

Ver. 10/31/22

Attachment 1 3/21/23

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO. _____

HOPE OF KENTUCKY, LLC
600 W. Main Street, Suite 400
Louisville, Kentucky 40202

PLAINTIFFS

and

KENTUCKY BANKERS ASSOCIATION
600 W. Main Street, Suite 400
Louisville, Kentucky 40202

**COMPLAINT FOR DECLARATION OF RIGHTS
AND FOR INJUNCTIVE RELIEF**

v.

DANIEL CAMERON, in his official capacity as the
Attorney General of the Commonwealth of Kentucky
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

*(Serve: Via Certified Mail
and
Via ServeTheCommonwealth@ky.gov)*

Plaintiffs, for their Complaint For Declaration Of Rights And For Injunctive Relief, allege
as follows:

Parties

1. Plaintiff, HOPE OF KENTUCKY, LLC (“HOPE”), is a Kentucky limited liability
company engaged in the business of providing financing to build safe and affordable multifamily
housing projects.

a. HOPE pays taxes to the Commonwealth of Kentucky.

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b. HOPE believes that everyone, including residents of the Commonwealth of Kentucky and areas outside of Kentucky in which it funds multifamily housing projects, deserve safe, decent and affordable housing.

c. There is a current shortage in the Commonwealth of Kentucky and the areas outside of Kentucky in which HOPE funds, or intends to seek to fund, multifamily housing projects. According to the National Low Income Housing Coalition, across Kentucky, there is a shortage of rental homes which are affordable and available to low income households. Many of these households are severely cost burdened, spending more than half of their income on housing. Severely cost burdened poor households are more likely than other renters to sacrifice other necessities like healthy food and healthcare to pay the rent, and to experience unstable housing situations like evictions.

d. HOPE helps address the current shortage of affordable housing by pooling funds from a network of participating lenders to finance multifamily housing projects.

e. HOPE has helped finance over 3,000 affordable housing units by funding loans of over \$300 million for more than 100 projects. More than 60 financial institutions have been involved in these financing efforts.

2. Plaintiff, KENTUCKY BANKERS ASSOCIATION (the "Bankers Association"), is a Kentucky non-stock, nonprofit corporation created pursuant to KRS 273.161 through 273.369 and having its offices at 600 W. Main Street, Suite 400, Louisville, Kentucky 40202.

a. The Bankers Association is a trade association having as members approximately 150 national banks, state banks and savings banks representing virtually all of the commercial banking industry in Kentucky.

b. The Bankers Association has been in existence since 1891, and it was formally incorporated in its present form in 1911. According to Article III of the Bankers

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Association's Articles of Incorporation, the "purposes of the Association are to promote the general welfare and usefulness of banks, trust and title companies, and financial institutions doing business in the Commonwealth of Kentucky; to cultivate a more intimate social and business relation between the representatives of such institutions; to collect and disseminate financial and economic information; to secure unity of action in all matters affecting the common welfare of such institutions; and to promote the educational, financial, industrial, commercial, ecological and agricultural interests of the Commonwealth."

c. The activities of the Bankers Association include charitable activities such as the creation of the Kentucky Bankers Relief Fund that was established in 2005 in response to Hurricane Katrina, to help communities in need after natural disasters. The relief funds collected by the Bankers Association include funds to assist with the December 2021 tornados in Western Kentucky and the July 2022 flooding in Eastern Kentucky

d. HOPE is a subsidiary of the Bankers Association, and many of the Bankers Association's member banks participate in the financing programs of HOPE.

3. Defendant, DANIEL CAMERON, is a natural person currently holding the office of the Attorney General of the Commonwealth of Kentucky, and he is named as a defendant in that capacity ("AG Cameron").

Nature Of The Action

4. This is an action to curtail, prevent and enjoin efforts by AG Cameron to regulate the business of banking that exceeds his powers as the Attorney General with those efforts most recently evidenced by his issuance on October 19, 2022, of six subpoenas and civil investigative demands which demand information about lending practices, including practices in the areas in which HOPE and its participating banks as well as other Bankers Association member institutions

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November 2, 2022

are involved. Not only is the Attorney General acting outside his jurisdiction and authority, he is wasting and improperly spending taxpayer funds in his improper efforts to do so.

5. This is also an action to curtail, prevent and enjoin efforts by AG Cameron to burden lawful communications and associations in ways that violate constitutional rights of free speech and freedom to associate.

6. This is also an action to obtain a declaration as to the legality of the acts of AG Cameron complained of herein.

7. In addition to all other applicable law, Plaintiffs have standing to bring this action (a) under KRS 367.260; and (b) because they have a direct, pecuniary and substantial interest in preventing AG Cameron from improperly using taxpayer funds in connection with his subpoenas and civil investigative demands.

Jurisdiction And Venue

8. This Court has jurisdiction over the subject matter of this case pursuant to KRS 23A.010 and KRS 418.040.

9. Venue is proper in Franklin Circuit Court, Franklin County, Kentucky pursuant to KRS 452.405(2) because this is an action against public officials for actions done in virtue of or under color of office and the causes of action alleged herein arose, in part, within Franklin County. Venue in the Franklin Circuit Court is also proper under KRS 452.480.

The Subpoenas And Civil Investigative Demands Of AG Cameron

10. In general, the business of banking in Kentucky is primarily regulated by the well-known and traditional banking regulators – the Kentucky Department of Financial Institutions, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Board of Governors of the Federal Reserve System.

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November 2, 2022

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10/11/2022

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11. However, on October 19, 2022, AG Cameron exceeded the powers of his office by issuing six “Subpoena And Civil Investigative Demands” addressed to Bank of America Corporation, Citigroup, Inc., the Goldman Sachs Group, Inc., JP Morgan Chase & Co., Morgan Stanley, and Wells Fargo & Co. (the “CIDs”). The definition of “You” in each CID includes “all subsidiary companies and affiliated companies” which would include the following FDIC insured banks -- Bank of America, N.A., Citibank, N.A., Goldman Sachs Bank USA, JPMorgan Chase Bank, N.A., Morgan Stanley Bank, N.A., and Wells Fargo Bank, N.A. Attached hereto and incorporated herein by reference as **Exhibits 1 through 6** are true and correct copies of the CIDs.

12. Upon information and belief formed after inquiry reasonable under the circumstances, AG Cameron is paying the expenses to prepare, issue, and otherwise act with respect to the CIDs with taxes paid to the Commonwealth of Kentucky.

13. AG Cameron announced the issuance of the CIDs with a press release posted on his office’s internet website, and a screen shot of that webpage is attached hereto and incorporated herein by reference as **Exhibit 7** (the “AG Press Release”).

14. AG Press Release states that his purported goal was to investigate “violations related to ESG (environmental, social, governance) investment practices.” In the CIDs, the term “ESG Factors” is defined as follows:

“ESG Factors” means factors relating to an entity’s environmental, ecological, climatological, social, and/or governance attributes, risks, opportunities, impacts, or effects, whether present or future, actual or perceived, and whether or not priced into the entity’s securities. This definition includes but is not limited to factors relating to an entity’s environmental, ecological, climatological, or social impacts. This definition includes but is not limited to disclosable factors under SASB and/or TCFD guidelines.

15. HOPE’s business includes addressing social concerns, opportunities, impacts and effects relating to the financing and construction affordable housing.

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10/11/2022

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16. Without limiting the ways that the CIDs bear upon subjects involving constructing affordable housing, HOPE's evaluation of housing financing involves, among other things, understanding, evaluating and underwriting the costs of the construction and the operation of affordable housing projects that will inevitably be affected by methods of producing energy. In addition, the financing and construction of affordable housing plainly has "social ... risks, opportunities, impacts or effects" within the meaning of ESG Factors as used in the CIDs.

17. The Bankers Association's activities include addressing environmental, ecological, climatological, and social activities (a) through its Kentucky Bankers Relief Fund and (b) through its activities as a trade association of its members which assist them in lending to or engaging with banking transactions with entities that have risks on account of their environmental, ecological, climatological and/or social activities.

18. The AG Press Release does not do justice to the amazing and disturbing broad overreach of the CIDs. For example,

a. The definition of "Global Climate Initiative" is the following:

"Global Climate Initiative" means any group, organization, or affiliation of private and/or public entities for the purpose of utilizing the financial system to reduce or eliminate greenhouse gas emissions or otherwise pursue environmental goals. Global Climate Initiatives include but are not limited to the Glasgow Financial Alliance for Net Zero and Net-Zero Banking Alliance. [Emphasis added]

b. The definition of "Environmental Goals" is "achieving an outcome or changing behavior, including not limited to changing information disclosure practices, relating to any aspect of the environment or environmental policy."

c. "Any aspect of the environment" can range from water quality to air pollution to solid waste disposal to recycling to flood control, to fertilizers, to pesticides, to plastics, to wildlife habitat, to endangered species, to energy efficiency, and list could go on and on.

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November 2, 2022

d. Then, in Demand For Documents ¶2, the CIDs demand production of “all Documents and Communications related to any Global Climate Initiative or any committee, board group, or subgroup thereof.” This Demand For Documents appears in all six of the CIDs.

19. Another example of the excessive scope of the CIDs is Demands For Information ¶15 which is a demand by AG Cameron to “Identify all entities to which You provide banking services that are part of the auto manufacturing industry, energy industry, or power generation industry.” This is the paragraph number for the Demand For Information for the Bank Of America Corporation (Complaint Exhibit 1). An equivalent demand is contained in all other of the CIDs though the specific paragraph number may be different. For the remainder of the Complaint, the CIDs paragraph number in this Complaint is from Exhibit 1 though similar paragraphs are contained in the other CIDs (though possibly with slightly different specific paragraph numbers).

20. Another example of the excessive scope of the CIDs is Demands For Information ¶19 which is a demand by AG Cameron to “Explain the manner in which You incorporate Your assumptions about energy transition and government mandates into Your general macroeconomic forecasts”

21. These excessive demands are just the “tip of the iceberg” of the huge scope of the information and reporting demands of the CIDs. There are 24 separate Demands For Information and 20 separate Demands For Documents in CIDs Exhibit 1, and the CIDs and Press Release plainly create unreasonable burdens upon and governmental investigations against businesses and people who might worry about, discuss, or even think about global climate change or environmental activities.

22. It is common knowledge that people in Kentucky are discussing whether or not the December 2021 Western Kentucky tornados or the July 2022 Eastern Kentucky flooding were exacerbated by climate change. How to respond to those disasters includes what environmental

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November 2, 2022

goals and policies, including zoning and building standards, are impacted or affected or involve remedying these disasters. How to respond to those disasters includes loans to affected persons which involve the risks of repayment that may include a borrower's "ESG Factors".

a. Since the Bankers Association is involved in providing relief to these disasters, Paragraph 1 of the CIDs Demands For Information would require the Bankers Association to identify "all of Your divisions, groups, offices, or business segments whose responsibilities relate" to those activities, and Paragraph 2 of the Demands For Documents would permit AG Cameron to demand production of "all Documents and Communications related" to these activities, including discussions about how to deal with natural disasters plainly affecting Kentucky.

b. Since members of the Bankers Association are involved in banking and lending in the areas impacted by these disasters, AG Cameron could require, as part of Demands For Information ¶24, information about "any interactions or engagements ... related to ... trade association activities...."

Count 1

AG Cameron Is Acting In Excess Of His Legal Authority

23. Plaintiffs incorporate by reference and reallege the allegations set forth in Paragraphs 1 through 22 of this Complaint.

24. Kentucky has addressed by statute the extent to which financial institutions are to be examined by Kentucky governmental entities, and that authority under state law is assigned by KRS 286.1-011 to the Kentucky Department of Financial Institutions.

25. KRS 286.1-011(2) states as follows:

- (2) The Department of Financial Institutions shall exercise all administrative functions of the state in relation to the regulation, supervision, chartering and licensing of banks, trust companies, savings and loan associations, consumer loan companies, investment and industrial loan companies, and credit unions, and in relation to the regulation of securities.

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November 2, 2022

26. On account of KRS 286.1-011(2), AG Cameron does not have authority to issue the CIDs.

27. Furthermore, in the first paragraph of the CIDs, AG Cameron asserts that the CIDs are issued “Pursuant to the authority granted in KRS 367.240 and KRS 367.250, two statutes that are part of the Kentucky Consumer Protection Act, KRS 367.110 to KRS 367.300 (the “KCPA”).

28. The purpose of the KCPA is stated in KRS 367.120(1): “to protect the public interest and the well-being of the consumer public and the ethical sellers of goods and services.”

29. KRS 367.170 of the KCPA defines unlawful acts prohibited by the KCPA as follows:

367.170 Unlawful acts.

(1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) For the purposes of this section, unfair shall be construed to mean unconscionable.

30. A decision of any business as to the extent to which it will consider any of the ESG Factors or any other of the subjects of the CIDs in its business operations is not an unfair, false, misleading or deceptive act or practice within the meaning of KRS 367.170.

31. AG Cameron is not investigating any acts or practices declared unlawful by the KCPA.

32. In addition, the period covered by the CIDs is “from January 1, 2015 to the present”. See Instructions ¶1. However, under KRS 413.120(2) and KRS 413.150, the statute of limitations for a violation of KRS 367.170 is five (5) years after the cause of action accrued. The CIDs are seeking information about matters for which an enforcement action under the KCPA would be untimely.

33. In addition, the CIDs seek information about activities outside the Commonwealth of Kentucky that may be lawful or even required under the laws of such jurisdictions. As such, the

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November 2, 2022

CIDs are beyond the scope of the KCPA and also in violation of the Commerce Clause of the Constitution of the United States of America. Article 1, Section 8, Clause 3.

34. KRS 367.260 addresses unreasonable investigations by AG Cameron. The statute states:

367.260 Unreasonable investigation.

Any person may apply to a Circuit Court for an appropriate order to protect such person from any unreasonable investigative action taken pursuant to KRS 367.110 to 367.300.

35. HOPE and the Bankers Association are each a “person” within the meaning of KRS 367.260 and KRS 367.110(1).

36. The CIDs, and AG Cameron’s efforts relating thereto, are “unreasonable investigative action” within the meaning of KRS 367.260, and they are improper and illegal.

WHEREFORE, Plaintiffs demand judgment against Defendant as set forth in their Prayer for Relief below.

Count 2

AG Cameron Is Violating First Amendment Rights

37. Plaintiffs incorporate by reference and reallege the allegations set forth in Paragraphs 1 through 36 of this Complaint.

38. The CIDs issued by AG Cameron violate rights of speech and association guaranteed to HOPE, the Bankers Association, and their participating lenders and members by the Constitutions of the United States of America and Kentucky.

39. Without limiting the ways that the CIDs are violative of free speech and association rights:

a. The CIDs demand the production of “all ... Communications related to interactions, engagements, or meetings between You and any covered Company related to the Covered Company meeting any Environmental Goal(s).” See Demand for Documents ¶5.

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November 2, 2022

b. The CIDs demand that a recipient “Describe Your political projections ... including but not limited to the political composition of Congress and the Executive branch, adopted legislation and administrative rules” See Demand For Information ¶16

c. The CIDs demand that a recipient describe “any Communications with, or other actions taken by You, to engage with any nationally recognized statistical rating organization.” See Demand For Information ¶11

d. The CIDS demand that a recipient “Identify any interactions or engagements You have had with a Covered Company related to the Covered Company’s political, lobbying, or trade association activities....” A “Covered Company” is “any entity to which You provide banking services of any kind that may be implicated by any commitment You made or intend to make to any Global Climate Initiative.”

40. The very existence of the CIDs calls into question and chills the Plaintiffs’ rights to think, speak and associate freely and without unwarranted governmental intrusion or criticism.

41. The CIDs state on page 12 that “There is a continuing obligation to disclose pursuant to this CID.” In effect, the CIDs are creating an ongoing state surveillance system on communications and activities of a recipient and with the persons a recipient is interacting.

Count 3
AG Cameron Is Violating 2022 Senate Bill 205

42. Plaintiffs incorporate by reference and reallege each and every allegation contained in Paragraphs 1 through 41 above.

43. The definition of Global Climate Initiative and the other provisions of the CID’s are plainly motivated by AG Cameron’s opposition to “utilizing the financial system to reduce or eliminate green house gas emissions or otherwise pursue environmental goals.”

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November 2, 2022

44. The subject of the extent to which the Commonwealth of Kentucky's governmental entities should be concerned with the financing of fossil energy producers was the subject of extensive debate and discussion in the 2022 regular session of the Kentucky General Assembly and led to the enactment of Senate Bill 205 title "AN ACT relating to state dealings with companies that engage in energy company boycotts." A true and correct copy of Senate Bill 205 as enacted is attached hereto as **Exhibit 8** and incorporated herein by reference. Senate Bill 205 is codified at KRS 41.470 through KRS 41.480.

45. In general, Section 3 of Senate Bill 205 (codified at KRS 41.474) assigns to the Kentucky State Treasurer (the "Treasurer") the task of preparing and maintaining and providing to each Kentucky state governmental entity a list of all financial companies that, to the Treasurer's knowledge, have engaged in energy company boycotts. Upon information and belief formed after inquiry reasonable under the circumstances, the Treasurer is currently involved in drafting regulations, policies and/or procedures to implement Senate Bill 205.

46. Section 3 of Senate Bill 205 then provides that Kentucky government entities must, subject to certain exceptions, divest from owning publicly traded securities of a company that the Treasurer lists as being engaged in energy company boycotts.

47. Section 5 of Senate Bill 205 (codified at KRS 41.480) prohibits, with certain exceptions, a Kentucky governmental entity from entering into a contract worth \$100,000 or more with a company having ten or more full-time employees unless that contract contains a written verification from the contracting company that it does not engage in energy company boycotts and requires that the contracting company will not engage in energy company boycotts during the term of the contract.

48. An important point is the Senate Bill 205 does not outlaw energy company boycotts. It only provides that (a) publicly traded securities of covered companies that do so may not be

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November 2, 2022

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owned by Kentucky government entities, and (b) covered companies that do so may not have large contracts with Kentucky governmental entities; and, there are even exceptions to these consequences.

49. Section 4(2) of Senate Bill 205 (codified at KS 41.476(2)) authorizes the Kentucky Attorney General or the Treasurer to “bring any civil action necessary to enforce” the provisions of Senate Bill 205. Senate Bill 205 does not contain any stand-alone subpoena authority.

50. AG Cameron’s issuing the CIDs is inconsistent with the provisions of, and the policy choices evidenced by, Senate Bill 205.

a. First, the General Assembly has plainly assigned to the Treasurer, and not the Attorney General, the task of determining who might be engaged in an energy company boycott.

b. Second, the General Assembly has plainly established the scope of the activities and the remedies for energy company boycotts, and they are not a violation of the KCPA (the basis for AG Cameron’s CIDs).

c. Third, if the Attorney General wants to address actions that would be a violation of Senate Bill 205, Section 4(2) (KRS 41.476(2)) requires that he first bring a civil action. Then, the scope of his investigation is governed by the applicable civil rules of discovery and Circuit Court oversight. The CIDs improperly circumvent this process and oversight.

WHEREFORE, Plaintiffs demand judgment against Defendant as set forth in their Prayer for Relief below.

Prayer For Relief

WHEREFORE, Plaintiffs demand as follows:

I. That this Court issue a declaration that AG Cameron does not have the statutory authority to issue or enforce the CIDs; and

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22-CI-00842

10/11/2022

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II. That this Court issue a declaration that the CIDs violate the Plaintiffs' rights to free speech and association guaranteed by the Constitutions of the United States of America and the Commonwealth of Kentucky; and

III. That this Court (a) quash the CIDs, and (b) enjoin and prohibit AG Cameron and all other persons in active concert or participation with him from taking any steps to enforce the CIDs or to issue any new CIDs, and (c) direct AG Cameron to notify any person subpoenaed or investigated pursuant to the CIDs that the CIDs have been quashed; and

IV. That Plaintiffs recover their costs herein expended and receive any and all other relief to which they may appear entitled.

Respectfully submitted,

MORGAN POTTINGER MCGARVEY

By: /s/ John T. McGarvey

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