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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

v.

CASHCALL, INC., WS FUNDING, LLC, DELBERT SERVICES CORPORATION, and J. PAUL REDDAM,

Defendants.

CASE NO.: 2:15-cv-07522-JFW (RAOx)

DISCOVERY MATTER

(1) DEFENDANTS' NOTICE OF MOTION AND MOTION TO COMPEL FURTHER INTERROGATORY RESPONSES AND FOR ORDER OVERRULING UNSUBSTANTIATED PRIVILEGE OBJECTIONS;

(2) JOINT STIPULATION ADDRESSING DEFENDANTS' MOTION TO COMPEL; and

(3) DECLARATION OF JOSEPH L. BARLOON IN SUPPORT THEREOF (separate cover).

Magistrate Judge: Rozella A. Oliver
Ctrm.: F, 9th Floor, Room 901
Hearing Date and Time: July 6, 2016
10:00 a.m.

Discovery Cutoff: July 25, 2016
Pre-Trial Conf.: September 9, 2016
Trial: September 27, 2016
Scheduling order attached.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 6, 2016, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom F, 9th Floor, Room 901 of the above-referenced Court, located at 312 N. Spring Street, Los Angeles, CA 90012, Defendants CashCall, Inc. ("CashCall") and WS Funding, LLC ("WS Funding") (collectively, "Defendants"), will, and hereby do, move the Court to compel further responses by the Consumer Financial Protection Bureau ("CFPB" or "Plaintiff") to CashCall's First Set of Interrogatories and WS Funding's First Set of Interrogatories (the "Interrogatories"), and to overrule the CFPB's unsubstantiated privileges and order production of information and documents responsive to the Interrogatories and CashCall's First Request for Production of Documents pursuant to Federal Rules of Civil Procedure ("Rule") 33, 34, and 37, as detailed herein.

This motion is based on this Notice of Motion and Motion to Compel Further Interrogatory Responses and Production of Documents ("Motion to Compel"), the attached Joint Stipulation Addressing Defendants' Motion to Compel, the Declaration of Joseph L. Barloon in Support of Joint Stipulation Addressing Defendant's Motion to Compel, all pleadings and papers filed in this action, and upon such and further oral or documentary evidence as may be presented to the Court at or prior to the hearing on this motion.

DATED: June 14 , 2016

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: */s/ Thomas J. Nolan*
Thomas J. Nolan
Attorneys for Defendants CashCall, Inc., WS Funding, LLC, Delbert Services Corporation, and J. Paul Reddam

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JOINT STIPULATION

Defendants and Plaintiff respectfully submit this joint stipulation pursuant to Local Rule 37-2 regarding Defendants' Motion to Compel. Pursuant to Local Rule 37-1, on April 15, 2016 and May 5, 2016 the parties conferred in an attempt to resolve their disputes but, according to Defendants, were unable to do so. (Barloon Decl. ¶ ¶ 7, 11.)

I. Defendants' Introductory Statement

Facing claims that carry civil money penalties of up to $1,000,000 per day of violation, Defendants are hamstrung by the CFPB's ongoing evasive discovery answers and withholding of information on unsubstantiated privilege grounds. Indeed, months after the CFPB's discovery responses at issue were due, and months after Defendants initiated meet and confer discussions on the topic, the CFPB continues to stall in providing information responsive to Defendants' interrogatories and satisfying the procedural requirements necessary for its privilege assertions. The CFPB seemingly fails to appreciate that the Government's discovery obligations are "commensurate with the Government's election to bring a suit of such broad scope and magnitude." *United States v. McGraw-Hill Cos.*, No. cv 13-779-DOC (JCGx), 2014 WL 1647385, at *5 (C.D. Cal. Apr. 15, 2014).[1] In light of the fast-approaching July 25, 2016, discovery cut-off, Defendants seek a Court order remedying the deficiencies outlined herein so that Defendants can obtain information critical to their ability to defend the action.

First, the CFPB's responses to the interrogatories described herein, which state merely that the CFPB "refers to documents produced by the Bureau" in response to CashCall's requests for production of documents, must be amended. These responses are plainly deficient, as an interrogatory response must be full and complete, without reference to other sources. The CFPB's attempt to rely on the narrow exception allowing

[1] Regarding citations, all emphasis is added, and all internal citations, quotation, and alterations are omitted, unless otherwise noted. References to "Decl." and "Ex." are to the contemporaneously filed Declaration of Joseph L. Barloon and the exhibits attached thereto.

specification of business records pursuant to Rule 33(d) falls short. Not only has the CFPB failed to establish that the indicated records are indeed appropriate for treatment under Rule 33(d), but the interrogatories at issue, which seek identification of various communications of relevance to this action, cannot be answered completely by reference to purported business records. Moreover, the CFPB's reliance upon a blanket reference to its production is troubling given recent developments about critical gaps in the CFPB's production. (*See infra* at 13-14.)

Second, the CFPB must make the threshold showing necessary to assert the various governmental privileges upon which it has withheld information and documents. More than two months after asserting these various privileges, the CFPB provided Defendants with an untimely declaration, necessary to assert the privileges, which suffers from numerous defects. As described in detail below, the declarant lacks the requisite authority and personal knowledge to invoke privilege on behalf of the CFPB, and the declaration fails to provide Defendants and the Court the specificity necessary to determine whether the privileges apply. Governmental privileges are "not to be lightly invoked" and the CFPB's adherence to the required procedures established under the law is critical to ensuring that Defendants are not unfairly deprived of discoverable information. (*See infra* at 33-41.)

Defendants respectfully request that the Court compel further, complete responses to the interrogatories identified below, and production of non-privileged documents responsive to CashCall's First Set of Requests for Production of Documents. Defendants also request that the Court overrule Plaintiff's deficient objections based on the various governmental privilege assertions and compel the production of documents that Plaintiff is withholding.

II. Plaintiff's Introductory Statement

The CFPB understands its discovery obligations, and does not dispute CashCall's characterization of the seriousness of this case. CashCall's specific challenges to the CFPB's discovery responses, however, are unfair and lack context. Neither can CashCall

claim to have been "hamstrung" in its defense: the overwhelming majority of discoverable information in this case consists of CashCall's own business records, and documents received from its own customers.

The interrogatories at issue in this motion are so broad as to be unanswerable. The document production requests are directed only toward attorney work product and other privileged information about the CFPB's and other agencies' investigations. As a result, CashCall's arguments do not have the persuasive force that they might have had in the context of more focused, fact-driven discovery. The Court should deny CashCall's motion to compel because the discovery described in this motion is objectionable due to its overbreadth, the undue burden of responding to it, and in many cases, because it requests only privileged information. In the alternative, the Court should find the CFPB's responses sufficient.

CashCall's first challenge, which relates to five interrogatories, claims that the CFPB's responses by reference to business records under Fed. R. Civ. P. 33(d) were too general. But CashCall does not inform the Court that it used the same approach in answering the CFPB's interrogatories. And because the volume of CashCall's document production to date exceeds the CFPB's by four orders of magnitude — the CFPB has produced about 800 documents; CashCall has produced 9.8 million unindexed, undifferentiated documents — it means much less for CashCall to refer generally to documents in its own interrogatory responses than for the CFPB to do so.

Moreover, CashCall's interrogatories are broad. They request a description of all communications between anyone at the CFPB, or any third party, and anyone who ever worked for the defendants, anyone who ever worked for Western Sky, any member of the Cheyenne River Sioux Tribe, any consumer who ever obtained a Western Sky loan, and any financial institution, relating to this case. They also request a description of any document supporting the CFPB's central contention in this case; that the Western Sky loans are subject to state law. Given the generality of these requests, and the impossibility of describing such a broad range of communications and documents, the

CFPB had no reasonable option (beyond preserving its objections), other than to refer to the documents that it had already produced.

CashCall's second challenge, claiming that the CFPB's declaration asserting the deliberative process and law enforcement privileges was too broad, has a similar flaw. Taken together, the document requests and interrogatories at issue request every single investigative document and communication concerning the CFPB's (and other agencies') strategies in this and other cases against CashCall, including — among other things — communications with state and other federal agencies, strategic communications among law enforcement agencies, communications concerning the type and amount of relief to seek from CashCall and how to divide it up, and a description of teleconferences between the CFPB and state agents. Indeed, one of the interrogatories — Interrogatory No. 14 — actually asks the CFPB to describe why it did not include certain claims in its first amended complaint.

CashCall is not entitled to any of this information. This discovery is a textbook attempt to pull back the curtain on the CFPB's work product, agency deliberations, and investigative strategy. The CFPB could not reasonably describe, in a declaration asserting deliberative process privilege, every single strategic communication and document that could be responsive to this set of discovery requests. Nor should it have to. This motion concerns discovery requests that are objectionable on their face because they are directed only at work product, deliberations, and investigative or litigation strategy. This is not a case where a party has asked for a particular document, or type of document, that the CFPB could address in a specific declaration. CashCall has asked the CFPB not only to open its investigative files to inspection, but also to describe every investigative communication it has had concerning this case. The Court should uphold the CFPB's objection to these requests.

Finally, the CFPB objects to the timing of CashCall's motion, to which it did not agree. Under Local Rule 37, the joint stipulation should be filed at least 21 days before the date on which the motion is calendared for hearing, allowing time for supplemental

submissions and for the Court's review. CashCall intends to file this stipulation within one day of the Court's hearing on the CFPB's discovery motion, which concerns an unrelated matter and which was calendared properly. CashCall also includes another discovery dispute, relating to defendant Reddam's deposition, that has not yet been briefed. This Court's standing order requires "strict compliance" with Local Rule 37. The Court should strike this motion and require CashCall to refile it in accordance with the rules.

III. Defendants' Motion to Compel Complete Responses To Interrogatories, Which Responses Refer Generally "To Documents Produced"

In response to the interrogatories identified below (CashCall's Interrogatories Nos. 7, 8, 9, 10, 11 and WS Funding's Interrogatory No. 13), the CFPB's responses state only that "the Bureau refers to documents produced in response to CashCall's First Request for the Production of Documents."

CashCall Interrogatory No. 7

IDENTIFY all COMMUNICATIONS RELATING TO the INVESTIGATION or ACTION between YOU, or any third party, and any current or former employee, agent, or independent contractor of any of the DEFENDANTS.

Plaintiff's Responses and Objections

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, seeks information that is not relevant to any party's claims or defenses, and calls for information that is protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

Notwithstanding and without waiving these objections, as permitted under Rule 33(d), the Bureau refers to documents produced in response to CashCall's First Request for the Production of Documents, Requests 1 through 6.

CashCall Interrogatory No. 8

IDENTIFY all COMMUNICATIONS RELATING TO the INVESTIGATION or ACTION between YOU, or any third party, and any current or former employee, agent, representative or independent contractor of Western Sky Financial, LLC.

Plaintiff's Responses and Objections

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, seeks information that is not relevant to any party's claims or defenses, and calls for information that is protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

Notwithstanding and without waiving these objections, as permitted under Rule 33(d), the Bureau refers to documents produced in response to CashCall's First Request for the Production of Documents, Request 7.

CashCall Interrogatory No. 9

IDENTIFY all COMMUNICATIONS RELATING TO the INVESTIGATION or ACTION between YOU, or any third party, and any current or former member, agent, representative or affiliate of the TRIBE.

Plaintiff's Responses and Objections

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, seeks information that is not relevant to any party's claims or defenses, and calls for information that is protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

Notwithstanding and without waiving these objections, as permitted under Rule 33(d), the Bureau refers to documents produced in response to CashCall's First Request for the Production of Documents, Request 8.

CashCall Interrogatory No. 10

IDENTIFY all COMMUNICATIONS RELATING TO the INVESTIGATION or

ACTION between YOU, or any third party, and any consumers who obtained a WS LOAN, including Eva Adams, Arnel Angeles, Karen Barboza, Georganne Bickle, Melissa Brown, Brenda Collins, Cynthia Consentino, Kimberiey Couch, Deloris Crawford, Melissa Dixon, Donald Durett, Thomas Eldred, Kristen Fenton, Jason Foreman, Pamela Foxx, Bradford Frieler, Lynne Graff, Lorri Gunnison, Jami Haider, Annette Haley, Dorian Hart, Brooke Hibbard, John Hill, Joseph Holtz, Kimberly Hoyle (Fairweather), Sheila Kelly, Jennifer Kennedy, Joseph LaFond, Jessica Lieding, Juan Liverpool, Scott McCleary, Mark McNamara, Christine Melanson, John Melo, Kristina Pargas, Brockton Rapp, Bruce Ritenburg, Henry Sheets, Carol Sterling, Stephen Vieira, Emma Willey (McClelland), Douglas Worobey, and Gwen Wright.

Plaintiff's Responses and Objections

RESPONSE TO INTERROGATORY NO. 10:

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, and calls for information that is protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

Notwithstanding and without waiving these objections, as permitted under Rule 33(d), the Bureau refers to documents produced in response to CashCall's First Request for the Production of Documents, Request 9.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 10:

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, and calls for information that is protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

Notwithstanding and without waiving these objections, as permitted under Rule 33(d), the Bureau refers to documents produced in response to CashCall's First Request for the Production of Documents, Requests 1 and 9.

CashCall Interrogatory No. 11

IDENTIFY all COMMUNICATIONS RELATING TO the INVESTIGATION or ACTION between YOU, or any third party, and GoDaddy.com, LLC; Network Solutions, LLC; T$$, LLC; Ryan McCurry; Wells Fargo Bank, N.A., or any other "Financial Institutions and Other Organizations and Related Individuals," as such terms are used on page 7 of PLAINTIFF'S INITIAL DISCLOSURES.

Plaintiff's Responses and Objections

RESPONSE TO INTERROGATORY NO. 11:

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, and calls for information that is protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine. Based on the objections, and because the requested discovery will not assist in the resolution of the issues in this case, and because the burden and expense of the requested discovery far outweighs any potential benefit, the plaintiff has not conducted a thorough search for responsive documents of an administrative nature, such as emails sent or received for the purpose of scheduling.

Notwithstanding and without waiving these objections, as permitted under Rule 33(d), the Bureau refers to documents produced in response to CashCall's First Request for the Production of Documents, Request 10.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 11:

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, and calls for information that is protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine. Based on the objections, and because the requested discovery will not assist in the resolution of the issues in this case, and because the burden and expense of the requested discovery far outweighs any potential benefit, the plaintiff has not conducted a thorough search for responsive documents of an administrative nature, such as emails sent or received for the purpose of scheduling.

Notwithstanding and without waiving these objections, as permitted under Rule 33(d), the Bureau refers to documents produced in response to CashCall's First Request for the Production of Documents, Requests 1 and 10.

WS Funding Interrogatory No. 13

IDENTIFY all DOCUMENTS supporting YOUR contention that the WS LOANS were and are subject to state law.

Plaintiff's Responses and Objections

RESPONSE TO INTERROGATORY NO. 13:

The Bureau objects to this interrogatory on the grounds that it seeks a legal conclusion. The Bureau further objects to this interrogatory as unduly burdensome insofar as it is a premature contention interrogatory not appropriate for the earliest stages of merits discovery. A complete answer to this interrogatory depends on merits discovery of defendants, which the Bureau has yet to obtain.

The Bureau reserves its right to supplement its answer to this interrogatory after merits and expert discovery have concluded.

Notwithstanding and without waiving this objection, the Bureau refers back to its First Amended Complaint and as permitted under Rule 33(d), the Bureau refers to documents to be produced by the Bureau in response to CashCall, Inc.'s Document Request No. 9.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 13:

The Bureau objects to this interrogatory on the grounds that it seeks a legal conclusion. The Bureau further objects to this interrogatory as unduly burdensome insofar as it is a premature contention interrogatory not appropriate for the earliest stages of merits discovery. A complete answer to this interrogatory depends on merits discovery of defendants, which the Bureau has yet to obtain.

The Bureau reserves its right to supplement its answer to this interrogatory after merits and expert discovery have concluded.

Notwithstanding and without waiving this objection, as permitted under Rule 33(d),

the Bureau refers to documents to be produced by the Bureau in response to CashCall, Inc.'s Document Requests No. 1 and 9.

A. Defendants' Argument

1. An Interrogatory Response Must Not Refer Generally To Documents

Plaintiff responds to CashCall's Interrogatories Nos. 7, 8, 9, 10, 11 and WS Funding's Interrogatory No. 13 by referring generally to the documents produced by the CFPB in response to CashCall's Request for Production of Documents. These responses are incomplete and constitute improper references to documents in lieu of interrogatory responses that are full and complete in and of themselves.

A party does not satisfy its obligations by referring generally to documents. *See Equal Rights Ctr. v. Post Props., Inc.*, 246 F.R.D. 29, 35 (D.D.C. 2007) ("Because Rule 33(b)(1) requires a party to answer each interrogatory 'fully,' it is technically improper and unresponsive for an answer to an interrogatory to refer to outside material, such as pleadings, depositions, or other interrogatories"); *Covad Commc'ns Co. v. Revonet, Inc.*, 258 F.R.D. 17, 20 (2009).

Generally, if the information sought in the request is contained in the responding party's records and files, that party is under a duty to search the records to provide the answers. *See Govas v. Chalmers*, 965 F.2d 298, 302 (7th Cir. 1992) ("[A] party that knows or has access to an interrogatory answer may not . . . avoid furnishing a responsive interrogatory answer where . . . the answer cannot be ascertained from the documents."). "[U]nder Rule 33(d), the responding party chooses to produce business records in answer to the interrogatories—not to avoid answering them." *O'Connor v. Boeing N. Am., Inc.*, 185 F.R.D. 272, 277-78 (C.D. Cal. 1999). "A shotgun 'default to the documents' approach to answering a factual contention interrogatory does not satisfy a party's obligation to articulate the facts . . . in an explicit, responsive, complete, and candid manner." *Probuilders Specialty Ins. Co. v. Valley Corp.*, No. C10-05533 EJD(HRL), 2012 WL 6045753, at *3 n.3 (N.D. Cal. Nov. 28, 2012).

The CFPB has a duty to provide full and complete information in response to Defendants' interrogatories. A general reference to "documents produced" or "documents to be produced" in response to various requests for production of documents is plainly inadequate and should be cured through supplemental responses.

2. The CFPB's Attempt To Invoke Rule 33(d) Is Improper

CashCall's Interrogatories Nos. 7, 8, 9, 10, and 11 ask Plaintiff to identify "all communications" with various third parties relating to the action, by providing the date, time, means and substance of the communication, and any persons present or with knowledge of the communication. As a matter of law, it is improper for a respondent to use Rule 33(d) to respond to interrogatories like these, which seek all communications related to a certain topic. *See Forest Guardians v. Kempthorne*, No. 06CV2560-L(CSP), 2008 WL 4492635, at *2 (S.D. Cal. Sept. 29, 2008) ("To the extent any of the referenced communications were oral or are not contained within the . . . record, responses under Rule 33(d) are wholly insufficient."); *Kelatron v. Marlyn Nutraceuticals*, No. 1:12-CV-00124-DB-DBP, 2013 WL 4498722, at *2 (D. Utah Aug. 21, 2013) ("Defendant inappropriately used Fed. R. Civ. P. 33(d) to respond to Interrogatory . . . [that] seeks all communications, including oral communications that would not be reflected in Defendant's business records."); *Robinson Steel Co. v. Caterpillar, Inc.*, No. 2:10-CV-438-JTM-PRC, 2012 WL 3245987, at *4-5 (N.D. Ind. Aug. 6, 2012) (ordering that plaintiff "supplement its written response by specifically identifying each oral communication . . . including as best as possible the date, place, type, substance, and persons who made and received the communication."). Indeed, as counsel for Defendants raised with counsel for the CFPB, certain of the documents produced by the Plaintiff in its second production reference oral communications with witnesses that would not be captured in any documents produced. (*See* Barloon Decl. Ex. 5, at 17; Ex. 11 (communications from borrowers to CFPB stating, "You called today requesting documents"; and referencing "our conversation."))

In addition, the responding party must refer to the business records with sufficient

detail such that the requesting party can determine whether those documents properly qualify as business records. *Tourgeman v. Collins Fin. Servs., Inc.*, No. 08CV1392-JLS (NLS), 2010 WL 2181416, at *6 (S.D. Cal. May 25, 2010), *objections overruled*, 2010 WL 3033808 (S.D. Cal. Aug. 3, 2010). Investigative reports are not "business records" within the meaning of Rule 33(d). *See Hoffman v. United Telecomms., Inc.*, 117 F.R.D. 436, 438 (D. Kan. 1987) (holding that documents submitted by an employer to the Equal Employment Opportunity Commission (EEOC) were not business records of the EEOC for purposes of providing business records in lieu of an answer to an interrogatory). Plaintiff's responses – which provide no information beyond referring CashCall to "documents produced" or "documents to be produced" – do not provide any details sufficient to assess whether the documents referenced are business records which are the proper subject of Rule 33(d). *See State of Colo. v. Schmidt-Tiago Constr. Co.*, 108 F.R.D. 731, 735 (D. Colo. 1985) ("The appropriate answer when documents are to be used [under Rule 33(d)] is to list the specific document provided [to] the other party and indicat[e] the page or paragraphs that are responsive to the interrogatory."). To the extent that Plaintiff attempts to refer to correspondence it had with borrowers as "business records," the CFPB's reliance on Rule 33(d) is inappropriate, and it must provide full and complete responses describing the responsive communications.

3. The Interrogatories Seek Discoverable Information

"The party opposing discovery has the burden of showing that the discovery is overly broad, unduly burdensome or not relevant." *Incorp Servs., Inc. v. Nev. Corp. Servs.*, No. 209-CV-01300-GMN-GWF, 2010 WL 2540607, at *3 (D. Nev. June 17, 2010). "[T]he objecting party must specifically detail the reasons why each request is irrelevant" and may not rely on boilerplate, generalized, conclusory, or speculative arguments. *Painters Joint Comm. v. Emp. Painters Tr. Health & Welfare Fund*, No. 2:10-CV-01385-JCM-PAL, 2011 WL 4573349, at *5 (D. Nev. Sept. 29, 2011), *order corrected on reconsideration sub nom. Painters Joint Comm. v. J.L. Wallco, Inc.*, No. 2:10-cv-01385-JCM-PAL, 2011 WL 5854714 (D. Nev. Nov. 21, 2011). The CFPB has

not made, and cannot make, this showing.

In a letter exchange on the topic, counsel for the CFPB stated, in objection to the interrogatories: "The implication is that we should describe all oral communications involving anyone relating to any issue involved in this case that was not previously recorded in business records. If so, that interrogatory is objectionable as noted in our response." (Barloon Decl. Ex. 7, at 20-21.)

The interrogatories at issue seek only those communications with various third parties that relate to the CFPB's investigation into, or action against, Defendants. On their face, the interrogatories seek relevant information within the broad scope of Rule 26. *See Lauer v. Longevity Med. Clinic PLLC*, No. C13-0860-JCC, 2014 WL 5471983, at *3 (W.D. Wash. Oct. 29, 2014) ("A request for discovery should be considered relevant if there is *any possibility* that the information sought may be relevant to the subject matter of [the instant] action."). Defendants' interrogatories are unquestionably allowable in federal discovery. *See, e.g.*, *Fresenius Med. Care Holding Inc. v. Baxter Int'l, Inc.*, 224 F.R.D. 644, 653-54 (N.D. Cal. 2004) (compelling responses to interrogatories seeking all communications between the defendant and a third party regarding the subject matter of the litigation). The CFPB's attempt to distinguish *Kelatron*, 2013 WL 4498722, in its letter by stating that, in that case, "the interrogatory at issue . . . requested only one specific type of communication between only two parties," is irrelevant. (Barloon Decl. Ex. 7, at 20 n.1.) That the *Kelatron* court did not address a hypothetical interrogatory seeking information relevant to the litigation does not bear on its permissibility here.

Indeed, counsel for the CFPB concedes that the requests touch "issue[s] involved in this case." In its meet and confer correspondence, the CFPB has provided no grounds supporting its blanket statement that the "interrogator[ies] [are] objectionable" and should be compelled to provide complete responses. (*Id.* at Ex. 7, 20-21.)

4. Plaintiff's Document Production Is Deficient

Plaintiff's responses citing to its document production are especially concerning in light of the fact that ongoing discovery has revealed serious deficiencies in Plaintiff's

production. Plaintiff made three productions of documents: on March 21, 2016, April 19, 2016, and May 13, 2016. (*See id.* Exs. 1, 4, 7.)

In the June 1, 2016 deposition of Defendant J. Paul Reddam, counsel for Plaintiff introduced several documents as exhibits that have not been produced in this action. (*Id.* Ex. 9.) The documents are squarely responsive to Defendants' requests for production of documents, to which Plaintiff responded on March 21, 2016 that it would produce responsive documents. (*Id.* Ex. 10.). When asked for a representation on the record that the CFPB had produced these documents to the Defendants in this action, Plaintiff's counsel refused to do so, stating:

> "[Y]ou're not entitled to my representation on the record in this deposition about what status this document has in other discovery. We can talk about that at length at any other time, but not on my clock, on the government's time, in this deposition. Right now I'm asking your client about it. If he knows about it, great. If he doesn't, great."

(*Id.* Ex. 9, at 131.) Counsel for Defendants have initiated a separate meet and confer on the issue of that production deficiency, but it is relevant here to the extent Plaintiff is both depriving Defendants of full and complete answers to interrogatories, which were due on March 21, 2016, and pointing Defendants to a production that is known to be incomplete over 70 days later.

5. Defendants' Attempts To Resolve The Discovery Dispute

In an attempt to resolve this issue, Defendants sent counsel for Plaintiff a letter on April 27, 2016 outlining this deficiency and requesting greater specificity in response to the interrogatories at issue. (*See id.* Ex. 5.) During a meet and confer conference on May 5, counsel for Defendants asked counsel for the CFPB to present its position on the interrogatory responses raised by Defendants. (*See id.* ¶ 11.) Counsel for the CFPB stated that they would provide a written response by the end of day on May 6. (*Id.*) That response was never delivered, and Defendants again lodged a request for the CFPB to address this discovery issue by letter sent via email on May 13, 2016. (*Id.* Ex. 12.) On May 18, 2016, counsel for the CFPB sent a letter that stated that "[t]he referenced

documents have already been produced." (*See id.* Ex. 7.) Counsel for the CFPB did not agree to provide full and complete interrogatory responses and did not provide information sufficient to determine whether the records cited to were indeed business records appropriate to invoke Rule 33(d). (*Id.*)

Moreover, though the CFPB's interrogatory responses reference documents "produced in response to" CashCall's Request Nos. 1-10, Plaintiff's production cover letters indicate that the CFPB has only produced documents responsive to Request Nos. 1, 2 and 11 of CashCall's requests for production. The documents produced by Plaintiff are not otherwise organized or identified by the topic to which the CFPB claims they are responsive. (*Id.* Exs. 1, 4, 7.)

Thus, Defendants request that the Court compel Plaintiff to amend its responses to provide full and accurate responses to these interrogatories, including identifying the date, time, means, and substance of any communication responsive to CashCall's Interrogatories Nos. 7, 8, 9, 10, 11 and WS Funding's Interrogatory No. 13, and identifying all persons with knowledge regarding any such communication.

B. Plaintiff's Argument

1. The Interrogatories Are Unduly Burdensome And Overbroad

This Court has the discretion to limit discovery to serve the interests of justice and equity. *Century Indemnity Co. v. The Marine Group, LLC*, No. 3:08-CV-1375-AC, 2015 WL 9294792, *1 (D. Or. Dec. 21, 2015) (citing *Herbert v. Lando*, 441 U.S. 153, 177 (1979)). "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules" if the burden and expense of producing the requested documents would outweigh the likely benefit of production. *Id.* (*citing* Fed. R. Civ. P. 26(b)(2)(C)(iii)).

The interrogatories here, by seeking "all communications" not only involving any CFPB employee, but also "any third party," and any "current or former employee, agent, representative or independent contractor" of the defendants, or Western Sky, or any member of the Cheyenne River Sioux Tribe, or any financial institution, or any consumer

who obtained a Western Sky Loan, are so broad and burdensome as to be unanswerable. They are unlimited by date. The subject matter — "the Investigation or Action" — is defined to encompass "any informal and formal investigations," past or current, that relate to "all facts" and matters relating to this case. Martikan Decl., Exhibit 1 at 1, 3. The verb "identify" requires production of the name, address, and contact information of each person involved, as well as the time, date, location, and circumstances of the communication. *Id*. at 1. The interrogatories include communications by "any third party," without limitation. It is unclear how the CFPB, or anyone else, could possibly answer these interrogatories. A district court in Texas, evaluating a much narrower request for communications — all communications between an employer and any other person regarding one individual's health conditions — found it objectionably overbroad. *Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 1180 (E.D. Tex. 2011).

In contrast, the district court cases on which CashCall relies involve much more focused interrogatories. The district court in *Fresenius Medical Care Holding, Inc. v. Baxter Int'l Inc.*, 224 F.R.D. 644, 653 (N.D. Cal. 2004), for example, upheld discovery about agreements and communications between two specified parties relating to a particular issue that the district court found "specific in seeking the first embodiment of each claimed invention for each claim of each asserted patent." And the interrogatory at issue in *Kelatron v. Marlyn Nutraceuticals*, No. 12-cv-0124 DB DBP, 2013 WL 4498722 (D. Utah Aug. 21, 2013), another case CashCall cites, requested only one specific type of communication between only two parties.

The Court should uphold the CFPB's objections to these interrogatories because they are impermissibly overbroad and unduly burdensome, especially in relation to its likely benefit. And with respect to the interrogatories concerning communications with defendants, defendants' contractors, Western Sky, or the Cheyenne River Sioux Tribe, CashCall has equal access to this information. Under Rule 26(b)(1), the equities of discovery in this case do not support CashCall's motion to compel information already in its own records.

2. The Interrogatories Impermissibly Seek Privileged Work Product

The work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3), protects "from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 906-07 (9th Cir. 2004) (*quoting Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1494 (9th Cir.1989)). Such documents may only be ordered produced upon an adverse party's demonstration of "substantial need [for] the materials" and "undue hardship [in obtaining] the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3). *Id*. at 907. The Supreme Court has held that the work product doctrine applies to documents created by investigators working for attorneys, provided the documents were created in anticipation of litigation. *United States v. Nobles*, 422 U.S. 225, 239 (1975).

The interrogatories at issue here, by requesting — without limitation — the details of any communications with various outside parties concerning this lawsuit or the investigation of any matter relating to this lawsuit, are designed to elicit work product. The substance of any communications that attorneys or investigators might have had with any member of a broad class of individuals (including any consumer who ever applied for a Western Sky loan), about the preparation or litigation of this lawsuit, would be responsive and thus fair game. District courts have found similar interrogatories objectionable, because they reveal the opposing party's investigative and litigation strategies. *In re Ashworth, Inc. Sec. Litig.*, 213 F.R.D. 385, 389 (S.D. Cal. 2002) ("any further response by plaintiffs to defendant's Special Interrogatory Nos. 1 through 3 would necessarily reveal counsel's opinions regarding the relative importance of these witnesses, the highlights of their testimony/factual knowledge, and would link any future statements by the witnesses with plaintiff's counsel's legal theories and conclusions as outlined in the complaint.' Accordingly, this Court finds that the information sought by defendant is protected as attorney work product."); *Thomas v. Beutler*, No. 2:10-CV-01300 MCE, 2012 WL 4845571, *3 (E.D. Cal. Oct. 10, 2012) ("Even the identities of witnesses

interviewed by counsel have been held to be protected attorney work product because "disclosure would necessarily reveal counsel's opinions regarding the relative importance of these witnesses, the highlights of their testimony/factual knowledge, and would link any future statements by these witnesses with counsel's legal theories and conclusions[.]").

For the same reasons, the information requested by these interrogatories is covered by the deliberative process privilege, which protects from disclosure inter-agency or intra-agency memoranda or letters that would not be discoverable in litigation under the work-product doctrine. *Pacific Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2009). While documents subject to a deliberative-process claim must ordinarily be segregated, that requirement does not apply when the privileged information is so interwoven with the discoverable material that it is not segregable. *Id*. In this case, where CashCall has asked the CFPB to create work product, rather than to produce it, and where the information cannot reasonably be segregated into privileged and non-privileged portions, this requirement should not apply.

3. The CFPB Properly Referenced Documents Under Fed. R. Civ. P. 33(d)

Without waiving its objections, described above, to the interrogatories at issue, the CFPB referred CashCall to documents already produced in response to CashCall's document production requests, as Rule 33(d) allows. Under that rule, the parties may, where appropriate, answer interrogatories by reference to business records. CashCall argues that the CFPB's invocation of this rule to answer five interrogatories was improper because (1) the response would not include purely oral communications; and (2) the reference was not sufficiently specific. The Court should reject these arguments because the request for a description of an undiscernible number of purely oral communications among numerous unspecified parties is objectionable, for the reasons described above. To the extent that non-privileged communications are not already memorialized in documents, it would be unduly burdensome for the CFPB to discover

and then recreate them. A case that CashCall cites in support of its motion, *Robinson Steel Co. v. Caterpillar, Inc.*, No. 2:10-CV-438 JTM PRC, 2012 WL 3245987 (N.D. Ind. Aug. 6, 2012), illustrates the problem with CashCall's position. In that case, the issue was whether an oral contract had been formed, and the magistrate judge held that since two employees had relevant information, it was not unduly burdensome to require the responding party to describe their oral communications. *Id*. at *5.

The situation here is different. CashCall's interrogatories invoke a virtually unlimited number of potential communications among numerous unspecified parties, including communications in which the CFPB did not even take part. The Court should find that the CFPB's use of Rule 33(d) to answer these interrogatories is sufficient given the objectionable nature of the request to describe numerous purely oral communications.

Second, the Court should reject CashCall's complaint about the generality of the CFPB's reference to documents because CashCall has done the same in its own responses to the CFPB's contention interrogatories. Martikan Decl., ¶2, Exhibit 2. Specifically, CashCall answered the contention interrogatories with a general reference to "electronic loan files," a category of documents so large and amorphous that the CFPB is unable to differentiate it from the other un-indexed, un-differentiated documents making up CashCall's 9.8 million documents (comprising 16.2 million pages) produced so far in discovery. Martikan Decl., ¶4, Exhibit 2. CashCall now complains that the CFPB may not use this same approach in its own interrogatory answers, even though the universe of documents that the CFPB has produced (about 800), is four orders of magnitude smaller. Martikan Decl., ¶4. While the adequacy of CashCall's discovery responses is not now before the Court, equity, proportionality, and fairness play an important role in discovery. Fed. R. Civ. P. 26(d)(1). CashCall cannot complain about the CFPB's interrogatory responses when it has used the same strategy to its own advantage.

One aspect of Rule 33(d) that CashCall does not address is that it applies "if the burden of deriving or ascertaining the answer will be substantially the same for either party[.]" The burden for CashCall to review the CFPB's document production is much

smaller than the burden on the CFPB to describe — as requested — all communications between anyone at the CFPB, or any third party, and anyone who ever worked for the defendants, and anyone who ever worked for Western Sky, and any member of the Cheyenne River Sioux Tribe, and any consumer who ever obtained a Western Sky loan, and any financial institution, relating to this case. The Court should find that the balance of burdens in responding to this discovery favors the CFPB's production of documents under Rule 33(d).

4. CashCall's Reference To An Unripe Discovery Dispute Is Improper

In an irrelevant aside, CashCall refers in Section A(4) of its portion of this joint stipulation to an unripe, discovery dispute involving the deposition of defendant Reddam. CashCall's Argument, Subsection A(4). When CashCall prepared its part of this joint stipulation this issue had not even been raised at a meet and confer, and the parties have not yet briefed it. CashCall's argument is untethered to any claim for relief in this motion. Under Local Rule 37, the Court should ignore this claim until it has been properly raised, briefed, and calendared.

5. The Parties' Attempts To Resolve This Issue

The parties' meet and confer process did not resolve this dispute. CashCall did not offer to reformulate its interrogatories, and the CFPB refused to withdraw its objections and modify its responses under Rule 33(d).

IV. Defendants' Motion For Order Overruling Unsubstantiated Privilege Assertions

In response to the interrogatories and requests for production identified below (CashCall's Interrogatories Nos. 12, 13, 14, 15, 16 and WS Funding's Interrogatory No. 14, and CashCall's Requests for Production Nos. 11, 12, 13, 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 47, and 48), the CFPB responds by standing on various privilege assertions.

CashCall Document Request No. 11

All COMMUNICATIONS and DOCUMENTS RELATING TO the

INVESTIGATION or ACTION and CONCERNING the State of Alaska Dept. of Commerce, Community and Economic Development, Div. of Banking and Securities; the Arkansas Attorney General's Office; the California Dept. of Business Oversight; the Office of the Colorado State Attorney General; the Connecticut Dept. of Banking; the District of Columbia Office of the Attorney General; the State of Florida, Office of Financial Regulation; the State of Florida, Office of the Attorney General; the Office of the Attorney General of Georgia; the State of Illinois Dept. of Financial and Professional Regulation; the Indiana Office of the Attorney General; the Iowa Div. of Banking; the Office of the State Bank Commissioner of Kansas; the Maryland Commissioner of Financial Regulation; the Massachusetts Div. of Banks; the Massachusetts Office of the Attorney General; the State of Michigan Dept. of Insurance and Financial Services; the Office of Minnesota Attorney General; the Missouri Attorney General; the State of Nevada, Dept. of Business & Industry, Financial Institutes Div.; the State of New Hampshire Banking Commission; the New York Attorney General's Office; the North Carolina Dept. of Justice; the Oregon Div. of Finance and Corporate Securities; the Oregon Dept. of Justice; the Pennsylvania Dept. of Banking and Securities; the State of Vermont Office of the Attorney General; the Washington State Dept. of Financial Institutions; the Office of the West Virginia Attorney General; or any other "Federal and State Consumer Protection Organizations," as such terms are used on page 8 of PLAINTIFF'S INITIAL DISCLOSURES.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

CashCall Document Request No. 12

All DOCUMENTS and COMMUNICATIONS RELATING TO the INVESTIGATION or ACTION and CONCERNING the FTC, including, but not limited

to, all DOCUMENTS referenced on page 12 of PLAINTIFF'S INITIAL DISCLOSURES.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

CashCall Document Request No. 13

All DOCUMENTS RELATING TO, and COMMUNICATIONS with, any FEDERAL AGENT CONCERNING DEFENDANTS, the INVESTIGATION or ACTION.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

CashCall Document Request No. 14

All DOCUMENTS RELATING TO, and COMMUNICATIONS with, the CSBS RELATING TO DEFENDANTS, the INVESTIGATION or ACTION.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine.

CashCall Document Request No. 16

All DOCUMENTS RELATING TO, and COMMUNICATIONS with, any STATE AGENT CONCERNING DEFENDANTS, the INVESTIGATION or ACTION, including all COMMUNICATIONS with the SCC and signatories to the 2011 INFORMATION SHARING MOU.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine.

CashCall Document Request No. 17

All DOCUMENTS and COMMUNICATIONS RELATING TO efforts by the CFPB, the CSBS, or STATE AGENTS to COORDINATE the INVESTIGATION or ACTION with any other past, contemplated or existing actions, enforcement proceedings, or regulatory proceedings against DEFENDANTS.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 19

All DOCUMENTS and COMMUNICATIONS RELATING TO relief sought in any actions, enforcement proceedings, or regulatory proceedings against DEFENDANTS.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine.

CashCall Document Request No. 20

All DOCUMENTS and COMMUNICATIONS RELATING TO the proposed, contemplated, or actual settlement, or any other resolution, of any actions, enforcement proceedings, or regulatory proceedings against DEFENDANTS, including settlement

offers made by DEFENDANTS or other parties, and any negotiations.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine.

CashCall Document Request No. 21

Produce all drafts, amendments, and signature pages of the 2011 INFORMATION SHARING MOU.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses. Notwithstanding and without waiving its objections, the Bureau responds that the 2011 Information Sharing MOU is publicly available on the website for the Conference of State Bank Supervisors, at https://www.csbs.org/regulatory/Cooperative-Agreements/Documents/CFPB%20CSBS%20MOU.pdf.

CashCall Document Request No. 22

All COMMUNICATIONS RELATING TO the 2011 INFORMATION SHARING MOU and all drafts or amendments.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

Notwithstanding and without waiving its objections, the Bureau responds that the 2011 Information Sharing MOU is publicly available on the website for the Conference of State Bank Supervisors, at https://www.csbs.org/regulatoryCooperative-Agreements/Documents/CFPB%20CSBS%20MOU.pdf.

CashCall Document Request No. 23

Produce all drafts, amendments, and signature pages of any information sharing memorandum of understanding, which the CFPB has entered into and, pursuant to which, has shared information about DEFENDANTS, other than the 2011 INFORMATION SHARING MOU.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is overbroad in that it exceeds the permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 24

All COMMUNICATIONS RELATING TO any information sharing memorandum of understanding, which the CFPB has entered into and, pursuant to which, has shared information about DEFENDANTS, other than the 2011 INFORMATION SHARING MOU.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 25

All COMMUNICATIONS and DOCUMENTS RELATING TO any teleconference with STATE AGENTS RELATING TO the ACTION held on December 16, 2013.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 26

All COMMUNICATIONS and DOCUMENTS RELATING TO any teleconferences in which the CFPB participates on a regularly scheduled basis, CONCERNING tribal affiliated payday lending, small lending, or payday lending, and in which DEFENDANTS were discussed or identified.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 27

All COMMUNICATIONS and DOCUMENTS RELATING TO DEFENDANTS and the CSBS-CFPB Complaint Information Sharing work group.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad in that

it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 28

All DOCUMENTS and COMMUNICATIONS RELATING TO any "list of Covered Non-Depository Entities potentially subject to examinations" under the 2013 FRAMEWORK that includes DEFENDANTS.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 29

All DOCUMENTS and COMMUNICATIONS RELATING TO any of the DEFENDANTS and any "Supervisory Plan," including, but not limited to, the "written comprehensive Supervisory Plan that covers an agreed upon supervisory period and provides for an effective and efficient supervision process tailored to the institution's or entity's organizational structure and risk profile," as described in the 2013 FRAMEWORK.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine.

The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 30

All DOCUMENTS and COMMUNICATIONS that include, or RELATE TO, any proposed or actual examination schedule CONCERNING DEFENDANTS, as those terms are used in the 2013 FRAMEWORK.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 31

All DOCUMENTS and COMMUNICATIONS RELATING TO any of DEFENDANTS and any "Independent Examination" or "Multi-State Examination," including, but not limited to, any "Concurrent Reports of Examination" or "examination plan," as those terms are used in the 2013 FRAMEWORK.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 32

All COMMUNICATIONS and DOCUMENTS RELATING TO DEFENDANTS and the SCC.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 47

All DOCUMENTS CONCERNING the involvement, or potential involvement, of any STATE AGENT in this ACTION, including COMMUNICATIONS with any STATE AGENT regarding a lawsuit against DEFENDANTS or the INVESTIGATION.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague, overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that is not relevant to any party's claims or defenses.

CashCall Document Request No. 48

All DOCUMENTS CONCERNING any AGREEMENT RELATING TO apportionment of any damages or recovery from this ACTION.

Plaintiff's Responses and Objections

The Bureau objects to this request on the grounds that it is vague due to the undefined phrase "apportionment of any damages" , overbroad in that it exceeds permissible grounds for discovery, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine. The Bureau further objects to this request on the ground that it seeks information that

is not relevant to any party's claims or defenses.

CashCall Interrogatory No. 12

IDENTIFY all COMMUNICATIONS RELATING TO the INVESTIGATION or ACTION between YOU, or any third party, and:

a) the State of Alaska Dept. of Commerce, Community and Economic Development, Div. of Banking and Securities; the Arkansas Attorney General's Office; the California Dept. of Business Oversight; the Office of the Colorado State Attorney General; the Connecticut Dept. of Banking; the District of Columbia Office of the Attorney General; the State of Florida, Office of Financial Regulation; the State of Florida, Office of the Attorney General; the Office of the Attorney General of Georgia; the State of Illinois Dept. of Financial and Professional Regulation; the Indiana Office of the Attorney General; the Iowa Div. of Banking; the Office of the State Bank Commissioner of Kansas; the Maryland Commissioner of Financial Regulation; the Massachusetts Div. of Banks; the Massachusetts Office of the Attorney General; the State of Michigan Dept. of Insurance and Financial Services; the Office of Minnesota Attorney General; the Missouri Attorney General; the State of Nevada, Dept. of Business & Industry, Financial Institutes Div.; the State of New Hampshire Banking Commission; the New York Attorney General's Office; the North Carolina Dept. of Justice; the Oregon Div. of Finance and Corporate Securities; the Oregon Dept. of Justice; the Pennsylvania Dept. of Banking and Securities; the State of Vermont Office of the Attorney General; the Washington State Dept. of Financial Institutions; the Office of the West Virginia Attorney General; or any other "Federal and State Consumer Protection Organizations," as such terms are used on page 8 of PLAINTIFF'S INITIAL DISCLOSURES; or

b) any STATE AGENT; or

c) any FEDERAL AGENT.

Plaintiff's Responses and Objections

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege,

deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine.

CashCall Interrogatory No. 13

IDENTIFY all COMMUNICATIONS RELATING TO the INVESTIGATION or ACTION between YOU, or any third party, and the FTC, to the extent they are not responsive to Interrogatory No. 12.

Plaintiff's Responses and Objections

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

CashCall Interrogatory No. 14

IDENTIFY all COMMUNICATIONS RELATING TO efforts by the CFPB, STATE AGENTS, FEDERAL AGENTS, or the Conference of State Bank Supervisors to COORDINATE this ACTION with any other contemplated or existing actions, enforcement proceedings, examinations, or regulatory proceedings against DEFENDANTS.

Plaintiff's Responses and Objections

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, seeks information that is not relevant to any party's claims or defenses, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

CashCall Interrogatory No. 15

IDENTIFY all COMMUNICATIONS between the CFPB, or any third party, and any STATE AGENT RELATING TO any AGREEMENT CONCERNING apportionment of any damages or recovery from this ACTION, including all material facts RELATING TO any such AGREEMENT.

Plaintiff's Responses and Objections

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, seeks information that is not relevant to any party's claims or defenses, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

CashCall Interrogatory No. 16

IDENTIFY all PERSONS who participated in any teleconference with STATE AGENTS held RELATING TO the ACTION on December 16, 2013.

Plaintiff's Responses and Objections

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, seeks information that is not relevant to any party's claims or defenses, and seeks information protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, bank examiners' privilege, and the work product doctrine.

WS Funding Interrogatory No. 14

Set forth all material facts RELATING TO why WS LOANS made to borrowers in Florida and Georgia were not included in the FAC, including, but not limited to, all material facts RELATING TO why Florida and Georgia were not included as SUBJECT STATES in the FAC.

Plaintiff's Responses and Objections

The Bureau objects to this interrogatory on the grounds that it is vague, overbroad, seeks information that is not relevant to any party's claims or defenses; and calls for information that is protected by the law enforcement privilege, deliberative process privilege, common interest privilege, attorney client privilege, and the work product doctrine.

A. Defendants' Argument

In response to CashCall's Interrogatories Nos. 12, 13, 14, 15, 16 and WS Funding's Interrogatory No. 14, and CashCall's Requests for Production Nos. 11, 12, 13,

14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 47, and 48, Plaintiff asserts, in various combinations, the following privileges with no specification or elaboration: the "law enforcement privilege," the "deliberative process privilege," the "common interest privilege," the "bank examiner's privilege," the "attorney client privilege," and the "work product doctrine." As discussed below, Plaintiff has failed to make the required showings for each privilege claim, for which Plaintiff bears the burden. *See United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir. 1995) ("The burden of proof is on the party seeking to establish that the privilege applies."). Withholding information on the current record is improper as described below. Defendants request that the Court compel further responses to Plaintiff's incomplete interrogatory responses and require that Plaintiff make the required showings for information withheld pursuant to any privilege claim.

1. The CFPB Has Failed To Meet The Threshold Procedural Requirements To Assert The Law Enforcement Privilege[2]

"[T]he Government cannot escape its duty to disclose documents by merely brandishing a general claim of privilege." *McGraw-Hill Cos.*, 2014 WL 1647385, at *7. A claim of the governmental privilege must be detailed and specific; a conclusory assertion of the privilege is insufficient. *See Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 511 F.2d 192, 198 (9th Cir. 1975) (rejecting "blanket objection" based on government privilege), *aff'd*, 426 U.S. 394 (1976).

To assert the governmental privilege, Plaintiff "must submit, at the time it files and serves its response to the discovery request, a declaration or affidavit, under oath or subject to the penalty of perjury, from the head of the department which has control over the matter." *Miller v. Pancucci*, 141 F.R.D. 292, 300 (C.D. Cal. 1992). The declaration must contain:

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[2] The "law enforcement privilege" is also referred to as the "official information privilege," the "government privilege" the "executive privilege" or "investigatory files privilege." *See McGraw-Hill Cos., Inc.*, 2014 WL 1647385, at *5 n.2; *Deocampo v. City of Vallejo*, 2007 WL 1589541, at *4 (E.D. Cal. June 1, 2007).

> (1) an affirmation that the agency generated or collected the material in issue and has in fact maintained its confidentiality (if the agency has shared some or all of the material with other governmental agencies it must disclose their identity and describe the circumstances surrounding the disclosure, including steps taken to assure preservation of the confidentiality of the material), (2) a statement that the official has personally reviewed the material in question, (3) a specific identification of the governmental or privacy interests that would be threatened by disclosure of the material to plaintiff and/or his lawyer, (4) a description of how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to significant governmental or privacy interest, (5) and a projection of how much harm would be done to the threatened interests if the disclosure were made.

Id.

Plaintiff did not submit such a sworn affidavit or declaration at the time it served its responses and objections on March 21, 2016. On May 18, 2016, nearly two months after Plaintiff asserted its privilege claims, Plaintiff provided Defendants with the Declaration of Jeffrey P. Ehrlich in support of Plaintiff's deliberative process and law enforcement claims of privilege (the "Ehrlich Declaration"). (*See* Barloon Decl. Ex. 8.) In addition to being nearly two months delinquent, the Ehrlich Declaration is inadequate as a matter of law.

First, as a government attorney without the requisite authority, Jeffrey Ehrlich cannot properly assert the privilege on behalf of the CFPB. A governmental privilege may be "invoked only by the agency head after personally reviewing the documents for which the privilege is asserted." *In re McKesson Governmental Entities Average Wholesale Price Litig.*, 264 F.R.D. 595, 601 (N.D. Cal. 2009). Alternatively, an agency head may delegate "to a high-ranking subordinate the responsibility for invoking a government privilege." *Chao v. Westside Drywall, Inc.*, 254 F.R.D. 651, 657 (D. Or. 2009). The delegation by the agency head "must be in writing." *Id.* (describing a proper delegation order "to a highranking subordinate with *expertise in the privilege at issue* and responsibility for administering and evaluating the agency's disclosure policies but who was not directly involved in the dispute"). This requirement "was designed to deter

governmental units from too freely claiming a privilege that is not to be lightly invoked . . . by assuring that some one in a position of high authority could examine the materials involved from a vantage point involving both expertise and an overview-type perspective." *In re McKesson*, 264 F.R.D. at 601. Indeed, "a government attorney is ***precisely who should not be asserting a government privilege***." *Chao*, 254 F.R.D. at 657; *see also Pac. Gas & Elec. Co. v. United States*, 70 Fed. Cl. 128, 135 (noting the basis for precluding government counsel from invoking the privilege "to ensure that the privilege is invoked as a result of an executive decision about the exigencies of executive management, rather than as a result of trial counsel's decision about a desirable litigation strategy"), *modified on reconsideration*, 71 Fed. Cl. 205 (2006). The CFPB has failed to provide a written delegation order vesting Mr. Ehrlich with the authority to evaluate the CFPB's privilege assertions. Further, with respect to Mr. Ehrlich's qualifications, the Ehrlich Declaration asserts only that he is "employed by the [CFPB] as a Deputy Director in the Office of Enforcement" and he is "the supervisor of the trial team" in this matter. There is no indication that Mr. Ehrlich has expertise in the privileges at issue. (Barloon Decl. Ex. 8.) Instead, Mr. Ehrlich's position as the "supervisor of the trial team for the CFPB" compromises his ability to provide an "overview-type perspective" necessary to make objective privilege determinations on the CFPB's behalf.

Second, the Ehrlich Declaration does not include a statement that Ehrlich "has seen and considered the contents of the documents himself; rather he claims only generalized knowledge of the documents at issue." *McGraw-Hill Cos.*, 2014 WL 1647385, at *7. "Therefore, the Government's formal assertion of the [governmental] privilege fails at the outset." *Id.*

Third, the Ehrlich Declaration does not "sufficiently specify the documents over which the privilege is claimed, nor does it sufficiently explain why each document or category of documents falls within the scope of the privilege." *Id.* Instead, the Ehrlich Declaration references broad categories of documents, including, but not limited to, "communications with state and federal law-enforcement agencies relating to

Defendants' activities," "civil investigative demands," and generally "[i]nternal memoranda and related internal communications concerning investigative plans and strategy." (Barloon Decl. Ex. 8, at 24.) This is inadequate and neither "precisely identifies the documents that are privileged" nor "fully explains why the privilege attaches to those particular documents." *See McGraw-Hill Cos.*, 2014 WL 1647385 at *7.

Fourth, the Ehrlich Declaration does not adequately establish why disclosure of the documents, subject to the protective order entered into by the parties and the Court in this case, would create a substantial risk of harm to significant government or privacy interests. *Id.* The Ehrlich Declaration presents a mere speculative harm: "[D]isclosure of the above-described information would expose the Bureau's decision-making process in such a way *that it might* discourage candid discussion within the Bureau and undermine its ability to perform its responsibilities and duties." (Barloon Decl. Ex. 8, at 24.) Furthermore, the Ehrlich Declaration does not address how the governing protective order would not serve to mitigate any harm were any such documents produced.

Moreover, the CFPB's reliance on vague and generalized statements alleging that disclosure "would decrease the willingness of witnesses to cooperate with the Bureau for fear that their communications would not be kept confidential," and "would decrease the Bureau's willingness to discuss law-enforcement techniques internally and to use them during investigations" (*id.*), fails to meet the requirement that Plaintiff identify "a *specific identification* of the governmental or privacy interests that would be threatened by disclosure of the material." *Miller*, 141 F.R.D. at 300; *see also Chism v. Cty. of San Bernardino*, 159 F.R.D. 531, 534-35 (C.D. Cal. 1994) ("A general assertion that a police department's internal investigatory system would be harmed by disclosure of the documents is insufficient" to meet threshold test for invoking the governmental privilege.); *Rodriguez v. City of Fresno*, No. F 09-CV-1176 AWI MJS, 2010 WL 5059644, at *7 (E.D. Cal. Dec. 6, 2010) (rejecting declarations with "essentially boilerplate assertions of governmental privilege that make blanket conclusory allegations as to the existence of substantial governmental or privacy interests"); *Myles v. Cty. of San*

Diego, No. 15-cv-1985-BEN (BLM), 2016 WL 2343914, at *6 (S.D. Cal. May 4, 2016) (rejecting declaration asserting that disclosure was "likely to discourage persons with relevant information from providing candid statements and assessments" and that government employees "may be less forthcoming," "which would negatively affect the overall functioning of the Sheriff's Department").

As this Court has held, a declaration like the Ehrlich Declaration is inadequate if "it fails to establish any nexus between the documents in question and the purported reasons for nondisclosure." *Chism*, 159 F.R.D at 534. The Ehrlich Declaration does not present any "indication that the documents contain" information that reflect the CFPB's "decision-making process" or that they would affect "the willingness of witnesses." *Cal. Native Plant Soc'y*, 251 F.R.D. at 408. Indeed, it is impossible to assess, given Plaintiff's inadequate showing, whether disclosure of "internal memoranda," "civil investigative demands," communications with other agencies, and other unidentified "internal communications" could have any plausible impact on future witnesses' conduct.

Plaintiff has plainly failed to meet the above procedural requirements, which are necessary to claim the privilege and to allow Defendants the opportunity to challenge the privilege assertion. *Hampton v. City of San Diego*, 147 F.R.D. 227, 230 (S.D. Cal. 1993). Moreover, the threshold showing was required at the time of service, on March 21, 2016, and it has been over sixty days since Defendants initiated a meet and confer to address the deficiencies. (Barloon Decl. Ex. 2, at 9 (citing *Miller*, 141 F.R.D. at 300).)

The law is clear in this Court that failure to meet the threshold requirements to support governmental privilege assertions results in overruling of that privilege assertion and disclosure of any information withheld on that basis. *See Miller*, 141 F.R.D. at 301 ("[S]hould the threshold requirements not appear in the papers, the privilege assertion will be overruled in its entirety and complete disclosure will be ordered."); *Ramirez v. Cty. of Los Angeles*, 231 F.R.D. 407, 411 (C.D. Cal. 2005) ("Defendants never submitted a declaration from a responsible official within the agency who has personal knowledge of the principal matter, and they submitted their privilege log only after plaintiff initiated

the meet-and-confer process. As the *Miller* court stated, 'should the threshold requirements not appear in the papers, the privilege assertion will be overruled in its entirety and complete disclosure will be ordered.'"); *cf. Myles v. Cty. of San Diego*, No. 15-cv-1985-BEN (BLM), 2016 WL 2343914, at *6 (S.D. Cal. May 4, 2016) (overruling objections based on official information privilege where agencies failed to meet their threshold burden to invoke the privilege and ordering disclosure of documents). Accordingly, Defendants request that the Court overrule Plaintiff's deficient privilege assertion and compel the production of any information or documents that Plaintiff is withholding on that basis.

2. The CFPB Has Failed To Meet The Threshold Procedural Requirements To Assert The Deliberative Process Privilege

The deliberative process privilege is "a sub-category of the executive or governmental privilege." *J.R. Norton Co. v. Arizmendi*, 108 F.R.D. 647, 648 (S.D. Cal. 1985); *see also Pac. Gas*, 70 Fed. Cl. at 133 n.6 ("[T]he deliberative process privilege is but one of several privileges that generally fall within the scope of the more general 'executive privilege.'"). Like the governmental privilege, any assertion of the deliberative process privilege must be detailed and specific; a conclusory assertion of the privilege is insufficient. *In re McKesson*, 264 F.R.D. at 599 (rejecting blanket assertion of deliberative process privilege); *McGraw-Hill Cos.*, 2014 WL 1647385, at *6 ("The governmental privilege must be formally asserted and delineated in order to be raised properly."). Thus, an agency asserting the deliberative process privilege must also submit, upon serving responses to discovery, an affidavit "from the head of the department which has control over the matter," with the information detailed *supra*. *See Miller*, 141 F.R.D. at 300.

Additionally, "[a]n agency must show that a document is both pre-decisional and deliberative in order to qualify for the deliberative process privilege." *Cal. Native Plant Soc'y v. U.S. Envtl. Prot. Agency*, 251 F.R.D. 408, 411 (N.D. Cal. 2008). "A document is 'pre-decisional' if it predates a decision and was prepared to assist in making the decision.

A document is 'deliberative' if it exposes personal opinions such that releasing the document would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.*

The Ehrlich Declaration, discussed *supra*, fails to provide Defendants with enough specificity to determine whether the withheld documents are both pre-decisional and deliberative. The Ehrlich Declaration contains only a general, conclusory statement that is inadequate to establish the prerequisites of the deliberative process privilege: "All of the records being withheld pursuant to the deliberative-process privilege are pre-decisional—i.e., antecedent to a final agency decision concerning the Bureau's investigation of issues relating to the allegations in the Complaint." (Barloon Decl. Ex. 9.)

Upon review of declarations containing very similar language to that of the Ehrlich Declaration, the court in *Pacific Gas* held that the defendant in that case "failed to provide 'precise and specific reasons' for maintaining the confidentiality of the documents requested by plaintiff" and rebuked the defendant's affidavits for "provid[ing] 'merely a paraphrase for the rationale of the deliberative-process privilege described in case law.'"[3] 70 Fed. Cl. at 142. There, the court determined that "such vague, general and conclusory statements – all purporting to apply to many documents but unconnected to any particular document – fail to meet the requirement that defendant supply the court with precise and certain reasons for maintaining the confidentiality of the requested document[s]." *Id.* at 140. The same imprecise and conclusory statements exist here.

[3] In *Pacific Gas*, the declarations included variations of the following language: "I have reviewed the contents of the three [DOE Office of Inspector General (OIG)] documents. I have determined that disclosure of any of the deliberative process contents of these OIG documents would impair the OIG's operations by interfering with the flow of predecisional communications within the OIG and the agency. If these types of documents were considered releasable, there could be a 'chilling effect' on the give-and-take necessary for the audit review and analysis process. It is in the public interest to ensure that thought processes, opinions and recommendations are expressed openly within the agency. I have concluded that disclosure of the documents discussed in this declaration would be injurious to the audit process and the operations of the OIG." *Id.* at 140.

Defendants request that the Court overrule Plaintiff's deficient privilege assertion and compel the production of documents that Plaintiff is withholding. *See Miller*, 141 F.R.D. at 301 (where the "threshold requirements do not appear in the papers . . . the privilege assertion [should] be overruled in its entirety and complete disclosure [should] be ordered."); *Ramirez v. Cty. of Los Angeles*, 231 F.R.D. 407, 411 (C.D. Cal. 2005) (overruling privilege assertion and ordering complete disclosure of documents where the *Miller* procedural requirements of the privilege were not met).

3. The CFPB Has Not Substantiated Its Assertion Of The Bank Examiner's Privilege

"Stated broadly, the bank examination privilege is a qualified privilege that protects communications between banks and their examiners in order to preserve absolute candor essential to the effective supervision of banks." *Wultz v. Bank of China Ltd.*, 61 F. Supp. 3d 272, 281 (S.D.N.Y. 2013). The bank examination privilege is intended to protect and promote candid relations between banks and government regulatory agencies. *See In re Subpoena Served Upon Comptroller of Currency, & Sec'y of Bd. of Governors of Fed. Reserve Sys.*, 967 F.2d 630, 633-34 (D.C. Cir. 1992). It has been described as a part of the privilege for "official information" or of the "deliberative process privilege." *Id.* at 633; *see also Delozier v. First Nat'l Bank of Gatlinburg*, 113 F.R.D. 522, 525 (E.D. Tenn. 1986). As such, Plaintiff must submit the requisite declaration in order to invoke this privilege. *See Miller*, 141 F.R.D. at 300.

Plaintiff did not submit such a sworn affidavit or declaration at the time it served its responses and objections, and the Ehrlich Declaration does not address the bank examination privilege. In Plaintiff's May 18, 2016 letter, Plaintiff's counsel states that its production of NMLS files "moots any privilege issue with respect to those documents." (*See* Barloon Decl., Ex. 7 at 21.) It remains unclear whether Plaintiff has withdrawn or intends to withdraw its assertion of the bank examiner's privilege. To the extent that Plaintiff still asserts this privilege, we request that the Court overrule Plaintiff's deficient privilege assertion and compel the production of documents that Plaintiff is withholding.

Any documents that are not communications between a bank and the agency, and factual matters, must also be produced forthwith.

4. The CFPB Has Not Substantiated Its Assertion Of The Common Interest Privilege, Attorney Client Privilege, and Work Product Doctrine

For documents withheld pursuant to the attorney-client privilege or work product doctrine, Defendants request that the Court compel Plaintiff to produce a log that identifies 1) the attorney and client involved; 2) the nature of the document (e.g., email, letter, memorandum); 3) all persons or entities shown on the document to have received or sent the document; 4) all persons or entities known to have been furnished the document or informed of its substance; 5) the date the document was generated, prepared, or dated; and 6) information on the subject matter of the document. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992); *Dole v. Milonas*, 889 F.2d 885, 888 n.3 (9th Cir. 1989).

Regarding the common interest privilege, "a shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception. Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement." *Pac. Pictures Corp. v. D.C. Comics* (*In re Pac. Pictures Corp.*), 679 F.3d 1121, 1129 (9th Cir. 2012). Defendants request that the Court compel Plaintiff to produce a log sufficient to show 1) the privilege that serves as the basis of the claim, with the details necessary to make a *prima facie* showing of that privilege, as described above; 2) that the information was shared in the course of a matter of joint strategy; and 3) that the information was shared in furtherance of that strategy.

5. Defendants' Attempts To Resolve The Discovery Dispute

To resolve the above-stated issues, Defendant sent the CFPB a letter on April 6, 2016 requesting that the CFPB provide Defendants with the proper privilege certifications and logs. (*See* Barloon Decl., Ex. 2 at 10.) On April 20, 2016, counsel for the CFPB advised that we would receive them during, or soon after, the week beginning

April 25, 2016. (Barloon Decl. Ex. 3.) On April 27, 2016, counsel for the CFPB stated that they "expect[ed] that the applicable certifications will follow in the next few days." (*Id.* Ex. 10.) During a May 5, 2016 meet and confer call, counsel for Defendants asked about the status of the CFPB's declaration and logs supporting its privilege assertions and counsel for the CFPB stated that Defendants would receive them by May 10, 2010. (Barloon Decl., ¶ 11, Ex. 12.) On May 13, 2016, having still not received any response, counsel for Defendants wrote to request them again. (Barloon Decl., Ex. 12.) On May 16, 2016, counsel for the CFPB provided the Ehrlich Declaration. Due to the magnitude of deficiencies in the Ehrlich Declaration, and the CFPB's pattern of undue delay providing proper substantiation of its privilege assertions, counsel for Defendants determined that the parties were unable to resolve this issue without Court involvement before the close of discovery on July 25, 2016.

B. Plaintiff's Argument

1. CashCall's Discovery Infringes On Attorney Work Product

The Court should uphold the CFPB's work product objection to this discovery. Every one of the numerous interrogatories and document requests at issue is designed specifically to pull back the curtain on the CFPB's litigation and pre-litigation strategy. Specifically, document requests and interrogatories relating to the CFPB's communications with state law enforcement and federal agencies about the investigation and litigation of this case, communications sharing information about this case, potential settlement strategy in this or other cases, or drafts of information-sharing agreements with other law enforcement agencies, are intended only to elicit attorney-driven strategies made in anticipation of, or during litigation. It is self-evident that these types of documents and communications are covered by the attorney work-product privilege. Specific interrogatories about why the CFPB did not include certain claims in its complaint are, without question, covered by the attorney work-product privilege. CashCall's interrogatory seeking information about who participated in any tele-conference relating to this litigation that took place on December 16, 2013, is similarly

objectionable. The Court should find that these discovery requests (all of the document requests and interrogatories listed by CashCall in this stipulation), which seek only work-product, are objectionable in their entirety and require no response.

2. CashCall's Requests For Examination Strategy Are Irrelevant

CashCall directed a number of its document requests toward supervisory strategies in general, such as lists of "non-depository entities potentially subject to examinations," or supervisory plans, or schedules for examinations of defendants, or various other documents about examination strategy. These documents are irrelevant to any claims or defenses in this action, and are intended only to fish for examination strategies that do not necessarily even involve the defendants. Discovery under Rule 26 is liberal, but not so liberal as to include information that has no relevance to any party's claims or defenses, and that cannot resolve any issue in the case. Fed. R. Civ. P. 26(b)(1). The Court should find that Document Production Request Nos. 21 through 32, and Document Production Request No. 48, are objectionable because they seek information that is irrelevant under Rule 26.

3. CashCall's Discovery Is Overbroad And Unduly Burdensome

The document requests and interrogatories at issue are objectionably overbroad and unduly burdensome, to the extent they request "all documents and communications" with numerous state agencies (Document Request No. 11; Interrogatory No. 12), any state or federal agent or agency (Document Request Nos. 12, 13, 14, 16, 17, 32, 47; Interrogatory Nos. 13, 14, 15), or anyone else (Document Request Nos. 19, 20), without time limitation, that relate to defendants or this case. These discovery requests suffer from the same infirmities as the interrogatories discussed earlier: they encompass a potentially unlimited number of communications among numerous parties in large organizations, covering an unlimited time period and a broad sweep of subject matter. Notwithstanding the other objections set forth here, the Court should find this discovery objectionably overbroad and unduly burdensome.

4. The CFPB Properly Supported Its Governmental Privileges

CashCall complains that the CFPB did not support its claim of the deliberative process and law enforcement privileges with sufficient specificity. But CashCall's claim rests on a Catch-22: CashCall has asked for a broad swath of material subject to this privilege and the attorney work-product privilege, but has demanded the most specific possible responses to support the CFPB's privilege assertion. If this case involved a proper discovery request for discoverable information, and the request also covered some documents covered by the deliberative process privilege, then the CFPB could respond with a declaration from a CFPB official that described the specific documents at issue. A case that CashCall cites, *Kerr v. U.S. District Court for the Northern District of California*, 511 F.2d 192, 196 (9th Cir. 1975), provides an example of this typical case. A party requests specific files, in that case certain personnel files, and the responding party provides a declaration that specifically invokes the governmental privilege. *Id.* Here, however, CashCall's requests are objectionably broad at the outset, and seek solely information that is governed by the attorney work-product and governmental privileges. The CFPB cannot provide a comprehensive, specific, description of each document and communication covered by the privilege for the same reason that it cannot answer the requests: they are too broad, and encompass a scope of information that is undefined.

CashCall has served a set of broad, improper discovery requests, and has rested its motion on the CFPB's failure to object with sufficient specificity. In a word, this is unfair. The Court should find that CashCall's discovery is objectionable because it is overbroad, unduly burdensome, and infringes upon attorney work-product. If the Court reaches the deliberative-process issue, then it should find that the CFPB's response was commensurate with the generality of CashCall's requests.

5. The CFPB Is Not Asserting The Bank Examiner's Privilege

CashCall complains that the CFPB has not properly supported a bank examiner's privilege claim. But as the CFPB informed CashCall in previous correspondence, it is no longer asserting this claim.

6. Neither Party Has Produced A Privilege Log

CashCall notes that the CFPB has not produced a privilege log. However, the CFPB informed CashCall that it intended to produce a privilege log on a rolling basis, and that it is still awaiting permission from various state agencies concerning whether they intend to assert privileges regarding investigative documents that they have shared with the CFPB. Barloon Decl., Exhibit 3; Martikan Decl., ¶5. At the same time, CashCall has not produced a privilege log, despite having produced over 9.8 million documents to date. The CFPB intends to produce a privilege log on a rolling basis, as it expects CashCall to do, and to produce responsive, non-privileged documents from other law enforcement agencies once it has received confirmation from state and other federal agencies about their privilege claims. Barloon Decl., Exhibit 3; Martikan Decl., ¶5.

7. The Parties' Attempts To Resolve This Dispute

The CFPB provided the Ehrlich Declaration to CashCall on May 16, 2016, in response to CashCall's May 13, 2016, letter regarding this and other discovery issues. CashCall made no attempt to meet and confer after receiving the Ehrlich Declaration, and instead filed this motion. Martikan Decl., ¶6.

DATED: June 14, 2016 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: */s/ Thomas J. Nolan*
Thomas J. Nolan
Attorneys for Defendants CashCall, Inc., WS Funding, LLC, Delbert Services Corporation, and J. Paul Reddam

The filer, Thomas J. Nolan, attests that the other signatory listed, on whose behalf this filing is submitted, concurs in the filing's content and has authorized the filing

DATED: June 14, 2016

CONSUMER FINANCIAL PROTECTION BUREAU

By: */s/ Owen P. Martikan*
Owen P. Martikan
Attorneys for Plaintiff Consumer Financial Protection Bureau