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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSUMER FINANCIAL PROTECTION BUREAU, Plaintiff, v. CHANCE E. GORDON, et. al., Defendants.	Case No.: CV12-6147 RSWL(MRWx) GORDON DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES OR CLAIMS Date: June 17, 2013 Time: 1:30 p.m. Place: Courtroom 15 Hon. Percy Anderson

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I. Introduction

The underlying motion for summary judgment is simple, straightforward, and based upon a few simple irrefutable defenses:

- First, Plaintiff lacks standing to prosecute the underlying action against Gordon Defendants because of the constitutional infirmity regarding the appointment of the Director of the Consumer Financial Protection Bureau;
- Second, even if Plaintiff did have standing, Gordon Defendants are not covered under the statutory claims that comprise Plaintiff's action; and
- Finally, even if this Court were to overlook the foregoing irrefutable defenses, the program at issue was lawful based on the contracts at issue and the integration clause contained therein.

Thus, summary judgment may be granted on any of three defenses, namely (1) Plaintiff lacks standing, (2) the Gordon Defendants are not covered under the claims being prosecuted, and, (3) any alleged actionable conduct is refuted by the clear unambiguous language of incorporated contracts.

II. Legal Standards

Rule 56(a), F.R.C.P. states that" "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 2514 (1986); *British Airways Board v. Boeing Co*., 585 F.2d 946, 951 (9th Cir. 1978). To do so, defendant must present sufficient evidence to demonstrate its entitlement to summary judgment. *Lopez v. Corporation Azucarera de Puerto Rico,* 938 F.2d 1510 (1st Cir. 1991).

If Defendant satisfies its initial burden, then Plaintiff must establish a genuine issue of material fact. A factual dispute is genuine if the evidence is such that a rational trier of fact could resolve the dispute in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Even after *Celotex Corp. v. Catrett,* 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986), courts in this circuit "require very little evidence to survive summary judgment." *Sischo-Nownejad v. Merced Community College District,* 934 F.2d 1104, 1111 (9th Cir. 1991). The adjudication of a summary judgment motion is not a "trial on affidavits." *Birdsong v. State Farm,* 1997 U.S. Dist. LEXIS 18504 (N.D. Cal. 1997) (citing *Anderson v. Liberty Lobby Inc*., 477 U.S. 242, 255, 91 L.Ed. 2d 202, 106 S. Ct. 2505 (1986)).

Summary judgment may not be used to resolve credibility issues. *Lendino v. Trans Union Credit Information Co*., 970 F.2d 1110 (2nd Cir. 1992). Factual inferences must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 587, 89 L.Ed. 2d 538, 106 S.Ct. 1348 (1986); *International Shortstop, Inc. v. Rally's, Inc*., 939 F.

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2d 1257 (1991); *Chipolini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987); *Lemnitzer v. Philippine Airlines, Inc.*, 816 F.Supp. 1141, 1149 (N.D. Cal. 1992).

In the instant case, summary judgment is based on very few items of fact, each of which are beyond any legitimate dispute.

III. Plaintiff Lacks Standing Because Its Director Was Not Lawfully Appointed And Does Not Validly Hold His Position.

A. Plaintiff Lacked Jurisdiction Over Non-Banking Persons

Plaintiff was established as the result of the Dodd-Frank Act, which provided plenary powers, many of which were transferred from other agencies. These powers, and direction for the fledgling agency were outlined in a July 15, 2011 report of the Office of Inspector General, which was entitled "Review of CFPB Implementation Planning Activities" (hereinafter "OIG Report"). *See* 12 U.S.C. § 5496b. The Gordon Defendants ask this Court to take Judicial notice of the OIG Report.

Page 2 of the OIG report explains that "As mandated by the Dodd-Frank Act, a presidentially appointed, Senate-confirmed director is to lead the agency. A CFPB Director has not yet been appointed." Page 4 of the OIG Report contains the following significant limitations on the CFPB's authority and powers:

> In addition to the transferred functions, CFPB has newly-established federal consumer financial regulatory authorities. The Treasury Secretary is not permitted to perform certain newly-established CFPB authorities if there is no Director by the designated transfer date. For

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example, if there is no Director by the designated transfer date, in general, the Treasury Secretary is not permitted to exercise the authority to:

- prohibit unfair, deceptive, or abusive acts or practices under subtitle C in connection with consumer financial products and services;

- prescribe rules and require model disclosure forms under subtitle C to ensure that the features of a consumer financial product or service are fairly, accurately, and effectively disclosed both initially and over the term of the product or service;

- prescribe rules under section 1022 relating to, among other things, the filing of limited reports to CFPB for the purpose of determining whether a nondepository institution should be supervised by CFPB;

- supervise nondepository institutions under section 1024, including the authority to (a) prescribe rules defining the scope of nondepository institutions subject to CFPB's supervision, (b) prescribe rules establishing recordkeeping requirements that CFPB determines are needed to facilitate nondepository supervision, and (c) conduct examinations of nondepository institutions.

In summary, the CFPB will not gain authority to bring enforcement actions against non banking persons (natural or legal) until "a presidentially appointed, Senate-confirmed director is to lead the agency."

CFPB's director, Richard Cordray, was appointed by President Obama on January 4, 2012, and was **not confirmed by the United States Senate.** The significance of this unconfirmed appointment was the subject of review in *Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013), which tested the constitutional validity

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of "three members [of the NLRB who] were all appointed by the President on January 4, 2012, purportedly pursuant to the Recess Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 3." According to the *Canning* Court, the presidential appoints on that day were not valid "intrasession recess" appointments for a variety of well explained reasons. As a result, the NLRB's order was vacated, and the Court of Appeals refused to enforce an invalid order.

The CFPB's director, Richard Cordray, was appointed on the same day as the NLRB members with President Obama using the same invalid usurpation of legislative authority. Thus, according to the reasoning of the D.C. Circuit Court of Appeals, enforcement actions initiated during the Cordray reign, including the instant action, would be constitutionally invalid. The instant situation is even more infirm than the NLRB situation because the OIG Report specifically requires the CFPB to have "a presidentially appointed, Senate-confirmed director ... to lead the agency." There has been no Senate confirmation of the CFBP's director Richard Cordray.

B. Plaintiff's Decision To Prosecute This Action Is Invalid

The invalidity of the appointment of Plaintiff's Director also invalidates actions initiated under his auspices. In *N.L.R.B. v. New Vista Nursing and Rehabilitation,* 2013 WL 2099742 (3d Cir. 2013), the Third Circuit Court of Appeals dealt with "intrasession" appointments, holding:

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> We hold that "the Recess of the Senate" in the Recess Appointments Clause refers to only intersession breaks. As a consequence, we conclude that the National Labor Relations Board panel below lacked the requisite number of members to exercise the Board's authority because one panel member was invalidly appointed during an intrasession break.

In that case, the court considered the jurisdictional issue *sua sponte* and invalidated an order of a NLRB delegee group because one of the members had been appointed during an intrasession break. The *New Vista* court was concerned with the jurisdictional limitations on administrative agencies, which in the *New Vista* case involved adjudicatory powers. The *New Vista* court held that one of the 3-member delegee group was invalidly appointed during an intrasession recess, so the group (which required 3 members) lacked jurisdiction to issue orders. As a result, the challenged order was deemed to be invalid.

Applied to the instant case, the constitutional invalidity involved in the appointment of Director Cordray, invalidates all decisions under his reign, including the decision to prosecute the instant action.

C. The Foregoing Points Provide Grounds For Summary Judgment

Rarely are the grounds for a court to make a dispositive ruling so unambiguous and crystal clear. Adhering to the doctrine of *stare decisis*, this Court can only conclude that the appointment of Richard Cordray as director of the CFPB was legally invalid. The next analytical step would branch in two directions, namely (a) the invalidation of any action against non-bank persons, and/

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or (b) the invalidation of every exercise of power by the Bureau. Naturally, that would send a clear message that jurisdictional limits to administrative agency power must be respected. In either event, summary judgment is mandated in the instant case.

IV. The First Three Counts of The Complaint Fail Because Defendants Are Not Covered Persons or Providers

Plaintiff asserts the first three counts of the complaint under the Consumer Financial Protection Act, 12 U.S.C. §§ 5531 to 5536. Plaintiff may only take action against "a covered person or service provider." 12 U.S.C. § 5531(a). Critical definitions are found in 12 U.S.C. § 5481, as follows:

> (5) Consumer financial product or service.
> The term "consumer financial product or service" means any financial product or service that is described in one or more categories under—
> (A) paragraph (15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or
> (B) clause (i), (iii), (ix), or (x) of paragraph (15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (A).
>
> (6) Covered person.
> The term "covered person" means—
> (A) any person that engages in offering or providing a consumer financial product or service; and
> (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.
>
> (15) Financial product or service.
> (A) In general. The term "financial product or service" means—

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(i) extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit (other than solely extending commercial credit to a person who originates consumer credit transactions);

(ii) extending or brokering leases of personal or real property that are the functional equivalent of purchase finance arrangements, if —

(I) the lease is on a non-operating basis;

(II) the initial term of the lease is at least 90 days; and

(III) in the case of a lease involving real property, at the inception of the initial lease, the transaction is intended to result in ownership of the leased property to be transferred to the lessee, subject to standards prescribed by the Bureau;

(iii) providing real estate settlement services, except such services excluded under subparagraph (C), or performing appraisals of real estate or personal property;

(iv) engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer;

(v) selling, providing, or issuing stored value or payment instruments, except that, in the case of a sale of, or transaction to reload, stored value, only if the seller exercises substantial control over the terms or conditions of the stored value provided to the consumer where, for purposes of this clause—

(I) a seller shall not be found to exercise substantial control over the terms or conditions of the stored value if the seller is not a party to the contract with the consumer for the stored value product, and another person is principally responsible for establishing the terms or conditions of the stored value; and

(II) advertising the nonfinancial goods or services of the seller on the stored value card or device is not in itself an exercise of substantial control over the terms or conditions;

(vi) providing check cashing, check collection, or check guaranty services;

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(vii) providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network, except that a person shall not be deemed to be a covered person with respect to financial data processing solely because the person—

(I) is a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer; or

(II) provides access to a host server to a person for purposes of enabling that person to establish and maintain a website;

(viii) providing financial advisory services (other than services relating to securities provided by a person regulated by the Commission or a person regulated by a State securities Commission, but only to the extent that such person acts in a regulated capacity) to consumers on individual financial matters or relating to proprietary financial products or services (other than by publishing any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation, including publishing market data, news, or data analytics or investment information or recommendations that are not tailored to the individual needs of a particular consumer), including—

(I) providing credit counseling to any consumer; and

(II) providing services to assist a consumer with debt management or debt settlement, modifying the terms of any extension of credit, or avoiding foreclosure;

(ix) collecting, analyzing, maintaining, or providing consumer report information or other account information, including

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information relating to the credit history of consumers, used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service, except to the extent that—

(I) a person—

(aa) collects, analyzes, or maintains information that relates solely to the transactions between a consumer and such person;

(bb) provides the information described in item (aa) to an affiliate of such person; or

(cc) provides information that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer; and

(II) the information described in subclause (I)(aa) is not used by such person or affiliate in connection with any decision regarding the offering or provision of a consumer financial product or service to the consumer, other than credit described in section 5517(a)(2)(A) of this title;

(x) collecting debt related to any consumer financial product or service; and

(xi) such other financial product or service as may be defined by the Bureau, by regulation, for purposes of this title, [1] if the Bureau finds that such financial product or service is—

(I) entered into or conducted as a subterfuge or with a purpose to evade any Federal consumer financial law; or

(II) permissible for a bank or for a financial holding company to offer or to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have, a material impact on consumers.

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The Gordon Defendants do not fit within the definition of a "covered person" even pursuant to very expansive definitions. The key definition is "consumer financial product or service." The only potentially close category is found in subsection (viii), however, even that does not apply here because it does not mention providing custom legal products. All additional work - particularly the work to avoid foreclose -- was performed for the consumers and for free, so they would not fit within the meaning of "financial **advisory** services" [emphasis supplied] Accordingly, Plaintiff lacks authority to prosecute.

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V. The Final Counts Fail Because Defendants Did Not Provide Mortgage Assistance Relief Services As Defined By Regulation O

Counts IV through VII, inclusive, of the complaint assert different claims under Regulation O, which is codified 12 CFR § 1015, et seq. Again, Plaintiff's claims fail at the threshold level. 12 CFR § 1015.2 is the Definitions section of the regulation. Specifically, 12 CFR § 1015.2 includes the following definitions:

> *Mortgage Assistance Relief Service* means any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer with any of the following: [omitted] [emphasis supplied]
>
> *Mortgage Assistance Relief Service Provider* or *Provider* means any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service. [exclusions omitted]

The regulatory prohibitions only apply to Mortgage Assistance Relief Service Providers. 12 CFR § 1015.2; 12 CFR § 1015.4. Similarly, the disclosure requirements only apply to Mortgage Assistance Relief Service Providers. 12 CFR § 1015.4. Accordingly, the Regulation O claims fail if the service,plan, or program is offered **without consideration.**

Since the implementation of the MARS Act, The Gordon Defendants offered two different programs. The first program was a pre-litigation program, which was offered for fees, as defined by engagement agreements. The second program was a pro bono (free) loan modification program, as defined by separate engagement agreements. The assistance for the specifically defined loan modification services was provided for NO compensation.

While the agreement as modified from time to time, the essential terms of the Pre-Litigation Agreement survived each generation. One example was produced at a deposition taken by Plaintiff, which is a representative example. The pay program involves a demand letter, a qualified written request, and a draft lawsuit. None of these services fits within the services listed in 12 CFR § 1015.2. In addition, paragraph 9 of the agreement is an integration clause.

Both agreements were self contained and fully integrated. Both agreements provide for totally different performance obligations with no overlap. One agreement required payment for custom leal products. The other agreement provided loan modification services for free. Plaintiff would have this Court meld the two agreements in violation of the applicable contract law.

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A. The Doctrine of Estoppel By Contract Applies

The terms of the written agreements govern the relationship between the parties thereto pursuant to the doctrine of estoppel by contract. That doctrine is codified in the California Evidence Code § 622, as follows:

> The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.

That Evidence Code section and the common law doctrine upon which it is based both provide for a **conclusive presumption** that the facts contained in the contract are true. *See Plaza Freeway Ltd. Partnership v. First Mountain Bank,* 81 Cal.App.4th 616 (2000). As between the parties to a contract, "the doctrine of estoppel by contract" stands for the proposition that "a party to a contract is generally estopped to deny essential facts recited therein." *In re Marriage of Brooks,* 169 Cal.App.4th 176, 184 (2009). That doctrine has also been interpreted to mean that without credible evidence that an agreement "was altered or rescinded by the parties, the terms of the contract are binding on the parties and their successors." *In re Estate of Wilson,* 64 Cal.App.3d 786, 801 (1977).

Thus, the parties to the two agreements at issue may not e heard to contradict their terms and limitations. It is **conclusively** presumed that the pay agreement contains no products or services that fit within the scope of the MARS laws, and the free agreement does not within the scope of the MARS laws because the services are NOT offered for consideration.

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B. The Integration Clause Precludes Consideration Of Alleged Facts Contrary To The Contract Terms

California Civil Code § 1856(a) codifies the law on the subject and states:

> Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.

Similarly, California Civil Code § 1625 states: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument

The first issue is to determine whether the parties intended a written contract to be the the exclusive embodiment of their agreement. *Masterson v. Sine,* 68 Cal. 2d 222, 225 (1968). "California cases have stated that whether there was an integration is to be determined solely from the face of the instrument [citations omitted]." *Masterson, supra*., 68 Cal.2d at 225; *Lonely Maiden Productions, LLC v. Goldentree Asset Management, LP,* 201 Cal.App.4th 368, 376 (2011). "The existence of an integration clause is a key factor in divining that intent." *Grey v. American Management Services,* 204 Cal.App.4th 803, 807 (2012). The Pre-Litigation Agreement, which is the only agreement that contains a payment obligation, is fully integrated with an integration clause.

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> Once it is determined that a contract is integrated, then the rule is as follows:
>
> When the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms.

Masterson, supra., 68 Cal.2d at 225. This means that "extrinsic evidence cannot be used to contradict or supplement an agreement if it is intended to be a final expression of that agreement and a complete and exclusive statement of the terms." *Lonely Maiden Productions, LLC, supra.,* 201 Cal.App.4th at 376; *See also Trautman v. Southland Corp.,* 842 F.Supp. 386 (N.D. Cal. 1993)("The [parol evidence] rule is based on the premise that the written agreement constitutes the final and absolute expression of the result of all negotiations.").

The Pre-Litigation Agreement is both integrated in its terms and contains an integration clause. Nothing in he Pre-Litigation Agreement fits within the scope of services (or products) regulated pursuant to Regulation O. *See* 12 CFR § 1015.2. Plaintiff cannot be heard to contradict the express language in the contract.

Clients were also eligible to receive the Attorney/Client Pro Bono Legal Agreement. Again, this contract evolved, but its essential terms survived each generation. A representative example was also produced at a deposition taken by Plaintiff. The Pro Bono Legal Agreement provides for a number of different mortgage relief services, which are provided "[f]or no fee, cost, or charge whatsoever. . . ."

As reflected in the written contracts subject of this action, Gordon Defendants conduct in charging people for custom litigation products would not

constitute a "mortgage relief service". The plain language of this contract clearly identified the scope of work which Gordon Defendants were being compensated for which was preparing; 1) draft federal complaint, 2) a qualified written request, and, 3) a demand letter. Nothing within this agreement involved charging customers a fee for **anything** constituting a mortgage assistance relief service.

Plaintiff does not have jurisdiction under Regulation O unless this Court disregards the express language of the contracts at issue. The parol evidence rule prevents Plaintiff and this Court from revising the deal between the Gordon Defendants and the parties with whom they contracted. In fact, the parol evidence rule expressly prohibits that type of revisionist history. Thus, summary adjudication on Counts IV through VII, inclusive, should be granted because the Gordon Defendants charged no fee or consideration for "any service, plan, or program" contained in the long list of items constituting a "Mortgage Assistance Relief Service" pursuant to 12 CFR § 1015.2.

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VI. Conclusion

The instant action fails at the macro level. Plaintiff lacks standing, based on constitutional and statutory issues, to raise any of the claims asserted in this action. Since its inception, Plaintiff has destroyed Mr. Gordon's legal publishing business and law practice, has seized his money to be paid to a receiver, has frozen his remaining assets, and has rendered him indigent and homeless. It is time to grant summary judgment, end this matter, and allow Mr. Gordon the start to rebuild his life and seek reparations.

Respectfully presented,
LAW OFFICE OF GARY KURTZ
A Professional Law Corporation

Dated: May 20, 2013

By: *Gary Kurtz*
Gary Kurtz, Esq. Attorney for
Defendants Chance E. Gordon
and The Gordon Law Firm, P.C.

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Certification

I hereby certify that, on May 20, 2013, a copy of the foregoing GORDON DEFENDANTS' POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES OR CLAIMS was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's EM/ECF System.

Dated: May 20, 2013

Gary Kurtz

Gary Kurtz