider in Supp. of Pls.’ Mot. for Summ. J. at 3, ¶ 5, ECF No. 17-1. On August 7, 2018, the Court, with the parties’ consent, ordered mediation. Order, ECF No. 33.

On November 6, 2018, the parties filed a Joint Status Report on Mediation and advised the Court they had “reached an agreement in principle on the scope of and timetable for compliance with the civil investigative demand.” Joint Status Report at 1, ECF No. 39. Nexus sought two more weeks of mediation to “consult with its client, reduce the CID compliance agreement to writing, and dismiss both cases from this Court’s docket.” *Id.* at 2. The Bureau opposed two more weeks of mediation. *Id.* At the time of this filing, the only remaining dispute between the parties was whether or not one of these cases would be dismissed with or without prejudice. *Id.* at 2. On the same day, the Bureau filed a “Notice of Resumption of Third-Party Investigative Activity.” ECF No. 40.² In this document, the Bureau stated “[t]oday, the parties have informed the Court that the parties did not reach an agreement at the conclusion of

² On December 4, 2017, 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.

mediation and the Bureau believes that further efforts at mediation would be fruitless.” *Id.* at 3. The Bureau made this representation to the Court despite noting in its previous filing earlier on the same day that the parties “reached an agreement in principle on the scope of and timetable for compliance with the civil investigative demand.” *Supra.* The Bureau continued “[i]n nearly every law-enforcement investigation, including this one, third-party contacts are not only a customary but a vital source of information—most of it unavailable from the subject of investigation itself.” ECF No. 40 at 3. It is now clear what the Bureau meant by this cryptic statement: once it realized it would not get Program Participants’ contact information from Nexus, it reengaged its plan to get the information from a third-party, never advising Nexus or the Court of this course of action.

On November 13, 2018, the Court held a status conference and extended mediation until November 30, 2018 and ordered a status report filed by December 4, 2018. Nov. 13, 2018 Min. Order. On December 4, 2018, the parties filed a Joint Status Report and Stipulation and advised the Court they had resolved the case and had agreed to a Modified CID. ECF Nos. 42, 43. Attached as **Exhibit A** is a true and accurate copy of the parties’ agreed to Modified CID (“Modified CID”). On December 11, 2018, the Court entered an Order stating, in part, “[t]he Court retains jurisdiction to enforce the terms of the Modified CID and adjudicate any disputes related to the Modified CID.” Dec. 11, 2018 Order ¶ 4, ECF No. 44. As described below, the parties now have a dispute related to the Modified CID, and Nexus asks the Court to resolve it and enforce the good faith, bargained for terms of the Modified CID.

II. The Parties’ Dispute

Nexus and the Bureau agreed to the Modified CID, which does not seek personal information of Program Participants. This Modified CID mollified Nexus’ concerns with the

Original CID. For example, in the Modified CID, the Bureau only seeks the current and former clients' contact information as indicated on the I-352 form. Modified CID at 3, Request for Written Report 4b. The modification protects Program Participants because the information on the I-352 form is the Program Participants information at the time they receive a bond. *See* ICE Form I-352 at 3, requesting Program Participants' address and telephone number, available at <https://www.ice.gov/sites/default/files/documents/Document/2017/i352.pdf>

Unknown to Nexus, in an end-around the parties' Stipulation as reflected in the Modified CID, the Bureau had already issued a third-party CID in an attempt to seek precisely the same personal information. *See* **Exhibit B**, October 24, 2017 CID to Statewide Bonding, Inc., request for Written Report 4(f), requesting the address, telephone number, and email address of Nexus Program Participants. The Bureau suspended enforcement of this CID until it "reached an agreement in principle on the scope of and timetable for compliance with the civil investigative demand" from Nexus. *Supra*. In other words, the Bureau pursued the addresses and phone numbers of Program Participants it sought in the Original CID but agreed not to seek in the Modified CID via a third-party CID. The Bureau never disclosed this to the Court or to Nexus. Upon information and belief, Statewide Bonding, Inc. did not provide the names and addresses and instead agreed to a modification of their CID to produce less information.

Nexus seeks an Order from this Court that prevents the Bureau from continually seeking from third-parties the names and addresses of Program Participants. Nexus does not know how many other CIDs the Bureau has issued for this information but similarly seeks an Order that any recipients of such requests for information need not provide it.

III. Argument

A. The Bureau Reneged on its Stipulation in the Modified CID

The United States Court of Appeals for the District of Columbia Circuit has held that a government agency acted in bad faith when its activities violated a stipulation it entered into with another party. In *American Hospital Association v. Sullivan*, 938 F.2d 216, 218 (D.C. Cir. 1991), the U.S. Department of Health and Human Services (“HHS”) issued a final regulation prohibiting certain billing practices that it had permitted in a stipulation it had previously entered into with the American Hospital Association (“AHA”). *Id.* at 218. In affirming the District Court’s determination that HHS’s publication of its final regulation was done “willfully, and in bad faith,” the D.C. Circuit stated that “bad faith in conduct . . . may be found where ‘a party, confronted with a clear . . . judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights.’” *Id.* at 220 (internal citation omitted). The Court concluded that “[b]ecause the stipulation had the force of law and because . . . the publication of the [regulation] contradicted the stipulation . . . HHS effectively forced AHA to sue to enforce plain legal rights defined by the stipulation.” *Id.*

Such is the case here. Despite Nexus’ attempts to resolve this issue outside of this Court, the Bureau is forcing Nexus to file this Motion to enforce the stipulation, *i.e.* the Modified CID, agreed to between the parties and ordered by the Court. Nexus sought mediation with the Bureau principally to protect the privacy rights of the Program Participants. The Bureau agreed to the Modified CID which does not seek disclosure of Nexus Program Participants’ name and address. Instead, the Bureau used an end-around to the Stipulation and Order by requesting

disclosure of this same sensitive information through a different source. This sleight-of-hand intentionally defies the purpose of the Stipulation and Order.³

As this Court has acknowledged, the Original CID seeking Program Participants' contact implicated privacy concerns. During the parties' status conference on July 18, 2018, this Court stated the Original CID asking for "all individuals who are current clients, very substantial amounts of information that might be able to be satisfied with some sampling; privacy concerns that need to be addressed...". July 18, 2018 Hr'g Tr. 33:9-14. The Court should stop the Bureau's attempt to circumvent the parties' Stipulation and issue an order that the Bureau shall not issue third-party CIDs or subpoenas seeking the same information they agreed not to seek in the Modified CID.

B. The Bureau Has Failed to Meet the Standards Required of All Government Civil Attorneys

As discussed above, Nexus agreed to the modified CID in an effort to protect sensitive personal information of Nexus Program Participants. Instead, the Bureau has created a work-around and now seeks to compel this information through other methods. This type of under-the-table dealing runs afoul of the clear standards required of government attorneys that the United States Supreme Court and D.C. Circuit have articulated.

The Supreme Court has said that a prosecutor "may prosecute with earnestness and vigor—indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful [result] as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*,

³ The Bureau will likely argue it never made an agreement with Nexus respect to third-party CIDs. This is correct. However, the disingenuous conduct described above completely circumvented the agreement the Bureau did make with Nexus in the Modified CID.

295 U.S. 78, 88 (1935). While *Berger* involved prosecutorial misconduct occurring during a criminal trial, the D.C. Circuit has concluded that the same standards apply to a government civil attorney. See *Freeport-McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992) (stating that a government’s civil lawyers should be held to the same ethical standard as that articulated in *Berger*, and that such a lawyer has the “responsibility to seek justice” without acting in a manner that is “obviously unfair” (quoting the Model Code of Professional Responsibility EC 7-14 (1981))).

As reflected in the Modified CID, the parties agreed to limit the Original CID’s scope given the sensitive nature of the Program Participants’ personal information. 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.

IV. Conclusion

For the foregoing reasons, Nexus respectfully requests this Court enter an Order (1) preventing the Bureau from issuing CIDs to any third-party requesting Nexus’ Program Participants’ addresses and telephone numbers; and (2) granting such further relief as this Court deems just and proper.

March 15, 2019

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