No. 17-10732

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff – Appellee,

v.

THE SOURCE FOR PUBLIC DATA, L.P.,

Defendant – Appellant

On Appeal from the United States District Court, Northern District of Texas,
No. 3:17-MC-00016-G, Honorable David L. Horan, Presiding

REPLY BRIEF OF APPELLANT THE SOURCE FOR PUBLIC DATA, L.P.

John E. Collins
BURLESON, PATE & GIBSON
900 Jackson, Suite 330
Dallas, TX 75202-4485
Tel: (214) 871-4900
Fax: (214) 871-7543
jcollins@bp-g.com

Ronald I. Raether, Jr.
Keith J. Barnett
TROUTMAN SANDERS LLP
5 Park Plaza, Suite 1400
Irvine, CA 92614-2545
Tel: (949) 622-2700
Fax: (949) 622-2739
ronald.raether@troutmansanders.com
keith.barnett@troutmansanders.com

Counsel for Appellant The Source for Public Data, L.P.

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INTRODUCTION

Public Data's opening brief demonstrates that the CID issued to Public Data fails to comply with 12 U.S.C. § 5562(c)(2), which provides that each CID issued by the CFPB must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." Read literally, the notification of purpose included in the CID broadly states that the CFPB is investigating all "persons" to determine whether any "federal consumer financial law" has been violated by any "unlawful acts or practices in connection with the provision or use of public records information." The CID thus fails to provide any specificity, much less the reasonable specificity required by § 5562(c)(2).

In response to that showing, the CFPB asks the Court to disregard the plain language of the CID. Indeed, that is the central thrust of the CFPB's entire argument. But the CFPB does not show – and cannot show – that the Court can or should do so.

Public Data's opening brief also demonstrates that the CFPB plainly lacks jurisdiction over Public Data and, in addition, that the district court erred by limiting its jurisdictional inquiry to whether the CFPB has authority to enforce the Federal consumer financial laws. While Public Data submitted evidence to the district court demonstrating that it is not a "consumer reporting agency" and therefore could not

be the subject of an investigation into FCRA violations, the CFPB not only failed to dispute that evidence but also failed to make even a *prima facie* showing establishing its jurisdiction or establishing that a jurisdictional inquiry is premature. This case thus presents one of those rare circumstances in which a court should not enforce an administrative subpoena because the agency that issued it plainly lacks jurisdiction. *See Burlington N. R. Co. v. Office of Inspector Gen., R.R. Ret. Bd.*, 983 F.2d 631, 638 (5th Cir. 1993) (noting that courts will only enforce an administrative subpoena if it is "within the statutory authority of the agency"); *see also United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 497 (5th Cir. 2014) (Jones, J., dissenting) ("The standard for challenging an administrative subpoena is strict: courts may only interfere with the process in a limited number of circumstances, one of which arises when the agency plainly lacks jurisdiction.").

Rather than addressing the absence of any facts supporting jurisdiction, the CFPB urges the Court to hold, for the first time, that courts are not permitted to make *any* factual findings when determining whether to enforce administrative subpoenas. At its core, the CFPB's argument is that an administrative subpoena is enforceable as long as the agency that issued it referenced a statutory provision that it has authority to enforce. But, as demonstrated below, that argument is in direct conflict with this Court's established and controlling precedent.

ARGUMENT

I. CONTRARY TO THE CFPB'S SUGGESTION, SECTION 5562(c)(2) IS NOT SATISFIED WHEN THE AGENCY DOES NOTHING MORE THAN REFERENCE A STATUTE THAT IT HAS AUTHORITY TO ENFORCE.

Public Data's opening brief demonstrates that the CID issued to Public Data fails to comply with § 5562(c)(2), which requires the CFPB to "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." The CFPB's opposition brief does not rebut that showing.

The CFPB first urges the Court to disregard much of the language used in the notification of purpose included in the CID issued to Public Data. *See, e.g.*, CFPB Br. 28. Read literally, the notification indicates that the CFPB is investigating all "persons" to determine whether any "federal consumer financial law" has been violated by any "unlawful acts or practices in connection with the provision or use of public records information." But the CFPB argues that "no fair reading of the CID could fail to notice that" the broad language used in the notification is followed by "specific" language. *See* CFPB Br. 28. Then, throughout its analysis, the CFPB *ignores* the broad language used in the notification in favor of the "specific" language, *see* CFPB Br. 23-32, thus suggesting that the Court should do the same.

But there is no warrant for that intentional misreading. As the CFPB appears to acknowledge, a "fair reading" should not cause *any* word used in a notification to

"disappear." *Cf.* CFPB Br. 28. By that measure, the CFPB's reading of the notification is not a fair reading: it *ignores* the broad language used in the notification. On the other hand, Public Data's reading is a fair reading – and, in fact, the only credible reading – because it embraces all of the language used in the notification: According to the notification, the CFPB is investigating all "persons" (which includes all "consumer reporting agencies" and all "persons using consumer reports") to determine whether any "federal consumer financial law" (which includes the "Fair Credit Reporting Act" and "Regulation V") has been violated by any "unlawful acts or practices in connection with the provision or use of public records information." *See* ROA 30.

Relying on its intentional misreading of the language used in the notification, the CFPB argues that it has identified with reasonable specificity the nature of the alleged violation it is investigating and the pertinent statutory provisions. *See* CFPB Br. 23-32. But there are at least six flaws in the CFPB's reasonable specificity argument.

First, and most fundamentally, the CFPB's argument depends on its intentional misreading of the notification. *See* CFPB Br. 23-32. Indeed, the CFPB does not even dispute that, if the notification is read as written, its CID fails to provide reasonable specificity and thus fails to comply with § 5562(c)(2).

Second, the CFPB's analysis renders the first *Morton Salt* factor meaningless. The first *Morton Salt* factor asks whether a CID was issued for a lawful purpose within the statutory authority of the issuing agency. *See Burlington N. R. Co.*, 983 F.2d at 638 (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). Within its reasonable specificity analysis, the CFPB argues that the first *Morton Salt* factor is satisfied because the notification indicates that the CFPB is investigating possible violations of the FCRA and Regulation V (as well as possible violations of all of the other federal consumer financial laws) and the agency has "authority to pursue" those violations. *See* CFPB Br. 27.

But by that logic, the first *Morton Salt* factor serves no purpose other than to catch gross carelessness – *i.e.*, those hopefully few instances in which an agency issues a CID without referencing *any* statute that it has authority to enforce. That plainly is not the actual purpose of the relevant inquiry, which, again, is intended to ensure that agencies only conduct investigations for a lawful purpose within their statutory authority. In other words, the CFPB is attempting to turn a substantive protection against roving and unauthorized government investigations into a mere technical requirement, and a trivial one at that, as it could be met, for all time, if the CFPB universally employed pre-printed forms that referenced any statute that the agency has authority to enforce. *See CFPB v. Accrediting Council for Indep. Colleges & Sch. (ACICS)*, 854 F.3d 683, 691 (D.C. Cir. 2017) ("As we observed

above, our review of the validity of a CID is governed by the *Morton Salt* analysis. While that review is narrow, it is not without content.").

Third, the CFPB's analysis makes it impossible to reasonably apply the second and third *Morton Salt* factors. The second *Morton Salt* factor asks whether the information requested by a CID is reasonably relevant to the purpose of the inquiry. *See Burlington*, 983 F.2d at 638 (citing *Morton Salt*, 338 U.S. at 652). The third *Morton Salt* factor asks whether the request is unreasonably broad or burdensome. Id. As the CFPB acknowledges, each of those factors requires an analysis of the information requested by a CID in relation to the scope of the pertinent investigation. *See* CFPB Br. 27. But the CFPB does not explain whether, in determining the scope of the pertinent investigation, a CID is to be read as written, or instead read narrowly, with an eye trained to see only the "specific" language used in a notification that can in any way be interpreted to claim jurisdiction.

If a CID is to be read as written when considering the second and third *Morton Salt* factors, then it would seem, as a matter of reasonableness, that it should also be read as actually written, i.e., generally. But, of course, the CFPB cannot embrace that logic here. When read as written, the CID issued to Public Data makes it impossible to apply the second and third *Morton Salt* factors. The analysis alone would be unreasonably burdensome. It would require Public Data – and a court – to

consider the information requested by the CID in relation to the *full* scope of *every* law that the CFPB has authority to enforce.

On the other hand, if a CID is to be read narrowly when considering the second and third *Morton Salt* factors, then the CFPB's analysis *requires* courts to read CIDs narrowly as a general matter (by disregarding the language actually used by the CFPB in its CIDs). And here, too, we have a logic that the CFPB cannot embrace.

Fourth, the CFPB does not point to any decision that has held that a similarly worded CID complies with § 5562(c)(2) or any other similar statutory limitation on an agency's investigative powers. In fact, each of the three decisions that the CFPB cites for that proposition is readily distinguishable. *See* CFPB Br. 25-29.

In *FTC v. Texaco*, the D.C. Circuit noted, *in dicta*, that a notification in a CID issued by the FTC "was not required to articulate its purpose with greater specificity." 555 F.2d 862, 874 n.26 (D.C. Circuit 1977). But unlike the notification in issue here, the notification in issue in *Texaco* (1) specifically identified targets of the investigations and (2) specifically identified the conduct in issue, noting that it involved "the reporting of natural gas reserves for Southern Louisiana" and "the exploration and development, production, or marketing of natural gas, petroleum, or petroleum products." *Id.* at 866.

In *FTC v. Carter*, the D.C. Circuit held that a notification in a CID issued by the FTC was adequate because the notification identified "the specific conduct under

investigation [as] cigarette advertising and promotion" and identified "the specific statutory provisions that confer authority" as "Section 8(b) of the Cigarette Labelling and Advertising Act." 636 F.2d 781, 788 (D.C. Cir. 1980). The *Carter* notification provided far more notice than the notification in issue here.

And in *CFPB v. Harbour Portfolio Advisors*, LLC, the Eastern District of Michigan did not even address whether the notification was adequate under § 5562(c)(2), but merely quoted a portion of it in the "Background" section of its decision. 2017 WL 631916, at *2 (E.D. Mich. Feb. 16, 2017).

Fifth, the CFPB's analysis fails to distinguish the D.C. Circuit's decision in *ACICS*. The CFPB tries to cabin *ACICS*, asserting that the D.C. Circuit was concerned only with the CFPB's lack of jurisdiction over the college accreditation process and its invocation of its broad authority to police unfair, deceptive, or abusive acts and practices. *See* CFPB Br. 30-31. But that, again, is not a fair reading. As Public Data demonstrated in its opening brief, the *ACICS* court faulted the CFPB for issuing a notification that: (1) did not explain what the broad and non-specific phrase "unlawful acts and practices" means; (2) cited a statutory provision without providing any language that clarified or defined what conduct allegedly violated the provision; and (3) invoked without limitation the agency's broad authority to enforce all of the federal consumer financial laws. *ACICS*, 854 F.3d at 690-92. Each of those failings also infects the notification included in the CID issued to Public Data.

Sixth, even if the Court adopts the CFPB's intentional misreading of the notification, the notification still fails to provide reasonable specificity as required by § 5562(c)(2). As Public Data demonstrated in its opening brief, the notification (1) does not provide *any* specificity regarding the target(s) of the CFPB's investigation; (2) does not provide any specificity regarding the "unlawful acts or practices" the CFPB is investigating because almost every conceivable law violation could be committed "in connection with the provision or use of public records information"; and (3) does not – even if the broad reference to all "federal consumer financial law" is disregarded – provide fair notice of the provision of law in issue because the notification's reference to the FCRA is not accompanied by any language that clarifies or defines what conduct allegedly violates the FCRA. Indeed, even a narrow reading of the notification in issue here leaves this case on all fours with *ACICS*.

At its core, the CFPB's argument is that § 5562(c)(2) is satisfied whenever a CID cites a statutory provision that the agency has authority to enforce. As Public Data explained in its opening brief, that premise formed the core of the district court's analysis. And throughout its brief to this Court, the CFPB repeatedly argues that the CID issued to Public Data complies with § 5562(c)(2) because it references "specific" laws that the agency has authority to enforce. *See, e.g.*, CFPB Br. 8, 11, 24, 27, 28, 31.

The Court, however, should not accept the basic premise laid down in the district court's decision and picked up by the CFPB's opposition brief. If § 5562(c)(2) is to have any meaning, then it is not satisfied where, as here, the CFPB merely references a statutory provision that it has authority to enforce and then goes on to invoke every other statutory provision that it has authority to enforce. That perfunctory effort provides no specificity at all, much less reasonable specificity, and it mocks the limitation on the CFPB's investigatory powers that Congress created with § 5562(c)(2).

II. CONTRARY TO THE CFPB'S SUGGESTION, THE JURISDICTIONAL INQUIRY IS NOT LIMITED TO WHETHER THE CFPB HAS AUTHORITY TO ENFORCE THE FEDERAL CONSUMER FINANCIAL LAWS.

Public Data's opening brief demonstrates that the CFPB plainly lacks jurisdiction over Public Data and, in addition, that the district court erred by limiting its jurisdictional inquiry to whether the CFPB has authority to enforce the Federal consumer financial laws. The CFPB's opposition brief does not rebut either of those showings.

The CFPB first argues that, even if Public Data does not furnish "consumer reports" and therefore is not a "consumer reporting agency," Public Data is nevertheless subject to the CFPB's CID authority because it is a "person" and may possess information "relevant to a violation." *See* CFPB Br. 10-11 (citing 12 U.S.C. §§ 5562(c)(1), 5561(5)). There are two problems with that argument.

As an initial matter, the CFPB's argument makes it impossible to apply the second and third *Morton Salt* factors. As noted above, and as the CFPB acknowledges, the second and third *Morton Salt* factors require an analysis of the information requested by a CID in relation to the scope of the pertinent investigation. *See, supra*, at pp. 6-7. Thus, whether Public Data is a target of the CFPB's investigation is an essential question under the second and third *Morton Salt* factors because it will determine, at least in part, the scope of the pertinent investigation. Indeed, if Public Data is *not* a target of the CFPB's investigation (or cannot be because the CFPB lacks jurisdiction over it), then, under the second and third *Morton Salt* factors, the CFPB's CID should *not* include information requests that would be relevant only if Public Data *were* a target of the investigation.

Moreover, the CFPB is being disingenuous in asking the Court to ignore the jurisdictional inquiry as irrelevant, because the CID in issue here demonstrates that Public Data is a target of the CFPB's investigation. For instance, the CID asks for all "policies and procedures relating to the Company's [*i.e.*, Public Data's] matching of records containing Public Data [*i.e.*, all types of information about a consumer] with the correct consumer." *See* ROA 35, 38. But that sort of information request is relevant only if Public Data is a target of the CFPB's investigation. In other words, in attempting an end run around the jurisdictional inquiry, the CFPB is asking the Court to ignore the scope of the information requests included in its CID.

The CFPB then argues that courts are not allowed to make *any* factual findings when deciding whether to enforce administrative subpoenas, suggesting that even a jurisdictional inquiry must focus only on whether the agency that issued a subpoena has referenced a statutory provision that it has authority to enforce. *See* CFPB Br. 11-21. But that argument is wrong on almost every level.

First, neither *Endicott Johnson Corp. v. Perkins* nor any other decision that the CFPB cites adopts a blanket rule prohibiting courts from making *any* factual findings at the subpoena enforcement stage. Indeed, in *Endicott Johnson*, the Secretary of Labor filed "affidavits for an enforcement order," the district court relied on those affidavits to make factual findings, and the Supreme Court rested its holding on "the admitted facts of the case." 317 U.S. 501, 507, 509 (1943). Thus, the Court's comment that the district court was not "authorized to decide the question of coverage itself" cannot be read to imply that courts are not permitted to make *any* factual findings at the subpoena enforcement stage.

Moreover, the other decisions that the CFPB cites for its hoped-for blanket rule prohibiting all factual findings at the subpoena enforcement stage share a common trait: not one of them says that a court may not under any circumstances make factual findings at the subpoena enforcement stage. *See EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071 (9th Cir. 2001); *United States v. Marshall Durbin &*

Co., 363 F.2d 1 (5th Cir. 1966); *FEC v. Lance*, 617 F.2d 365 (5th Cir. 1980); *NLRB v. Line*, 50 F.3d 311 (5th Cir. 1995).

Second, the CFPB's hoped-for blanket rule prohibiting any factual findings at the subpoena enforcement stage is contrary to established and controlling precedent. For instance, in *United States v. Zadeh*, this Court held that, for an administrative agency to satisfy the *Morton Salt* factors, it must make "a *prima facie* showing," which it can do via "a simple affidavit of an agent involved in the investigation." 820 F.3d 746, 757-58 (5th Cir. 2016). In other words, per *Zadeh*, an administrative agency can satisfy the *Morton Salt* factors only if it makes a factual showing, which of course presumes that the court receiving that showing is required to make factual findings.

Moreover, other established and controlling authorities confirm that factual findings are sometimes permissible at the subpoena enforcement stage. *See, e.g.*, *Tobin v. Banks & Rumbaugh*, 201 F.2d 223, 226, n.7 (5th Cir. 1953) (quoting, approvingly, congressional testimony suggesting that, while courts should not "enter into a detailed examination of facts and issues which are committed to agency authority in the first instance," they should "inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction"); *United States v. Feaster*, 376 F.2d 147, 150-51 (5th Cir. 1967) (noting that, before filing suit, the agency "made some investigation of the matter of possible

carrier status," and that the record on appeal accordingly "contains adequate evidence to support the right of the Board, at this stage, to see the records over the objections" presented); *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 487 (5th Cir. 2014) (at the subpoena enforcement stage, reviewing the "district court's factual findings underlying its decision on this issue for clear error").

Third, the CFPB's hoped-for blanket rule prohibiting any factual findings at the subpoena enforcement stage is an attempt – and nothing more than an attempt – to address its failure to make an adequate *prima facie* showing before the district court. Contrary to its assertion (*see* CFPB Br. 21), the CFPB did not make a *prima facie* showing below establishing its jurisdiction over Public Data, or establishing that it cannot determine whether it has jurisdiction over Public Data unless its CID is first enforced. The CFPB filed two affidavits below. *See* ROE 34-36, 59. But neither addresses whether the CFPB's has jurisdiction over Public Data, and in fact neither even uses the word "jurisdiction." *Id*. The CFPB thus wholly failed to make the required *prima facie* showing, and therefore has no option here but to argue that courts are not allowed to make *any* factual findings when deciding whether to enforce administrative subpoenas.

The CFPB closes its argument in support of a blanket rule prohibiting *any* factual findings at the subpoena enforcement stage by introducing a parade of horribles, none of which survives outside the parade.

For instance, the CFPB asserts that its proposed rule is "eminently reasonable" because "it would make little sense if parties under investigation could nip that inquiry in the bud simply by disputing the very facts . . . the investigation is meant to uncover." *See* CFPB Br. 14-15. But no one is suggesting that the target of an investigation should be able to block an administrative agency from acquiring information relevant to an investigation. Rather, invoking well-settled law, Public Data only argues that a court should not enforce an administrative subpoena if the agency that issued it plainly lacks jurisdiction. *See Burlington*, 983 F.2d at 638 (noting that courts will only enforce an administrative subpoena if it is "within the statutory authority of the agency"); *see also Transocean*, 767 F.3d at 497 (Jones, J., dissenting) ("The standard for challenging an administrative subpoena is strict: courts may only interfere with the process in a limited number of circumstances, one of which arises when the agency plainly lacks jurisdiction."). And here, Public Data offered *undisputed* evidence that it is not a "consumer reporting agency" and therefore not subject to the FCRA.

Similarly, the CFPB argues that permitting any factual findings at the subpoena enforcement stage would "stymie effective law enforcement," "burden the parties and the courts with unnecessary additional litigation" by requiring a "dress rehearsal of whatever substantive defenses" the target of an investigation might "raise against a hypothetical future enforcement action," and lead to litigation that is

not "manageable." *See* CFPB Br. at 15-16. But the world is not so stark. Again, Public Data only argues under well-settled law that a court should not enforce an administrative subpoena if the agency that issued it plainly lacks jurisdiction. And it should prevail on that argument because, here, it offered *undisputed* evidence that it is not a "consumer reporting agency" and therefore not subject to the FCRA.

CONCLUSION

For the foregoing reasons and for those provided in Public Data's opening brief, Public Data respectfully requests that the Court reverse the district court and direct it to enter an order quashing the CFPB's CID.

Dated: February 23, 2018

Respectfully submitted,

/s/ Ronald I. Raether

Ronald I. Raether, Jr.
Keith J. Barnett
TROUTMAN SANDERS LLP
5 Park Plaza, Suite 1400
Irvine, CA 92614-2545
ronald.raether@troutmansanders.com
949-622-2722 (phone)
949-622-2739 (fax)

John E. Collins
BURLESON, PATE & GIBSON
900 Jackson, Suite 330
Dallas, TX 75202-4485
jcollins@bp-g.com
214-871-4900 (phone)
214-871-7543 (fax)

Counsel for Appellant The Source for Public Data, L.P.

CERTIFICATE OF SERVICE

I hereby certify that on the February 23, 2018, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Ronald I. Raether

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,805 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Ronald I. Raether