Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

IN RE GOLDEN VALLEY LENDING, INC.; MAJESTIC LAKE FINANCIAL, INC.; MOUNTAIN SUMMIT FINANCIAL, INC.; SILVER CLOUD FINANCIAL, INC.; and UPPER LAKE PROCESSING SERVICES, INC.	)
2019-MISC-HPUL Entities-0001	)

DECISION AND ORDER ON PETITION BY GOLDEN VALLEY LENDING ET AL. TO SET ASIDE CIVIL INVESTIGATIVE DEMANDS

Golden Valley Lending, Inc.; Majestic Lake Financial, Inc.; Mountain Summit Financial, Inc.; Silver Cloud Financial, Inc.; and Upper Lake Processing Services, Inc. (collectively, Petitioners) have filed a petition with the Bureau seeking to set aside civil investigative demands (CIDs) that the Bureau issued to each of Petitioners. For the reasons set forth below, the petition is denied.

FACTUAL BACKGROUND

This matter arises from the Bureau's investigation of several companies that offer installment loans to consumers over the Internet. The companies are owned by the Habematolel Pomo of Upper Lake Indian Tribe (Tribe), a federally recognized Indian tribe located in Upper Lake, California. In 2017, the Bureau brought an enforcement action against four of Petitioners—Golden Valley, Majestic Lake Financial, Mountain Summit Financial, and Silver Cloud Financial—for violations of the Consumer Financial Protection Act (CFPA). Compl., *CFPB v. Golden Valley Lending, Inc.*, No. 2:17-cv-2521 (D. Kan. filed April 27, 2017). In particular, the Bureau's complaint alleged that these companies violated the CFPA's prohibitions on unfair, deceptive, and abusive acts and practices in connection with demanding and collecting payments that consumers did not actually owe. The complaint alleged that the companies also violated the Truth in Lending Act by failing to disclose the annual percentage rate of the loans they offered. In January 2018, the Bureau voluntarily dismissed that action without prejudice. Not. of Voluntary Dismissal, *CFPB v. Golden Valley Lending, Inc.*, No. 2:17-cv-2521 (D. Kan. filed Jan. 18, 2018).

The Bureau subsequently issued CIDs to each of the Petitioners in October 2019. The CIDs' Statements of Purpose state that the Bureau seeks to determine whether lenders or

associated individuals or entities have violated the CFPA's prohibition on unfair, deceptive, and abusive acts and practices by collecting amounts that consumers did not owe or by making false or misleading representations to consumers in the course of servicing loans and collecting debts. Petitioners timely filed a petition seeking to set aside the CIDs on November 18, 2019.

LEGAL DETERMINATION

The petition raises five arguments: (1) that the Bureau lacks authority to investigate entities that are arms of a tribe; (2) that Petitioners cannot comply with the CIDs without violating a protective order issued by a tribal regulator; (3) that the CIDs lack a proper purpose; (4) that the CIDs are overly broad and unduly burdensome; and (5) that the CIDs should be withdrawn or stayed pending the Supreme Court's resolution of *Seila Law LLC v. CFPB*, a case involving a constitutional challenge to the provision of the Bureau's organic statute that purports to restrict the President's authority to remove the Bureau's Director. I address each argument in turn.

I. The Bureau Has Authority to Investigate Tribally Affiliated Entities

Petitioners first contend that the Bureau lacks authority to investigate (or enforce the law against) them because they are arms of a tribe. I disagree. As the U.S. Court of Appeals for the Ninth Circuit has held, "the Consumer Financial Protection Act ... applies to tribal businesses," and the Bureau accordingly may issue CIDs to companies that are arms of a tribe. *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049, 1053-54, 1058 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 555 (2017).

Petitioners make several arguments in support of their contention that they are not subject to the Bureau's investigative or enforcement authority. None of those arguments—all of which were expressly rejected in *Great Plains*—is convincing. First, Petitioners contend that the Bureau has authority to investigate and enforce the law only against "persons," and they are not "persons." But the CFPA defines "person" to include "compan[ies]," 12 U.S.C. § 5481(19), and Petitioners are all companies that fall squarely within this definition. Petitioners argue that they cannot be "persons" because they are instead "States," a term that the Act defines to include federally recognized Indian tribes, 12 U.S.C. § 5481(27). According to Petitioners, they are arms of a tribe, and so "logically" must qualify as "States" as well. Pet. at 12. But nothing in the CFPA suggests that companies that are affiliated with an entity that falls within the definition of "State" (such as a tribe) are not "persons" subject to the Act. Indeed, the court in *Great Plains* rejected just this argument. 846 F.3d at 1054.

Second, Petitioners also contend that Congress has not unequivocally abrogated the tribes' sovereign immunity. But whether Congress has abrogated tribal immunity is irrelevant because "Indian tribes do not enjoy sovereign immunity from suits brought by the federal government." *Id.* at 1056 (quotations omitted); *accord, e.g.*, *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996); *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1135 (11th Cir. 1999); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987).

Third, Petitioners contend that tribes (or tribally affiliated entities) cannot be "persons" subject to the CFPA in light of the Supreme Court's decision in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), which applied an interpretive presumption that the term "person" ordinarily does not include the sovereign. This is another argument that the Ninth Circuit rejected in *Great Plains*. 846 F.3d at 1054, 1058. The interpretive proposition discussed in *Stevens* has never had any bearing on whether tribes or tribally affiliated companies must comply with generally applicable federal laws when they engage in commercial activity.

Finally, Petitioners contend that the CFPA should be interpreted to exclude coverage of tribally affiliated lenders in light of the interpretive canon that statutes be construed liberally in favor of Indians, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Pet. at 13-14. But that canon applies only to statutes passed for the benefit of tribes, and not to statutes of general applicability like the CFPA. *See, e.g.*, *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007) ("We have found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application."); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (explaining that this canon "applies only to federal statutes that are passed for the benefit of dependent Indian tribes" (quotations omitted)); *accord Great Plains*, 846 F.3d at 1057 (explaining that it would not apply canon "to laws of general applicability").

II. The Protective Order Issued by a Tribal Regulator Does Not Bind the Bureau

Petitioners next contend that they cannot comply with the CIDs because that would violate a protective order issued by the Tribal Consumer Financial Services Regulatory Commission, a regulatory body established by the Habematolel Pomo Tribe. They attach to their petition a Protective Order issued by the Commission that instructs Petitioners "to file with the Commission—rather than with the CFPB"—the information responsive to the CIDs. Pet., Ex. D. The Protective Order opines that the CFPA requires the Bureau to coordinate with the Tribe's Regulatory Commission before receiving any of the information requested.

The Bureau has the utmost respect for the regulatory role that states and tribes play in regulating the consumer financial marketplace under the CFPA, and it is committed to coordinating its regulatory efforts with states and tribes when required and in other instances where appropriate. But, contrary to Petitioners' suggestion, nothing in the CFPA requires the Bureau to coordinate with any state or tribe before issuing a CID or otherwise carrying out its authority and responsibility to investigate potential violations of federal consumer financial law—and Petitioners have pointed to no such requirement. Although various provisions of the Act require the Bureau to coordinate with states and tribes on particular matters, "[t]hese coordination provisions of the Act in no way restrict the Bureau's jurisdiction to investigate covered entities simply because the States have a measure of co-regulatory status." *Great Plains*, 846 F.3d at 1056.

By the same token, nothing in the CFPA (or any other law) permits any state or tribe to countermand the Bureau's investigative demands. To the extent that tribal or state law purports to prohibit entities from complying with a CID that the Bureau issued under the CFPA, that law

is preempted under the Supremacy Clause of the U.S. Constitution. *See Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986) ("There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress."). Accordingly, the Protective Order directing Petitioners not to comply with the Bureau's CIDs provides no basis to excuse Petitioners' compliance with the CIDs.

III. The CIDs Have a Proper Purpose

Next, Petitioners contend that the CIDs should be set aside because they lack a "proper purpose"—specifically, because they make an "end-run" around the discovery process and the statute of limitations that would have applied in the litigation that the Bureau voluntarily dismissed in early 2018. Pet. at 2, 15. This contention is baseless. The Bureau properly dismissed that suit as permitted by Federal Rule of Civil Procedure 41(a)(1)(A)(i). That dismissal was without prejudice, Fed. R. Civ. P. 41(a)(1)(B), and thus does not preclude the Bureau from bringing an action in the future—or from investigating to determine whether such a future action would be appropriate.

Further, to the extent that Petitioners separately mean to challenge the CIDs' requests for information that (in their view) relates to conduct outside the statute-of-limitations period, I reject that challenge as well. Even if some information related to conduct for which any claim would be time-barred (which is far from clear at this juncture), that would not undermine the CIDs' validity: The Bureau can properly seek information regarding conduct outside the applicable limitations period, not least because such conduct can bear on conduct within the limitations period. *See, e.g.*, *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 969 (C.D. Cal. 2017) ("[E]ven assuming that the only actionable conduct occurred within the past three years, the CFPB may properly demand information for an additional two years because this information is reasonably relevant to conduct occurring within the statute of limitations period."), *vacated in irrelevant part*, No. 17-55721 (9th Cir. Oct. 18, 2018); *CFPB v. Harbour Portfolio Advisors, LLC*, No. 16-14183, 2017 WL 631914, *5 (E.D. Mich. Feb. 16, 2017) (similar).

IV. The CIDs are Not Overbroad or Unduly Burdensome

Petitioners also contend that the CIDs are overly broad and unduly burdensome because they would require Petitioners to search and review one terabyte of data and materials from 60 custodians, which they assert would seriously hinder their normal business operations. Petitioners further argue that the other claimed problems with the CIDs—the Bureau's lack of authority over tribal entities, the agency's failure to coordinate with the tribal regulator, and the investigation's improper purpose—make the CIDs' request unduly burdensome. I decline this request to modify or set aside the CIDs on burden grounds for three reasons.

First, as explained above, the Bureau does have authority over Petitioners; nothing requires the Bureau to coordinate with the Petitioners' tribal regulator in conducting this investigation; and the CIDs have a proper purpose. Therefore, no other problem with the CIDs makes their otherwise lawful and proper demands unduly burdensome.

Second, Petitioners did not "meaningfully engage[]" in the meet-and-confer process described in the Bureau's rules, 12 C.F.R. § 1080.6(c), to raise their burden objections. Bureau regulations require the recipient of a CID to confer with Bureau investigators "to discuss and attempt to resolve all issues regarding compliance with the [CID]." 12 C.F.R. § 1080.6(c). Those regulations further provide that, in resolving a petition to modify or set aside a CID, the Bureau will "consider only issues raised during the meet and confer process." *Id.* § 1080.6(c)(3). These requirements serve "to improve the efficiency of investigations" for all parties involved by providing an opportunity to negotiate mutually agreeable modifications to a CID and to narrow any areas of actual disagreement. CFPB, Rules Relating to Investigations, 77 Fed. Reg. 39,101, 39,104 (June 29, 2012). Such considerations take on a heightened importance when CID recipients seek to raise fact-bound arguments about the practical burdens imposed by CID requests, claims that are better negotiated initially with Bureau investigators rather than being brought in the first instance to the Bureau's Director. Although Petitioners raised burden concerns with Bureau investigators at a very general level, they declined the investigators' request that they provide specifics about what parts of the CIDs imposed the burden, and this failure prevented Bureau investigators from meaningfully considering modifications that could minimize burden while still enabling the Bureau to get the information it needs. This did not amount to "meaningful[] engage[ment]" in the meet-and-confer process, and I accordingly decline to modify or set aside the CIDs on burden grounds.

Third, even if Petitioners had properly preserved their burden argument in the meet-and-confer process, their petition does not establish that the CIDs should be set aside or modified as unduly burdensome. The recipient of a CID bears the burden to show that a request is "unduly burdensome." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc). On review, courts will not "modify investigative subpoenas" on the basis of burden "unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *Id.*; *accord, e.g.*, *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 n.4 (2d Cir. 2006). Although Petitioners make the conclusory assertion that complying with the CIDs would seriously hinder their normal business operations, they provide no explanation of why that is so, let alone provide an affidavit or any other evidence establishing the impacts of the CIDs. Nor does their petition identify any particular requests in the CIDs that cause the claimed burden or any ways in which those requests could be modified to lessen the burden.

V. *Seila Law* Does Not Warrant a Stay

Finally, Petitioners contend that the CIDs should be withdrawn or stayed pending the Supreme Court's resolution of *Seila Law v. CFPB*, No. 19-7, a case presenting a constitutional challenge to a provision in the Bureau's organic statute that purports to restrict the President's authority to remove the Bureau's Director to certain circumstances. The Bureau, however, has consistently taken the position that the administrative process set out in the Bureau's statute and regulations for petitioning to modify or set aside a CID is not the proper forum for raising and adjudicating challenges to the constitutionality of the Bureau's statute. *See, e.g.*, *In re Kern-Fuller and Sutter*, 2019-MISC_Candy Kern-Fuller and Howard E. Sutter III-0001 (Apr. 25,

2019),[1] at 2; *In re Fair Collections and Outsourcing, Inc.*, 2018-MISC-Fair Collections and Outsourcing, Inc. and Fair Collections and Outsourcing of New England, Inc.-0001 (Apr. 25, 2019),[2] at 2; *In re Nexus Servs., Inc.*, 2017-MISC-Nexus Services, Inc. and Libre by Nexus, Inc.-0001 (Oct. 11, 2017),[3] at 2. In the event that the Bureau determines at a later date that it is necessary to seek a court order compelling Petitioners' compliance with these CIDs, *see* 12 U.S.C. § 5562(e), Petitioners can more appropriately raise their constitutional objection as a defense to any such proceeding in district court.[4]

CONCLUSION

For the foregoing reasons, the petition to set aside the CIDs is denied. Petitioners are directed to comply in full with the CIDs within 30 calendar days of this Order. Petitioners are welcome to engage in discussions with Bureau staff about any suggestions for modifying the CIDs or staggering production, which may be adopted by the Assistant Director for Enforcement or Deputy Enforcement Director, as appropriate.

Feb 18, 2020

Kathleen L. Kraninger, Director

[1] *Available at* https://files.consumerfinance.gov/f/documents/cfpb_petition-to-modify_candy-kern-fuller-and-howard-e-sutter_decision-and-order.pdf.

[2] *Available at* https://files.consumerfinance.gov/f/documents/cfpb_petition-to-modify_fair-collections-and-outsourcing-inc-et-al_decision-and-order.pdf.

[3] *Available at* https://files.consumerfinance.gov/f/documents/cfpb_petition-to-modify_nexus_decision-and-order.pdf.

[4] The Bureau has in its ongoing litigation adopted the view that the removal restriction is unconstitutional but that its invalidity does not affect the remainder of the Bureau's statute, including the provisions authorizing the Bureau to issue and enforce CIDs. *See* Br. for Resp., *Seila Law*, No. 19-7, 2019 WL 6727094 (U.S.).