**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI,**

*Plaintiffs,*

v.

**CONSUMER FINANCIAL PROTECTION BUREAU,**

*Defendant.*

Civil Action No. 13-cv-01112 (CKK)

**DEFENDANT CONSUMER FINANCIAL PROTECTION BUREAU'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Defendant Consumer Financial Protection Bureau (Bureau) hereby moves to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6); or, in the alternative, for summary judgment pursuant to Federal Rule of Civil Procedure 56. The grounds for this motion are fully set forth in the accompanying Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment. A proposed order is also attached.

Dated: August 27, 2013

Respectfully submitted,

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# MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Dated: August 27, 2013

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## INTRODUCTION

After the Consumer Financial Protection Bureau (CFPB or Bureau) advised Morgan Drexen that it was considering filing an enforcement action against the company, Morgan Drexen, joined by Kimberly Pisinski, filed this action against the Bureau for declaratory and injunctive relief. Plaintiffs raise a single constitutional claim—that the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) that establish the Bureau violate the separation of powers.

This Court should decline to exercise jurisdiction in this case. On August 20, 2013, the Bureau filed an enforcement action against Morgan Drexen in the U.S. District Court for the Central District of California. *CFPB v. Morgan Drexen*, No. 8:13-cv-1267. Notwithstanding Morgan Drexen's efforts to beat the Bureau to the courthouse, it is in the enforcement action that Morgan Drexen should be required to present its constitutional claims. Morgan Drexen can obtain complete relief on its constitutional challenge by seeking dismissal of that action. Moreover, that court can consider Morgan Drexen's non-constitutional defenses to the Bureau's action (which are not presented here), and, if it finds them to be meritorious, can grant Morgan Drexen relief without needing to rule on the separation-of-powers question. Nor does the Bureau's now-completed investigation justify this Court's exercise of equity powers, because the Bureau's civil investigative demands—enforceable only through court actions—cannot cause the type of irreparable harm that equitable or declaratory relief is designed to redress. For these reasons, and because Plaintiffs have made no effort to demonstrate Pisinski's standing to maintain this action, the Court should dismiss the complaint without reaching the merits of Plaintiffs' constitutional claim.

If the Court decides to reach the merits, it should nonetheless grant the Bureau's motion because the provisions of the Dodd-Frank Act establishing the Bureau comply with the constitutional separation of powers. Plaintiffs' constitutional claim rests on the Bureau's supposed lack of adequate accountability to the three branches of government. In reality, however, the Dodd-Frank Act preserves each branch's constitutional role in overseeing the Bureau's work. For starters, the Act preserves the President's authority to remove the head of the Bureau for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). This broad "for-cause" removal power has consistently been held to preserve the President's executive authority over independent agencies like the Bureau. That authority is in no way diminished by Congress's decision to make the head of the Bureau a single director rather than a multimember commission.

Similarly, the Act does not impinge Congress's "power of the purse" by providing the Bureau a funding source outside of the annual appropriations process (just as other financial regulators have). And Congress retains the full panoply of legislative and oversight authorities through which it can hold the Bureau accountable for its actions.

The Bureau's final actions are also subject to judicial review under the Administrative Procedure Act. Federal courts thus have authority to review and, if necessary, set aside the Bureau's actions to the same extent, and on the same terms, as virtually every other federal regulatory agency.

Finally, Plaintiffs' request that this Court find a new separation-of-powers restriction that is tailored uniquely to the Bureau's structure and authorities has no basis. Plaintiffs complain about the Bureau's broad powers, but even if the scope of the Bureau's powers were relevant to the separation-of-powers inquiry, Plaintiffs utterly fail to show that the Bureau's authority is out

of step with that exercised by other federal regulatory agencies. Plaintiffs' other claim—that the Constitution *compels* a commission or board structure for the Bureau—is completely unmoored not only from precedent, but also from any separation-of-powers principle. Indeed, if anything, the separation of powers suggests that the policymaking judgment as to how the leadership of the Bureau should be structured falls squarely within Congress's ken.

## BACKGROUND

### A. The Bureau's Structure, Jurisdiction, and Powers

The Bureau is the principal federal agency charged with "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). Before the Bureau's creation, these laws were administered by "seven different federal regulators," a situation that Congress believed "undermine[d] accountability" and produced regulatory gaps that contributed to the recent financial crisis. S. Rep. No. 111-176, at 9-10 (2010). To address that problem, Congress passed and the President signed the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Title X of that Act establishes the Bureau as an "independent bureau" within the Federal Reserve System, 12 U.S.C. § 5491(a), with the responsibility for "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive," *id.* § 5511(a).

The Bureau's Structure and Funding. The Bureau is headed by a Director, who is appointed for a five-year term by the President with the advice and consent of the Senate. *Id.* § 5491(b), (c). The President has the authority to remove the Director for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). The Director is responsible for conducting the Bureau's affairs and managing its employees. *Id.* §§ 5492; 5493(a)(1).

The Dodd-Frank Act funds the Bureau's operations by authorizing the Bureau to receive an allocation from the Federal Reserve System's earnings. *Id.* § 5497(a)(1). By statute, that allocation is limited to 12 percent of the total 2009 operating expenses of the Federal Reserve System—or $597.6 million in the current fiscal year—subject to an annual adjustment for inflation. *Id.* § 5497(a)(2); Semi-Annual Report of the Consumer Financial Protection Bureau, July 1, 2012–December 31, 2012 77 (Mar. 2013) ("March 2013 Semi-Annual Report"), *available at* http://files.consumerfinance.gov/f/201303_CFPB_SemiAnnualReport_March 2013.pdf. If additional funds are needed "to carry out the authorities of the Bureau," the Director must seek appropriations from Congress. 12 U.S.C. § 5497(e).

The Bureau's Jurisdiction. The Dodd-Frank Act transferred to the Bureau certain consumer financial protection functions previously exercised by one or more of the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the former Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Trade Commission (FTC), the National Credit Union Administration, and the Department of Housing and Urban Development. *See id.* §5581(b). The Bureau is now responsible for implementing "Federal consumer financial law." *See Id.* § 5511(a). This body of law includes 18 pre-existing statutes, collectively known as "enumerated consumer laws." *Id.* § 5481(12), (14).

Federal consumer financial law also includes Title X itself. *See id.* § 5481(14). Title X prohibits "covered persons" (in the main, providers of consumer financial products and services, *see id.* § 5481(6)) and their "service provider[s]" from "engag[ing] in any unfair, deceptive, or abusive act or practice" in violation of Title X or from violating, or offering or providing consumers with a financial product or service not in conformity with, Federal consumer financial

law. *Id.* §§ 5531(a), 5536(a)(1). Title X also authorizes the Bureau to adopt rules requiring "full[], accurate[], and effective[]" disclosures to consumers, *id*. § 5532, and ensuring consumers' access to other information in covered persons' control or possession, *id*. § 5533.

The Bureau also has the authority to enforce certain FTC rules. Specifically, the Bureau may enforce FTC rules concerning "unfair or deceptive act[s] or practice[s] to the extent that such rule[s] appl[y] to a covered person or service provider with respect to the offering or provision of a consumer financial product or service." *Id.* § 5581(b)(5)(B)(ii). The Bureau also may enforce the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act) "with respect to the offering or provision of a consumer financial product or service." 15 U.S.C. § 6105(d). The Telemarketing Act generally prohibits "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," *id.* § 6102(a)(1), and has been implemented by the FTC through the Telemarketing Sales Rule (TSR), 16 C.F.R. part 310, which the Bureau is also authorized to enforce, 15 U.S.C. § 6102(c)(2).

The Bureau's Powers. Title X grants the Bureau rulemaking, supervision, and enforcement powers.

*Rulemaking*. The Bureau has the authority to adopt regulations to administer Federal consumer financial law. 12 U.S.C. § 5512(b)(1). In issuing rules, the Bureau must comply with the same rulemaking procedures that generally apply to federal agencies under the Administrative Procedure Act (APA), *see* 5 U.S.C. § 553, as well as other statutes governing agency rulemaking activities, such as the Congressional Review Act, *id*. §§ 801-808. The Bureau's rules are subject to APA review in federal district courts, and may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

*Supervision*. Supervision, a common tool in financial regulation, refers generally to a "sovereign's supervisory powers over corporations" and includes "any form of administrative oversight that allows a sovereign to inspect books and records on demand." *Cuomo v. The Clearing House Ass'n, LLC*, 557 U.S. 519, 535 (2009). The Bureau has "exclusive authority" to supervise very large depository institutions and credit unions (*i.e.*, those with assets of over $10 billion), as well as their affiliates, for assessing compliance with Federal consumer financial law and for related purposes. 12 U.S.C. § 5515(a), (b). The Bureau also has authority to supervise certain nondepository covered persons. *Id.* § 5514(a), (b).

*Enforcement*. The Bureau also may conduct investigations and bring enforcement actions. When conducting investigations, the Bureau may issue civil investigative demands (CIDs), a form of administrative subpoena that may direct the recipient to produce documents or other materials or to provide information or oral testimony. *Id.* § 5562(c). A CID recipient may petition the Director to modify or set aside the CID, and the CID is unenforceable while such a petition is pending. *Id.* § 5562(f). Materials submitted in response to a CID are considered confidential, *id.* § 5562(d), and a recipient may withhold responsive material based on a "claim of privilege," 12 C.F.R. § 1080.8(a). Title X does not impose a fine or penalty for failure to comply with a CID. Rather, in the event of noncompliance, the Bureau may file a petition in federal district court seeking enforcement of the CID. 12 U.S.C. § 5562(e).

The Bureau may bring an enforcement action in either of two forums. First, the Bureau may bring an administrative proceeding before an administrative law judge. *Id.* § 5563; *see also* 12 C.F.R. part 1081. The administrative law judge's recommended decision in the proceeding is subject to review by the Director, whose final decision is subject to judicial review. *Id.* § 5563.

Second, the Bureau may bring an enforcement action by filing a civil action in federal district court. *Id.* § 5564.

**B. The Bureau's Investigation of Morgan Drexen**

In early 2012, the Bureau began investigating Morgan Drexen for possible violations of the TSR, the Dodd-Frank Act, and other laws. *See* Morgan Drexen Complaint, Dckt. #1 (Compl.) ¶¶ 39, 44. On March 13, 2012, the Bureau issued a CID to Morgan Drexen, seeking records related to its debt settlement business. Compl. ¶¶ 39, 40; Declaration of Randal M. Shaheen, Dckt. #3-5, (Shaheen Decl.) Ex. 1. Over the course of its investigation, the CFPB sought records from third parties and "deposed various officers of Morgan Drexen, including its Chief Executive Officer, Walter Ledda."[1] Compl. ¶ 41; *see also* Shaheen Decl. ¶¶ 34-37.

On April 22, 2013, consistent with Bureau practice, the Bureau advised Morgan Drexen that it was "considering enforcement action" against the company and Ledda.[2] On May 8, 2013, Morgan Drexen responded with a written submission making factual, statutory, and First Amendment arguments for why the Bureau should not file an enforcement action against it. Compl. ¶¶ 46-47; *see also* Shaheen Decl. ¶ 39 & Ex. 33.

On July 23, 2013, Morgan Drexen, joined by Pisinski, (together, "Plaintiffs") filed this lawsuit, claiming that "Title X of the Dodd-Frank Act violates the Constitution's separation of powers." Compl. ¶ 120. Plaintiffs seek a declaration that "the provisions of the Dodd-Frank Act

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[1] In 2005, Mr. Ledda, who previously ran a debt relief company called National Consumer Council, Inc., entered into a settlement agreement with the FTC, whereby he consented to be permanently enjoined from violating the TSR, including any amendments to the TSR. *See Federal Trade Commission v. National Consumer Council, Inc.*, 8:04-cv-474 (C.D. Cal. Mar. 30, 2005) (Dckt. #197). The Bureau requests that the Court take judicial notice of this final order pursuant to Federal Rule of Evidence 201.

[2] Compl. ¶ 43; Shaheen Decl. ¶ 38 & Ex. 32. The Bureau advised Morgan Drexen pursuant to its "Notice and Opportunity to Respond and Advise" process. *See* CFPB Bulletin 2011-04, Notice and Opportunity to Respond and Advise (NORA), *available at* http://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf.

creating and empowering the CFPB" are unconstitutional, as well as injunctive relief. Compl. at 20. They also purport to reserve certain arguments, "in the event that the CFPB is found to be constitutional," including the arguments that applying "the TSR to attorneys engaged in the practice of law violates the Tenth Amendment and [12 U.S.C. § 5517(e)]"; that the CFPB has acted in excess of its statutory jurisdiction; and that the CFPB is acting in an arbitrary and capricious manner. Compl. at 20.

On August 20, 2013, acting pursuant to its authority under 12 U.S.C. § 5564(a) and 15 U.S.C. §§ 6102(c)(2) and 6105(d), the Bureau filed a complaint (CFPB Complaint) against Morgan Drexen and Ledda in the U.S. District Court for the Central District of California, the "district in which [Morgan Drexen] is located."[3] 12 U.S.C. § 5564(f). The CFPB Complaint brings claims for violations of the TSR and the Dodd-Frank Act's prohibition on deceptive acts or practices and seeks injunctive relief, consumer redress, and civil money penalties. CFPB Complaint ¶¶ 74-100.

The CFPB Complaint alleges the following: In 2007, Mr. Ledda founded Morgan Drexen. CFPB Complaint ¶ 7. At the time, many state laws regulating debt relief services provided an exemption for attorneys. *Id.* To take advantage of these exemptions, Morgan Drexen began employing the "Attorney Model" of debt relief services, whereby consumers contracted directly with attorneys affiliated with Morgan Drexen ("Network Attorneys") for debt relief services and paid those attorneys up-front fees in advance of any debt settlement. *Id.* ¶ 8. Morgan Drexen actually performed the work on behalf of the consumers, however, and most of the up-front fees paid to the attorneys were transferred to Morgan Drexen. *Id.* ¶¶ 9-10.

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[3] *See Consumer Financial Protection Bureau v. Morgan Drexen, Inc. et al.*, 8:13-cv-01267 (C.D. Cal.) (Dckt #1) (attached to the Notice filed by the CFPB on August 20, 2013, Dckt. #14-1). Defendant requests that the Court take judicial notice of the CFPB Complaint pursuant to Federal Rule of Evidence 201(b)(2).

In October 2010, the FTC amended the TSR to, among other things, prohibit debt relief companies engaged in telemarketing from requesting or receiving up-front fees "before renegotiating, settling, reducing, or otherwise altering the terms of a least one of a consumer's debts."[4] *Id.* ¶ 11. The amended TSR does not exempt attorneys from this prohibition. *Id.*

The CFPB Complaint alleges that at about the time these amendments became effective, Morgan Drexen changed its business model again, adopting the "Dual Contract Model," which the CFPB Complaint alleges "is designed to disguise consumers' up-front payments for debt relief services provided by Morgan Drexen as payments for bankruptcy-related work purportedly performed by Network Attorneys." *Id.* ¶ 13-14. In particular, the CFPB Complaint alleges that consumers are charged significant up-front fees after signing up for Morgan Drexen's debt relief program. Although these fees are purportedly for bankruptcy related services, the Bureau alleges, "[b]y the bankruptcy contract's own limited scope, little to no bankruptcy work is performed for consumers." *Id*. ¶¶ 42-53.

The CFPB Complaint further alleges that Morgan Drexen, in advertising its debt relief services, tells consumers that they can "[e]liminate [their] debt" without paying any up-front fees. *Id.* ¶¶ 17, 19. But in reality, the CFPB Complaint alleges, Morgan Drexen not only charged up-front fees but also failed to renegotiate, settle, reduce, or otherwise alter even a single debt for the "vast majority of consumers." *Id*. ¶ 59.

**C. Kimberly Pisinski**

Plaintiff Kimberly Pisinski is an attorney admitted to practice law in Connecticut. Declaration of Kimberly A. Pisinki, Dckt. #3-3, (Pisinski Decl.) ¶ 1. According to Pisinski, Morgan Drexen has notified her that the Bureau sought documents from it relating to Pisinski's

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[4] *See* 75 Fed. Reg. 48,458 (Aug. 10, 2010) (codified at 16 C.F.R. part 310).

clients. *Id.* ¶ 4. Pisinski asserts she has not authorized Morgan Drexen to produce these documents, which she believes are subject to the attorney-client privilege. *Id.* ¶ 5.

## ARGUMENT

### I. The Legal Standard

A court must dismiss a case pursuant to Federal Rule of Civil Procedure 12(b)(1) when it lacks subject matter jurisdiction. In determining whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted). Although factual allegations must be "construed with sufficient liberality to afford all possible inferences favorable to the pleader[,] . . . it remains the plaintiff's burden to prove subject matter jurisdiction by a preponderance of the evidence." *Leitner v. United States*, 725 F. Supp. 2d 36, 41 (D.D.C. 2010) (internal citations and quotations omitted).

A court must dismiss a case pursuant to Federal Rule of Civil Procedure 12(b)(6) when the complaint "fail[s] to state a claim upon which relief can be granted." When a plaintiff seeking declaratory and injunctive relief has an "adequate remedy at law for the asserted violation of his constitutional rights," the claim must be "dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Leitner*, 725 F. Supp. 2d at 43.

A court must "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." Fed. R. Civ. P. 56(a). A fact is material only if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facial challenges,

such as Plaintiffs' challenge here, do not normally depend upon factual findings. *See Daskalea v. Wash. Humane Soc'y*, 577 F. Supp. 2d. 82, 87 (D.D.C. 2008).

## II. The Court Should Dismiss the Complaint Without Addressing the Merits

This litigation should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) without addressing the merits of Plaintiffs' claim because neither Plaintiff has demonstrated—nor could demonstrate—the right to have this Court grant injunctive or declaratory relief. Morgan Drexen should raise its arguments as a defense to the pending enforcement action against it, and Pisinski has not satisfied her burden of showing that she has standing to maintain this action.

### A. Morgan Drexen Is Not Entitled to Injunctive or Declaratory Relief

#### *1. Morgan Drexen is not entitled to injunctive relief because it has an adequate remedy at law and will not suffer irreparable harm*

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto v. Geertson Seed Farms*, 561 U.S. —, 130 S. Ct. 2743, 2761 (2010) (citing *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 311-312 (1982)). "It is a 'basic doctrine of equity jurisprudence that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)) (internal alteration omitted); *see also Monsanto*, 130 S. Ct. at 2756. Indeed, the Supreme Court has long recognized that "[w]here a party, if his theory of the controversy is correct, has a good defence at law to 'a purely legal demand,' he should be left to that means of defence, as he has no occasion to resort to a court of equity for relief." *Phoenix Mut. Life Ins. Co. v. Bailey*, 80 U.S. 616, 623 (1871); *see also O'Shea*, 414 U.S. at 502.

Neither the Bureau's enforcement action nor its (now-completed) investigation threatens Morgan Drexen with irreparable harm that would entitle it to injunctive relief.

*a. Morgan Drexen is not entitled to an order enjoining the Bureau's enforcement action*

Morgan Drexen has an adequate remedy at law for any injury caused by the Bureau's enforcement action: It can move to dismiss the Bureau's lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(6). Furthermore, requiring Morgan Drexen to raise its constitutional challenge as a defense to the pending enforcement action will not cause it irreparable harm. "[C]ourts have uniformly recognized that '[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" *McGinn, Smith & Co., Inc. v. Fin. Indus. Regulatory Auth.*, 786 F. Supp. 2d 139, 147 (D.D.C. 2011) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)). Accordingly, Morgan Drexen's request to enjoin the Bureau's enforcement of the law should be denied.

The D.C. Circuit's decision in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), is instructive in this regard. In that case, an independent counsel appointed under the Ethics in Government Act was investigating a former White House official, Michael Deaver, for possibly illegal lobbying activities. Before any indictment issued, Deaver filed a civil complaint challenging the independent counsel provisions of the Ethics in Government Act on separation-of-powers grounds. *Id.* at 66-67. Deaver sought a declaratory judgment and an injunction barring the independent counsel from obtaining an indictment, alleging that without such relief he would suffer irreparable harm in the form of "'continuing destruction of his business,' 'injury to his reputation and dignity,' and 'the expenditure of substantial resources in his defense.'" *Id.* at 67-68. The D.C. Circuit directed dismissal of the complaint, reasoning that Deaver could raise his constitutional claims through a motion to dismiss any eventual criminal prosecution. He

could not, however, "by bringing ancillary equitable proceedings, circumvent federal criminal procedure." *Id.* at 71; *see also id.* at 71-73 (Ginsburg, D.H., concurring) (relying on the principle that "'courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief'" (quoting *Younger v. Harris*, 401 U.S. 37, 43-44 (1971))).

The court's holding was based on two principal considerations, both of which apply equally in the civil context. First, the court observed that permitting Deaver to bring as a separate action what was, in effect, an anticipatory affirmative defense to the prosecution would frustrate the "final judgment rule" by permitting Deaver to appeal an adverse decision directly in the ancillary equitable proceeding, instead of awaiting a trial and conviction on the merits in the primary proceeding before seeking review. *Id.* at 70. This concern is equally applicable here, where Morgan Drexen likely would not be able to immediately appeal the denial of any motion to dismiss the Bureau's enforcement action.[5]

Second, the Court reasoned that permitting Deaver to litigate his constitutional defense in a separate action would contravene the well-established principle that courts should "avoid constitutional questions if at all possible"; because Deaver could be "acquitted of the charges brought against him," the court might be able to avoid "decid[ing] th[e] constitutional issue." *Id.* at 71 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936)). Again, the concern is equally applicable here. Should Morgan Drexen successfully move to dismiss the action pending in the U.S. District Court for the Central District of California based on one of the defenses its purports to reserve (or any other available defense), that court would be able to avoid

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[5] *See Am. Fed. of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027, 1039-40 (9th Cir. 2007) (citing the "general rule that defendants are not entitled to interlocutory appellate review of a district court's denial of a Rule 12(b)(6) motion").

the constitutional issue raised in this litigation. Accordingly, Morgan Drexen's complaint for injunctive relief should be dismissed for the same reasons the D.C. Circuit directed dismissal of Deaver's constitutional challenge.

*b. Morgan Drexen is not entitled to an order enjoining the Bureau's now-completed investigation*

Morgan Drexen's claim that the Bureau's issuance of CIDs to its business partners caused it harm, *see* Plaintiffs' Mem. of Points and Authorities in Support of Mot. for Summary Judgment, Dckt. #13-2 (Pl. Mem.) at 7, likewise cannot serve as a basis for granting equitable relief. "Even if a plaintiff has suffered past harm from the kind of conduct the suit seeks to enjoin, the plaintiff must 'establish a real and immediate threat' that the harm-producing conduct will recur." *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1280 (D.C. Cir. 2012) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). There is no prospect that the Bureau will issue any further CIDs to any of Morgan Drexen's business partners: The Bureau may issue CIDs related to the subject of an investigation only "*before* the institution of any proceedings under Federal consumer financial law." 12 U.S.C. § 5562 (emphasis added). Morgan Drexen also has not shown that an injunction would redress any past harm it claims to have suffered, or that it could not obtain such redress by pressing its constitutional challenge as a defense to the Bureau's enforcement action. Accordingly, the Bureau's issuance of CIDs does not entitle Morgan Drexen to the equitable relief it seeks.

Likewise, Morgan Drexen's assertion that the Bureau has "substantially burdened [its] business by demanding that it produce documents that are protected by the attorney-client privilege," Pl. Mem. at 7, does not "'establish the basic requisites of the issuance of equitable relief . . .—the likelihood of substantial and immediate irreparable injury.'" *Lyons*, 461 U.S. at 103 (quoting *O'Shea*, 414 U.S. at 502). As an initial matter, recipients of Bureau CIDs may

assert any applicable privilege, including the attorney-client privilege, in response to any such demand. *See* 12 C.F.R. § 1080.8(a). Indeed, Instruction D of the CID that the Bureau sent Morgan Drexen advised the company of its right to assert any applicable privilege. *See* Shaheen Decl. Ex. 1 at 3. More fundamentally, Bureau CIDs can never impose irreparable harm because they are not self-enforcing. The Bureau may not impose sanctions for failing to comply with a CID, but instead must petition a district court for an order enforcing the CID. *See* 12 U.S.C. § 5562(e); 12 C.F.R. § 1080.10. The CID recipient faces sanctions only if it fails to comply with the court's order. *See* 12 C.F.R. § 1080.10(b)(2).

Indeed, the Bureau's authority to issue CIDs is modeled on that of the FTC, *compare* 12 U.S.C. § 5562 *with* 15 U.S.C. § 57b-1, and courts have repeatedly recognized that FTC "CIDs are not self-enforcing. Having received a CID, a respondent may either petition the FTC for an order modifying or setting aside the demand, or simply decline to respond." *FTC v. O'Connell Assoc., Inc.*, 828 F. Supp. 165, 168 (E.D.N.Y. 1993) (citing 15 U.S.C. § 57b–1(f)(1); 16 C.F.R. § 2.7(d)). If the party declines to respond, "the [FTC] must bring suit in federal court for enforcement. There, the CID defendant may raise such objections and defenses to enforcement as it may have." *XYZ Law Firm v. FTC*, 525 F. Supp. 1235, 1236 (N.D. Ga. 1981) (internal citations omitted). The Bureau's CIDs operate in the same way.[6]

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[6] Contrary to Plaintiffs' contention (Pl. Mem. at 5), words like "demand," "[a]ction [r]equired," and "must" in the March 2012 CID do not suggest otherwise. The CID sets forth what the Bureau "demand[s]" and "require[s]"; it does not indicate that the Bureau may enforce those demands and requirements without going to court. Likewise, the statement in the CID that noncompliance "may" subject recipients to a "penalty imposed by law" is simply a reference to the Bureau's regulation on this subject, which provides that the Bureau may "[s]eek civil contempt or other appropriate relief in cases where a court order enforcing a civil investigative demand has been violated." 12 C.F.R. § 1080.10(b)(2). Indeed, the FTC CIDs contain similar language. *See, e.g.*, Exhibit 1 to FTC Denial of Petition to Quash CID issued to Countrywide Periodicals, LLC, *available at* http://www.ftc.gov/os/quash/X080036countrywideorderdenying petitiontoquash.pdf.

Given the nature of the Bureau's CIDs, Morgan Drexen would not be entitled to an injunction of the Bureau's investigation even if it were still ongoing. Courts have routinely rejected attempts to bring pre-enforcement challenges to agency subpoenas or civil investigative demands that are not self-enforcing. Demonstrating the truth of the Supreme Court's observation that "case or controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief,'"[7] some courts have dismissed such suits for lack of jurisdiction,[8] while others have done so for lack of equity.[9] However framed, the law is clear that the mere receipt of a CID does not entitle the recipient (or any other interested third party)[10] to injunctive relief because the CID enforcement action would provide a "full opportunity for judicial review before any coercive sanction may be imposed." *Reisman*, 375 U.S. at 450.

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[7] *Lyons*, 461 U.S. at 103 (quoting *O'Shea*, 414 U.S. at 499).

[8] *See OTS v. Dobbs*, 931 F.2d 956, 958 (D.C. Cir. 1991) ("What Dobbs is requesting in this case is protection from future attempts to enforce the subpoena—attempts that may not even occur and, if they do, will provide their own opportunity for review. Thus, no live controversy exists."); *Shea v. OTS*, 934 F.2d 41, 45 (3d Cir. 1991) ("'Since agencies lack the power to enforce their own subpoenas, they must apply to the district courts for enforcement. Only then may substantive or procedural objections to the subpoena be raised for judicial determination.'" (quoting 3 J. Stein, G. Mitchell, & B. Mezines, Administrative Law § 21.01[1] at 21-4.)); *Gen. Fin. Co. v. FTC*, 700 F.2d 366, 372 (7th Cir. 1983) (dismissing pre-enforcement challenge to FTC civil investigative demands for lack of subject matter jurisdiction); *Wearly v. FTC*, 616 F.2d 662, 667-68 (3d Cir. 1980) (dismissing pre-enforcement challenge to FTC subpoena on ripeness grounds).

[9] *See Reisman v. Caplin*, 375 U.S. 440, 450 (1964) (dismissing suit for declaratory or injunctive relief challenging agency subpoenas that could only be enforced by district courts on the ground that the action for enforcement of the subpoena would provide a "full opportunity for judicial review before any coercive sanction may be imposed"); *Jerry T. O'Brien v. SEC*, 704 F.2d 1065, 1069 (9th Cir. 1983), *rev'd on other grounds SEC v. Jerry T. O'Brien*, 467 U.S. 735, (1984); *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 648-50 (5th Cir. 1977).

[10] Objections to a CID may be made by the recipient or by any interested intervenor. *See Reisman*, 375 U.S. at 449 (noting that third parties may seek to intervene in summons enforcement actions to protect their interests); *Jerry T. O'Brien*, 467 U.S. at 748 & n.19 (same).

Of course, here, the Bureau has not sought enforcement of any civil investigative demand, but instead has filed a lawsuit to enforce the TSR and the Dodd-Frank Act's prohibition of deceptive acts or practices. And, to the extent the CFPB seeks further records through civil discovery in that action, Morgan Drexen will be able to raise any objections in that court. *See* Fed. R. Civ. P. 26. In these circumstances, Morgan Drexen cannot rely on the existence of outstanding civil investigative demands to demonstrate its entitlement to injunctive relief.[11]

***2. Morgan Drexen is not entitled to declaratory relief***

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . *may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). As the emphasized language suggests, "[t]his language is permissive, not mandatory: even when a suit otherwise satisfies subject matter jurisdictional prerequisites, the Act gives courts discretion to determine 'whether and when to entertain an action.'" *Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72, 76 (D.D.C. 2009) (quoting *Wilton v. Seven Falls*, 515 U.S. 277, 282 (1995)); *see also MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 136 (2007) (stating that the use of the permissive "may" in the Declaratory Judgment Act "has long been understood 'to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants'" (quoting *Wilton*, 515 U.S. at 286)).

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[11] Unlike Morgan Drexen, the plaintiffs in both *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, —U.S.—, 130 S. Ct. 3138 (2010), and *Sackett v. EPA*, —U.S.—, 132 S. Ct. 1367 (2012), were subject to sanctions for their failure to comply with agency orders, and they had no other adequate avenue for judicial review of their claims. *See Free Enter. Fund*, 130 S. Ct. at 3150-51 (noting that the plaintiff accounting firm would have "incur[red] a sanction (such as a sizable fine) by ignoring Board requests for documents and testimony" while awaiting enforcement of the requests); *Sackett*, 132 S. Ct. at 1372 ("[T]he Sacketts cannot initiate [the enforcement action], and each day they wait for the agency to drop the hammer, they accrue, by the government's telling, an additional $75,000 in potential liability."). Accordingly, these cases do not support Morgan Drexen's entitlement to injunctive relief.

The key consideration for courts exercising their discretion under the Declaratory Judgment Act is the practical utility of declaratory relief. Thus, "[i]f a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose, [the court need not] proceed to the merits before . . . dismissing the action." *Wilton*, 515 U.S. at 288; *see also Hanes Corp. v. Millard*, 531 F.2d 585, 592 (D.C. Cir. 1976) ("'[T]he declaration is an instrument of practical relief and will not be issued where it does not serve a useful purpose.'" (quoting E. Borchard, *Declaratory Judgments* 307 (2d ed. 1941))).

Providing declaratory relief here would "serve no useful purpose." *Wilton*, 515 U.S. at 288. The purpose of declaratory relief is to allow one potentially liable for a violation of law "to know in advance [of the adverse party's affirmative litigation] whether he may legally pursue a particular course of conduct." *Hanes*, 531 F.2d at 592; *see also* 10B Fed. Prac. & Proc. Civ. § 2751 (3d ed.) ("The remedy made available by the Declaratory Judgment Act . . . is intended to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action after the damage has accrued."). Morgan Drexen is not seeking to determine the legality of a course of conduct so that it may, depending on the court's resolution of the issue, either proceed with confidence that damages are not accruing, or change its behavior. *Hanes*, 531 F.2d at 592. Indeed, it has specifically asked the Court *not* to decide whether its conduct is legal. *See* Compl. at 20. As a result, granting the requested declaration would tell Morgan Drexen nothing about whether its conduct violates the law. "The classic and most persuasive reason for granting a declaration . . . is therefore absent from this case." *Hanes*, 531 F.2d at 592.

Further, even if the requested declaration did relate to Morgan Drexen's potential liability, it would still not be "useful" to provide declaratory relief here because any issues

relating to the legality of Morgan Drexen's conduct may be resolved in the litigation now pending in the U.S. District Court for the Central District of California. This is not a case where declaratory relief would "relieve[] potential defendants 'from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure—or never.'" 10B Fed. Prac. & Proc. Civ. § 2751 (3d ed.) (quoting *Japan Gas Lighter Assoc. v. Ronson Corp.*, 257 F. Supp. 219, 237 (D.N.J. 1966)). The thread has been severed; the suit has been filed; and all of the legal issues that bear on Morgan Drexen's liability, including the constitutional issue that Plaintiffs raise here, can be resolved (if necessary) in that litigation.

Indeed, the events leading up to this case reveal that the only conceivable purpose for bringing this action is an inappropriate one. After being advised of possible enforcement action by the Bureau, Morgan Drexen brought suit seeking "an anticipatory adjudication, at the time and place of its choice, of the validity of the defenses it expect[ed] to raise against . . . claims it expect[ed] to be pressed against it." *Hanes*, 531 F.2d at 592. But "[t]he anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse." *Id.* at 592-93; *see also Swish Mktg.*, 669 F. Supp. 2d at 77; *POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 44-45 (D.D.C. 2012). Indeed, "'[c]ourts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum.'" *Swish Mktg.*, 669 F. Supp. 2d at 78 (quoting *AmSouth Bank v. Dale*, 386 F.3d 763, 788 (6th Cir. 2004)). As the Court in *Swish Marketing* put it: "Where a putative defendant files a declaratory action whose only purpose is to defeat liability in a subsequent coercive suit, no real value is served by the declaratory judgment except to guarantee to the declaratory plaintiff [its] choice of forum—a

guarantee that cannot be given consonant with the policy underlying the Declaratory Judgment Act." *Swish Mktg.*, 669 F. Supp. 2d at 79 (quoting *Gov't Emps. Ins. Co. v. Rivas*, 573 F. Supp. 2d 12, 15 (D.D.C. 2008)). The absence of any reason to entertain Morgan Drexen's request for declaratory relief is a sufficient basis to deny the request.

Declaratory relief should also be denied because granting the requested declaration would not "finally settle the controversy between the parties." *Hanes*, 531 F.2d at 592 n.4. The Court cannot assume, in applying this factor, "that it will resolve the merits of [Morgan Drexen's] complaint in the company's favor." *Swish Mktg.*, 669 F. Supp. 2d at 77. If the Bureau were to prevail on the constitutional issue, the parties would still have to litigate whether Morgan Drexen violated the law, as well as all of the affirmative defenses it purports to reserve. *See* Compl. at p.20. Accordingly, "[t]his factor . . . cuts against the exercise of jurisdiction." *Swish Mktg.*, 669 F. Supp. 2d at 78.

Furthermore, courts must consider "whether other remedies are available or other proceedings pending" in which the claims may be resolved. *Hanes*, 531 F.2d at 592 n.4. Here,

> [Morgan Drexen] will be able to raise in the [Central] District of California the same arguments it has pursued in this action. 'Where a pending coercive action, filed by the natural plaintiff, would encompass all the issues in the declaratory judgment action, the policy reasons underlying the creation of the extraordinary remedy of declaratory judgment are not present, and the use of that remedy is unjustified.' Such is the case here.

*Swish Mktg.*, 669 F. Supp. 2d at 80 (quoting *AmSouth Bank*, 386 F.3d at 787).

Finally, courts exercising their discretion under the Declaratory Judgment Act must be "keenly mindful . . . that judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty [the courts are] called on to perform.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). Generally, courts "'will not decide a constitutional question if there is

some other ground upon which to dispose of the case.'" *Id.* (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984)). Requiring Morgan Drexen to raise its constitutional arguments as a defense to the Bureau's enforcement action may, if Morgan Drexen prevails on some statutory ground, obviate the need to address the constitutional question. Accordingly, because the controversy between the parties may be resolved on other grounds, the constitutional issue presented here is not of "sufficient immediacy" to warrant declaratory relief. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

***3. The first-to-file rule does not entitle Morgan Drexen to declaratory or injunctive relief***

That Morgan Drexen won the "race to the courthouse" by filing its complaint first does not entitle it to declaratory or equitable relief. *See Deaver*, 822 F.2d at 71 (dismissing for lack of equity a suit filed before the government initiated its prosecution). The D.C. Circuit has warned against the "mechanical application" of the so-called "first-filed rule," cautioning that "countervailing equitable considerations, where present, cannot be ignored." *Columbia Plaza Corp. v. Sec. Nat'l Bank*, 525 F.2d 620, 627 (D.C. Cir. 1975). Accordingly, courts have rejected similar attempts to use this principle "to preempt an imminent . . . enforcement action," noting that such conduct "create[s] 'a lamentable spectacle' [that is] 'tantamount to the blowing of a starter's whistle in a foot race.'" *EEOC v. Univ. of Penn.*, 850 F.2d 969, 978 (3d Cir. 1988) (quoting *Rayco Mfg. Co. v. Chicopee Mfg. Corp.*, 148 F. Supp. 588, 592 (S.D.N.Y. 1957)); *accord Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 551-52 (6th Cir. 2007) (reversing district court's application of the first-to-file rule in favor of an "anticipatory suit"); *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 750 (7th

Cir. 1987) ("The federal declaratory judgment is not a prize to the winner of the race to the courthouse.") (quoting *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 219 (2d Cir. 1978)).

Indeed, "'[c]ases construing the interplay between declaratory judgment actions and suits based on the merits of underlying substantive claims create, in practical effect, a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit.'" *Certified Restoration Dry Cleaning Network*, 511 F.3d at 552 (quoting *AmSouth Bank*, 386 F.3d at 791 n.8). Rewarding Plaintiffs' conduct with an adjudication on the merits would not be consistent with the equitable principles that govern "wise judicial administration." *Columbia Plaza*, 525 F.2d at 627 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). Rather, it would result in piecemeal litigation of this case, delay the complete resolution of the parties' dispute, and encourage "an unseemly race to the courthouse, and quite likely, numerous unnecessary suits." *Tempco*, 819 F.2d at 750.

**B. Pisinski Lacks Standing to Challenge the Bureau's Constitutionality**

For the reasons discussed above, Plaintiff Morgan Drexen has no right to the relief sought in this lawsuit. Plaintiff Pisinski's claims should be dismissed not only for lack of equity, but also for the more foundational reason that she lacks standing to bring this case.

Article III of the Constitution limits federal courts' authority to resolving "Cases" and "Controversies." U.S. Const. art. III, § 2. "For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have 'standing.'" *Hollingsworth v. Perry*, —U.S.—, 133 S. Ct. 2652, 2659 (2013). To establish standing, plaintiffs must first show that they have suffered an "injury in fact," that is, the violation of a legally protected interest that is "(a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotations omitted). Second, "there must be a causal

connection between the injury and the conduct complained of." *Id.* Third, it must be "likely" that the injury would be "redressed by a favorable decision." *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Where a plaintiff is seeking declaratory or injunctive relief, she "must show [s]he is suffering an ongoing injury or faces an immediate threat of injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011).

Plaintiffs' memorandum makes no argument in support of Pisinski's standing, *see* Pl. Mem. at 4-7, nor is there any ground for finding that she has standing. She states in her declaration that she would suffer injury if Morgan Drexen were forced to comply fully with the Bureau's CIDs, which she claims seek information subject to the attorney-client privilege. Pisinski Decl. ¶¶ 4, 10. But the Bureau itself informed Morgan Drexen of its right to assert any applicable privilege in response to the CID. *See* Shaheen Decl. Ex. 1 at 3, Ex. 2 at 2 (letter from the Bureau's Chief of Enforcement stating that "Morgan Drexen may withhold information based on privilege"). Moreover, any CID enforcement action would provide Piskinski a full opportunity to raise any argument that her information should be protected from disclosure. *See supra* page 17 n.11. In any event, now that the Bureau has brought an enforcement action against Morgan Drexen, the Bureau has no reason to seek to compel Morgan Drexen to produce the allegedly privileged information by petitioning a court to enforce its CID. In effect, "[w]hat [Pisinski] is requesting in this case is protection from future attempts to enforce the [civil investigative demands]—attempts that may not even occur and, even if they do, will provide their own opportunity for review." *Dobbs*, 931 F.2d at 958. Because "no live controversy exists" between Pisinski and the Bureau, Pisinski lacks standing to challenge the Bureau's constitutionality. *Id.*

* * *

For all of these reasons, Plaintiffs' request for declaratory and injunctive relief should be denied without reaching the merits of Plaintiffs' constitutional claim.

## III. The Bureau's Structure Is Constitutional

If this Court reaches the merits, it should grant the Bureau's motion because Plaintiffs' single claim fails: The Bureau's structure complies with the Constitution's separation-of-powers requirements.

The doctrine of separation of powers reflects "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). But "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Thus, while the Supreme Court has struck down "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch," it has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." *Mistretta*, 488 U.S. at 382.

The Dodd-Frank Act provisions that establish the Bureau comply with these principles. In creating the Bureau, Congress did not aggrandize or abdicate its own powers or encroach on another branch's. The President, Congress, and the courts all maintain their traditional constitutional authorities with regard to the Bureau, and well-established precedent confirms that those authorities are constitutionally sufficient. Moreover, contrary to Plaintiffs' contention,

there is nothing unique about the Bureau that would call the application of that precedent into question or give rise to new constitutional requirements specially tailored for the Bureau.

### A. The Dodd-Frank Act Preserves Each Branch's Ability to Oversee the Bureau, Consistent with Well-Established Separation-of-Powers Requirements

The President, Congress, and the judiciary all exercise traditional checks on the Bureau, consistent with well-established separation-of-powers principles.

#### *1. The President's power to remove the Bureau Director for cause gives him constitutionally sufficient means to oversee the Bureau*

Plaintiffs contend that Congress has unconstitutionally diminished the President's control over the Bureau by making the Bureau Director removable only for cause. Longstanding precedent is clear, however, that the power to remove an officer for cause gives the President constitutionally adequate means to supervise an independent agency. Contrary to Plaintiffs' suggestions, that precedent applies with equal force to the Bureau.

##### *a. Longstanding precedent makes clear that for-cause removal gives the President ample authority to oversee independent agencies*

The Supreme Court has long recognized that Congress may create independent agencies run by officers "whom the President may not remove at will but only for good cause." *Free Enter. Fund*, 130 S. Ct. at 3143 (citing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). In *Humphrey's Executor*, the Supreme Court upheld an FTC Act provision preventing the President from removing FTC commissioners except for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 620 (quoting 15 U.S.C. § 41). As the Court explained, the "authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime." *Id.* at 629. As the

Court later observed, it is "not essential to the President's proper execution of his Article II powers that [independent] agencies be headed up by individuals who were removable at will." *Morrison v. Olson*, 487 U.S. 654, 691 (1988). So long as the official "may be terminated for 'good cause,'" the President "retains ample authority to assure that the [official] is competently performing his or her statutory responsibilities in a manner that comports" with the statute, *id.* at 692, and "to ensure that the laws are 'faithfully executed,'" *id.* at 696.

The Supreme Court recently reaffirmed these principles in *Free Enterprise Fund*, 130 S. Ct. 3138. That case concerned removal protections for members of the Public Company Accounting Oversight Board (PCAOB), a government entity "with expansive powers to govern [the] entire [accounting] industry." *Id*. at 3147. The PCAOB's members were removable only for cause by the Securities and Exchange Commission (SEC), whose members themselves were understood to be removable by the President only "under the *Humphrey's Executor* standard of inefficiency, neglect of duty, or malfeasance in office." *Id.* at 3148 (internal quotation marks omitted). The Supreme Court concluded that having these two layers of for-cause removal "subvert[ed] the President's ability to ensure that the laws are faithfully executed" and thus violated the separation of powers. *Id.* at 3155. In remediating that violation, however, the Court simply made the PCAOB members removable at will by the SEC, explaining that "leav[ing] the President separated from [PCAOB] members by only a single level of good-cause tenure" guaranteed adequate presidential oversight. *Id.* at 3161. Thus, *Free Enterprise Fund* makes clear the President had constitutionally sufficient ability to oversee this agency—a "regulator of first resort and the primary law enforcement authority for a vital sector of our economy"—even though he lacked the power to remove its leaders directly, much less at will. *Id.*

In this case, the President has the direct authority to remove the Bureau Director "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). This "very broad" removal standard, *Bowsher v. Synar*, 478 U.S. 714, 729 (1986), preserves the President's constitutional ability "to ensure that the laws are 'faithfully executed'" and is wholly consistent with the separation of powers. *Morrison*, 487 U.S. at 696.

*b. Neither the Bureau's single-director leadership nor any other Bureau feature makes the President's for-cause removal power constitutionally inadequate*

Plaintiffs argue that this Court should not apply the longstanding precedent approving for-cause removal restrictions for three reasons. None has merit.

i. Plaintiffs first contend that for-cause removal restrictions are not constitutionally appropriate for an agency led by a single director. This argument finds no support in case law or in general separation-of-powers principles.

As the Supreme Court's cases make clear, it is the nature of an agency's statutory responsibilities—not the structure of its leadership—that determines whether for-cause removal restrictions are constitutionally permissible. In *Humphrey's Executor*, for example, the Supreme Court held that the constitutionality of for-cause removal protections "depend[ed] on the character of the office." 295 U.S. at 631. In particular, because the FTC acted "in part quasi legislatively and in part quasi judicially," protecting the FTC commissioners from removal except for cause passed constitutional muster. *Id.* at 628. In the same vein, the Court explained in *Morrison* that whether a for-cause removal restriction unconstitutionally "impede[d] the President's ability to perform his constitutional duty" required analysis of "the functions of the officials in question." *Morrison*, 487 U.S. at 691.

No court has ever held that otherwise-permissible for-cause removal restrictions become unconstitutional if applied to an agency headed by a single individual. Contrary to Plaintiffs'

contention (Pl. Mem. at 19), *Humphrey's Executor* offers no support for that proposition. To be sure, the Court in that case noted that the FTC was to be a non-partisan body of experts—but only as evidence that Congress intended for-cause removal to be the exclusive avenue for removing commissioners. *Humphrey's Executor*, 295 U.S. at 624. The FTC's status as a multimember body had no bearing on the Court's conclusion that for-cause removal was consistent with the Constitution. *See id.* at 626-32.

Indeed, there is no reason why the structure of an agency's leadership would affect the constitutionality of a for-cause removal restriction. The removal power serves separation-of-powers purposes by ensuring that the President can oversee the agency. Structuring an agency to be headed by a single director does not diminish the President's oversight capability. The President can just as easily remove a single agency head for "inefficiency, neglect of duty, or malfeasance" as he could remove members of a commission for the same reasons. The Bureau therefore is no less accountable to the President than it would be if led by a multimember commission.[12] The logic of *Humphrey's Executor* applies to the Bureau with equal force as it would to any multimember independent agency.

ii. Finding no support in separation-of-powers principles or the precedent applying them, Plaintiffs next contend that the Constitution does not permit for-cause removal here because the Dodd-Frank Act "calls CFPB an executive agency and gives CFPB executive authority." Pl.

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[12] Indeed, in some cases Congress may conclude that giving an agency a single head better promotes accountability. For example, in deciding that the head of the Social Security Administration should be a single person (with tenure protection) rather than a board, Congress relied on studies concluding that "single administrators are far more effective and accountable than multi-person boards or commissions, bipartisan or otherwise." S. Rep. No. 103-221, at 3 (1994); *see also* Social Security: Leadership Structure for an Independent Social Security Administration, GAO/HRD-89-154, at 2 (Sept. 1989) (1989 GAO Report) (observing that a "single administrator form of organization . . . offers the advantage of allowing for a clear delineation of authority and responsibility"); 42 U.S.C. § 902(a).

Mem. at 15-16. To be sure, the Act does denominate the Bureau an "executive agency" in a provision that subjects the Bureau to generally applicable rules on government administration. 12 U.S.C. § 5491(a). But an agency's functions, not its label, determine the level of presidential control required. And the Bureau's functions—including rulemaking, adjudicatory, enforcement, and other authorities—are the same as those of other independent agencies. *See id.* § 5511(c)(4), (5). In any event, the term "executive agency" cannot carry the weight Plaintiffs put on it, because it is explicitly defined to include "independent establishments." 5 U.S.C. § 105; *see also id.* § 104 (defining "independent establishment").

iii. Finally, Plaintiffs contend that for-cause removal is not constitutionally compatible with the Bureau because the Bureau is an "independent agency housed inside another independent agency." Pl. Mem. at 15. This is both factually incorrect and legally irrelevant. The Federal Reserve *System*, in which the Bureau is located, 12 U.S.C. § 5491(a), is not an agency at all, but rather a network of various entities.[13] The *Board of Governors* of the Federal Reserve System (Federal Reserve Board) is an independent agency, but the Bureau is not "housed" within the Federal Reserve Board. Indeed, Congress expressly provided for the Bureau's "autonomy" from the Federal Reserve Board. *See* 12 U.S.C. § 5492(c) (formatting altered). In any event, where the Bureau is "housed" is irrelevant because, consistent with

[13] The U.S. Government Manual describes the Federal Reserve System as including the "Board of Governors; the 12 Federal Reserve Banks and their 25 branches and other facilities; the Federal Open Market Committee; the Federal Advisory Council; the Consumer Advisory Council; the Thrift Institutions Advisory Council; and the Nation's financial institutions, including commercial banks, savings and loan associations, mutual savings banks, and credit unions." Office of the Fed. Register, THE UNITED STATES GOVERNMENT MANUAL 2012 366 (2012), *available at* http://www.gpo.gov/fdsys/pkg/GOVMAN-2012-12-07/pdf/GOVMAN-2012-12-07.pdf.

*Humphrey's Executor*, the President retains his constitutional authority to appoint the Bureau's Director and to remove him for cause. This satisfies any separation-of-powers requirements.[14]

***2. Congress retains its constitutional prerogative to oversee the Bureau, including through its power of the purse***

Plaintiffs are also wrong to suggest that Congress has unconstitutionally abdicated its "ability to check the CFPB's power." Pl. Mem. at 17. Congress retains its constitutional authority to oversee the Bureau, both through its power of the purse and through other traditional legislative and oversight authorities.

*a. Congress's control over the Bureau's funding satisfies separation-of-powers requirements*

Plaintiffs argue that, by funding the Bureau outside of the annual appropriations process, Congress unconstitutionally relinquished its "power of the purse." Pl. Mem. at 16-17. This argument ignores the fundamental fact that Congress established, and maintains full legislative authority over, the Bureau's funding mechanism. It is well established that separation-of-powers principles do not require anything more.

At the outset, Plaintiffs are wrong to assert that the Bureau "unilaterally" funds itself "without congressional approval." Pl. Mem. at 16. By statute, Congress authorized the Bureau to obtain from the Federal Reserve Board the funds "reasonably necessary to carry out" its mission, up to annual limits. 12 U.S.C. § 5497(a). Thus, when the Bureau requests those funds, it acts in accordance with the process, and subject to the limits, approved by Congress. To the

[14] The Plaintiffs also object that the Bureau is not subject to control by the Federal Reserve Board. Pl. Mem. at 15. There is, however, no constitutional law principle that would require an administrative agency to be subject to another agency's control. Plaintiffs perhaps mean to suggest that Federal Reserve Board control is needed as a substitute for direct presidential control. But no such substitute is needed, as the President exercises direct control over the Bureau through his appointment and removal powers.

extent that Congress wishes to change the Bureau's funding, it retains full power to do so pursuant to the ordinary legislative process.

Plaintiffs' argument boils down to a complaint that Congress chose to fund the Bureau outside of the annual appropriations process. *See* Pl. Mem. at 16-17. But no separation-of-powers principle requires Congress to fund agencies through annual appropriations. To be sure, Congress's "exclusive power over the federal purse"—which the Appropriations Clause guarantees—is "a bulwark of the Constitution's separation of powers." *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2012) (internal quotations omitted). But nothing in the Appropriations Clause restricts the ways in which Congress may exercise that power. On the contrary, "[i]t has long been held that the Appropriations Clause is not a restriction on Congress, but on the Executive Branch." *AINS, Inc. v. United States*, 56 Fed. Cl. 522, 539 (Fed. Cl. 2003). The Appropriations Clause effectively ensures that the Executive cannot expend funds except as authorized by Congress. *See Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Labor Relations Auth.*, 388 F.3d 405, 409 (3d Cir. 2004); *AINS, Inc.*, 56 Fed. Cl. at 539; *accord In re Aiken Cnty.*, -- F.3d --, 2013 WL 4054877, at *9 n.3 (D.C. Cir. 2013). This purpose is served regardless of whether Congress provides funding through an annual appropriation or through some other funding mechanism.

Consistent with these principles, courts have made clear that providing funding outside of the annual appropriations process passes constitutional muster. *See Am. Fed'n of Gov't Emps.*, 388 F.3d at 409 (explaining that "Congress may . . . decide not to finance a federal entity with appropriations," but rather through some other funding mechanism); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 313 (1937); *AINS, Inc.*, 56 Fed. Cl. at 539. Most relevantly here, Congress may create "self-financing programs" by authorizing an agency to obtain and use

funds from a specified source "without first appropriating the funds as it does in typical appropriation and supplemental appropriation acts." *AINS, Inc.*, 56 Fed. Cl. at 539 (noting that Congress complied with the Appropriations Clause in authorizing the Federal Reserve Board and Federal Housing Finance Board to levy assessments on banks to fund their operations). Indeed, Congress has chosen to fund most financial regulators in this way. *See* 12 U.S.C. § 16 (Office of the Comptroller of the Currency); *id.* § 243 (Federal Reserve Board); *id.* § 1755 (National Credit Union Administration); *id.* § 1817(b) (Federal Deposit Insurance Corporation); *id.* § 4516 (Federal Housing Finance Agency); 12 U.S.C. § 1462a(i) (2010) (Office of Thrift Supervision); 15 U.S.C. § 7219 (Public Company Accounting Oversight Board).

Congress followed this well-established model for the Bureau. As with these other agencies, Congress authorized the Bureau to obtain and use funds from a specified source "pursuant to an authorizing or enabling statute without a separate appropriation act." *AINS, Inc.*, 56 Fed. Cl. at 539. This funding mechanism—like the other ways in which Congress provides funding outside of the annual appropriations process—does not unconstitutionally diminish Congress's power of the purse.[15]

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[15] The Constitution gives Congress—not congressional appropriations committees—the power of the purse. Thus, it is constitutionally irrelevant that the Bureau's funding is "not subject to review" by the House and Senate Appropriations Committees. *See* 12 U.S.C. § 5497(a)(2)(C). Indeed, the appropriations committees are creatures of Congress, not the Constitution, and did not even come into existence until the 1860's. U.S. Senate Comm. on Appropriations, *Committee History*, http://www.appropriations.senate.gov/about-history.cfm; U.S. House of Representatives Comm. on Appropriations, *About the Committee*, http://appropriations.house.gov/about/. In any event, congressional committees do oversee the Bureau's funds. The Bureau must provide the Senate Committee on Banking, Housing, and Urban Affairs and House Financial Services and Energy and Commerce Committees with semi-annual reports and testimony that cover, among other things, "a justification of the budget request of the previous year." 12 U.S.C. § 5496. Moreover, Congress's agent, the Comptroller General, must annually audit and report to Congress on the Bureau's financial transactions. *Id.* § 5497(a)(5); *see also Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991) (noting that Comptroller General is "an agent of Congress").

*b. Congress has other tools for overseeing the Bureau*

Congress also retains other traditional legislative and oversight authorities vis-à-vis the Bureau. As an initial matter, Congress controls the Bureau, like all administrative agencies, "in the legislation that creates [it]." *I.N.S. v. Chadha*, 462 U.S. 919, 955 n.19 (1983). In particular, the Bureau's exercise of delegated authority "is always subject to check by the terms of the legislation that authorized it."[16] *Id.* at 953 n.16. "[I]f that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." *Id.*

Beyond that basic fact, Congress has the power to overturn Bureau regulations legislatively, and it may review certain regulations pursuant to expedited procedures under the Congressional Review Act. *See* 5 U.S.C. §§ 801–808. Congress also may use—and in fact

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[16] To the extent that Plaintiffs argue that the Dodd-Frank Act is too vague to provide this check, their argument is unavailing. The Supreme Court has made clear that legislation sufficiently controls an agency exercising delegated power so long as it sets forth an "intelligible principle" to which the agency must conform. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Plaintiffs appear to suggest that the Dodd-Frank Act fails to establish such an intelligible principle in granting the Bureau authority to regulate "unfair" and "abusive" acts and practices in the consumer financial marketplace. *See* Pl. Mem. at 10, 11; Compl. ¶ 65.

This argument is a non-starter. The Dodd-Frank Act contains multi-pronged provisions setting forth what each of those terms means. 12 U.S.C. § 5531(c), (d). An act or practice cannot be considered "unfair" unless it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers" and that injury "is not outweighed by countervailing benefits to consumers or to competition." *Id.* § 5531(c). An act or practice cannot be considered "abusive" unless it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or it "takes unreasonable advantage of" one of three statutorily enumerated circumstances. *Id.* § 5531(d). The Supreme Court has approved far-less-detailed principles in the past, including instructions for agencies to fix "fair and equitable" commodities prices, *Yakus v. United States*, 321 U.S. 414, 426–27 (1944); to regulate broadcast licensing as "public interest, convenience, or necessity" requires, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); to take action to "avoid an imminent hazard to the public safety," *Touby v. United States*, 500 U.S. 160, 165-66 (1991); and to modify corporate structures so that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders," *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). In light of these precedents, there can be no doubt that the Dodd-Frank Act lays down "intelligible principles" for the Bureau to follow.

frequently uses—ordinary oversight tools, including holding oversight hearings and requesting GAO investigations, to oversee Bureau activities. *See* March 2013 Semi-Annual Report at 104. And Congress requires the Bureau to submit regular reports on its activities. For example, the Bureau is required by statute to submit comprehensive semi-annual reports on various subjects, 12 U.S.C. § 5496(b), as well as annual reports on specific topics, including complaints it receives from consumers on consumer financial products and services, *id.* § 5493(b)(3)(C); its fair lending efforts, *id.* § 5493(c)(2)(D); and its financial literacy activities, *id.* § 5493(d)(4). The Supreme Court has recognized that these kinds of "formal reporting requirements" are one means by which Congress can "oversee and control its administrative creatures." *Chadha*, 462 U.S. at 955 n.19.

Through all these checks and others, Congress maintains control over the Bureau, and the Bureau remains accountable to Congress.

***3. The Bureau is subject to ordinary judicial review***

Contrary to Plaintiffs' contention, the Dodd-Frank Act does not insulate the Bureau's activities from judicial review. As with essentially all other administrative agencies, the Bureau's final actions are subject to review under the APA, according to ordinary administrative law principles. 12 U.S.C. § 5491(a); 5 U.S.C. §§ 701-706.

The statutory provision on judicial review to which Plaintiffs object does not provide otherwise. That provision simply directs courts to defer to Bureau interpretations of Federal consumer financial law "as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." 12 U.S.C. § 5512(b)(4)(B). Far from "insulat[ing]" the Bureau from judicial review (Pl. Mem. at 22), this provision merely clarifies that courts should review Bureau interpretations under well-

established principles of agency deference, regardless of whether other agencies share authority to administer the laws that the Bureau has interpreted.[17]

In any event, Plaintiffs have not cited any authority suggesting that this presents a separation-of-powers problem—or even articulated the nature of the problem they perceive. Nor can they. *Chevron* deference, for example, does not violate separation-of-powers principles. It serves them. *See, e.g.*, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996); *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (explaining that *Chevron* is "important to the division of powers between the Second and Third Branches"); *Matter of Appletree Mkts., Inc.*, 19 F.3d 969, 973 (5th Cir. 1994) ("The *Chevron* doctrine is based upon separation of powers.").

### B. The Bureau Does Not Have Any Unusual Features that Justify Plaintiffs' Request for Novel Constitutional Restrictions

As discussed above, Congress made the Bureau subject to ordinary checks by the three branches of government, consistent with well-established separation-of-powers norms. In particular, the President, who appoints the Director, retains the ability to remove him for cause; Congress maintains the power of the purse as well as other checks; and courts subject the Bureau's actions to ordinary judicial review. There is nothing unique about the Bureau that would make these well-established checks constitutionally insufficient, or that would give rise to a new constitutional requirement for a multimember commission.

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[17] When multiple agencies share authority to administer a statute, courts have sometimes refused to defer to an interpretation offered by only one of those agencies. *See, e.g.*, *DeNaples v. OCC*, 706 F.3d 481, 488 (D.C. Cir. 2013); *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996). That refusal is based not on any constitutional concern, but on a presumption that, when Congress grants multiple agencies the authority to interpret the same statute, "it cannot be said that Congress implicitly delegated to one agency authority to reconcile ambiguities or to fill gaps." *Salleh*, 85 F.3d at 692. Here, Congress has simply displaced that presumption by expressing clearly its intent to delegate such interpretive authority to the Bureau.

### *1. The scope of the Bureau's authority does not render the well-established checks on the Bureau constitutionally insufficient*

Contrary to Plaintiffs' contention (Pl. Mem. at 20-21), the scope of the Bureau's authority does not make the well-established checks on the Bureau constitutionally inadequate. Even if the scope of an agency's authority could give rise to new constitutional requirements, Plaintiffs utterly fail to show that the Bureau's authority is out of the ordinary. Indeed, the Bureau's authority is comparable to that of other federal regulatory agencies, particularly those operating in the financial sector.

For instance, Plaintiffs complain that the Bureau has "rulemaking, adjudicatory, and enforcement powers." Pl. Mem. at 21. But those powers are common among regulatory agencies. As the Supreme Court has observed, "[u]nder most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) (citing the FTC, Securities and Exchange Commission, and Federal Communications Commission as examples). Likewise, the Bureau may examine certain financial institutions for compliance with the law, 12 U.S.C. §§ 5514, 5516, but that too is a power common among financial regulators, *see* 12 U.S.C. §§ 481 (OCC), 483 (Federal Reserve), 1820 (FDIC), 1844(c) (Federal Reserve), 4517 (FHFA).

Plaintiffs similarly fall short in characterizing the Bureau's substantive jurisdiction as unusually far-reaching so as to justify idiosyncratic constitutional treatment. *See* Pl. Mem. at 21. All federal agencies have jurisdiction to regulate particular subject areas. Just as the Federal Communications Commission regulates communications, or the Securities and Exchange Commission regulates securities, Congress authorized the Bureau to regulate "consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a).

Plaintiffs contend that this gives the Bureau "unprecedented breadth and scope," but they provide no evidence to support that claim. They note, for example, that the Bureau now enforces "forty-nine (49) pre-existing consumer financial product rules." Pl. Mem. at 22. But, by way of comparison, the FTC enforces or administers more than 70 laws. See Federal Trade Commission, Statutes Enforced or Administered by the Commission, http://ftc.gov/ogc/stats.shtm. In any event, Plaintiffs offer no basis for concluding that the mere counting of laws enforced has any constitutional relevance.

Finally, Plaintiffs complain about the "level of regulatory discretion" the Bureau has in implementing Federal consumer financial law. *See* Pl. Mem. at 20. Although not entirely clear, Plaintiffs appear to take particular issue with the Bureau's authority to take action to prevent "unfair," "deceptive," or "abusive" acts and practices. But the FTC has long had very similar authority to prevent "unfair" and "deceptive" acts and practices, as well as additional authority to prevent "unfair methods of competition." 15 U.S.C. § 45. Further, as discussed above, the Dodd-Frank Act provides a detailed definition of "abusive," and other agencies exercise far greater "regulatory discretion" to implement far less concrete standards. *See supra* page 33 n.16. The level of regulatory discretion enjoyed by the Bureau does not justify Plaintiffs' request that the Court depart from established separation-of-powers principles.

***2. The Bureau is not uniquely required to have a multimember commission***

Plaintiffs next contend that the Constitution requires the Bureau to have a multimember commission given its lack of accountability and the scope of its powers. Pl. Mem. at 17. This novel constitutional argument is wholly unmoored from any separation-of-powers principle.

As an initial matter, Plaintiffs' contention that the Bureau lacks accountability or has an extraordinary scope of power has already been refuted. As explained above, the Bureau is fully accountable to the President and Congress; its actions are subject to ordinary review by the

judiciary; and its powers are comparable to the powers exercised by other regulatory agencies. The Bureau therefore lacks any unique qualities that could somehow trigger a new constitutional requirement for a multimember commission.

More fundamentally, Plaintiffs fail to explain how a multimember commission is required by the separation of powers. Separation of powers' "basic principle" is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). A branch may not "arrogate power to itself" or "impair another in the performance of its constitutional duties." *Id.* Plaintiffs do not explain how the Bureau's single-director leadership impairs any branch's powers or otherwise violates these principles.

The only constitutional argument that Plaintiffs manage to muster is that a multimember commission would be "consistent" with separation of powers because, they contend, it would avoid "the concentration of legislative, executive, and judicial power in a single unelected individual." Pl. Mem. at 20. But the legislative, executive, and judicial powers of government are not concentrated in the Bureau Director. They are dispersed among the three branches, each of which exercises checks on the Bureau. More generally, the separation-of-powers doctrine disapproves of "concentrated" power regardless of whether it is exercised by single individuals or multimember bodies. *See Metro. Wash. Airports Auth.*, 501 U.S. at 273 ("'[L]egislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.'") (quoting The Federalist No. 48, pp. 332-34 (J. Cooke ed. 1961)). Thus, even if the Plaintiffs were correct that the Bureau's structure otherwise

violates separation of powers (which it does not, for the reasons given above), replacing the Director with a commission or board would not cure the violation.[18]

Plaintiffs also suggest, without citation to authority, that Congress must follow the "perva[sive]" practice of structuring independent agencies as multimember bodies. *See* Pl. Mem. at 17. The Bureau, however, is not the first single-head independent agency that Congress ever created. Indeed, the Federal Housing Finance Agency, Social Security Administration, and Office of Special Counsel are all headed by single leaders removable only for cause. *See* 12 U.S.C. 4512(b)(2) (Federal Housing Finance Agency); 42 U.S.C. § 902(a)(1), (3) (Social Security Administration); 5 U.S.C. § 1211 (Office of Special Counsel). And even if the Bureau's single-director leadership were truly anomalous, that would not affect the constitutional analysis, for "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta*, 488 U.S. at 385.

Rather than rely on separation-of-powers principles, Plaintiffs emphasize the policy benefits that they contend a multimember commission could produce, like encouraging "collective deliberation among persons with diverse views, expertise, and backgrounds." Pl. Mem. at 20. As an initial matter, Plaintiffs' view of the benefits of commissions is debatable. See 1989 GAO Report at 1 ("[T]he board form of organization has not proven effective in providing stable leadership, in insulating decisions from political pressures, and in assuring that diverse viewpoints are considered in the decision-making process."). More to the point,

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[18] Plaintiffs' reliance (Pl. Mem. at 19) on *David B. Lilly Co. v. United States*, 571 F.2d 546 (Ct. Cl. 1978), is misplaced. Contrary to Plaintiffs' assertion, that case did not hold that a "multimember agency structure safeguards fairness and individual liberty." Pl. Mem. at 19. Rather, that case addressed whether the agency order became "final" before the resignation of three members of the Renegotiation Board caused that agency to lose a quorum. *David B. Lilly*, 571 F.2d at 548-49. That fact that a multimember board must act through a quorum says nothing about whether a multimember structure for independent agencies is constitutionally required.

Plaintiffs' arguments about the desirability of a commission structure are about policy, not the Constitution. Indeed, assessing the benefits of a commission structure calls for a quintessential policy judgment that is for Congress to make.

* * *

Plaintiffs have failed to demonstrate how the Bureau's features, whether considered individually or in combination, violate the "basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving*, 517 U.S. at 757. Nor could they. The President, Congress, and the courts all exercise checks over the Bureau that comply with well-established constitutional norms, and there is nothing unique about the Bureau that would trigger new constitutional requirements. The Bureau's structure accordingly does not violate the separation of powers.

## CONCLUSION

For these reasons, the Bureau respectfully requests that this Court grant the Bureau's motion to dismiss or, in the alternative, for summary judgment.

Respectfully submitted,

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Dated: August 27, 2013

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI,**

***Plaintiffs,***

**v.**

**CONSUMER FINANCIAL PROTECTION BUREAU,**

***Defendant.***

Civil Action No. 13-01112 (CKK)

**DEFENDANT CONSUMER FINANCIAL PROTECTION BUREAU'S RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant Consumer Financial Protection Bureau (Bureau) files this Response to Plaintiff's Statement of Facts (Doc. 13-1) pursuant to Federal Rule of Civil Procedure 56, Local Rule LCvR 7(h)(1), and this Court's Orders (Docs. 4, 8).

Defendant submits, at the outset, that Plaintiffs' statement of facts is inconsistent with the governing law. A statement of facts must be "short and concise" and each "material fact" must be supported by citation to record evidence. *See* Fed. R. Civ. P. 56(c); LCvR 7(h); Scheduling and Procedures Order ¶ 4. A fact is "material" if its establishment "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Legal argument is not appropriate for inclusion within a statement of material facts. *See, e.g., Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 153 (D.C.Cir.1996) ("[R]epeatedly blending factual assertions with legal argument, the 'relevant facts' section does not satisfy the purposes of a [Rule 7(h) ] statement."); *Novo Nordisk A/S v. Dudas*, 2008 WL 7985227 (D.D.C. 2008) (finding contrary to the Local Rules

and the Court's Order a statement of facts that included "numerous instances of legal arguments . . . as well as statements that are not attributed to a particular source").

Notwithstanding this clearly established law, Plaintiffs' statement of facts includes 149 individually numbered paragraphs, the vast majority of which contain legal argument or assertions that have no bearing on the outcome of plaintiffs' facial constitutional challenge, and which are often not supported by citations to admissible evidence. Plaintiffs' flagrant disregard of the governing law and the Court's order is sufficient grounds for striking their statement. *See Jackson*, 101 F.3d at 153-54.

Notwithstanding these objections, the Bureau responds individually to Plaintiffs' asserted undisputed material facts as follows:

1. *On June 17, 2009, President Obama proposed a "sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression." Remarks by the President on 21st Century Financial Regulatory Reform (available at http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on- Regulatory-Reform/) (last visited Aug. 1, 2013).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' selective quotation of this statement, to which the Court is respectfully referred for a full and accurate statement of its contents.

2. *The President's June 30, 2009 draft legislation proposing the creation of CFPB adopted a multimember commission. Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. §§ 111-114 (1st Sess. 2009) (as introduced).*

Response: The draft legislation is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of draft legislation, to which the Court is respectfully

referred for a full and accurate statement of its contents.

3. *The financial reform legislation reported by the House Energy and Commerce Committee adopted a multimember commission structure for CFPB. H.R. Rep. 111-367, pt. 1, at 8-9 (2009).*

Response: The legislation reported by a House Committee is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of reported legislation, to which the Court is respectfully referred for a full and accurate statement of its contents.

4. *The House-passed bill adopted a multimember commission structure for CFPB. H.R. 4173, 111th Cong. § 4103 (2009) (enacted).*

Response: The House-passed bill is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of draft legislation, to which the Court is respectfully referred for a full and accurate statement of its contents.

5. *The Senate-passed version of the legislation replaced the multimember commission structure with a single Director. See 156 CONG. REC. S4034, S4078 (daily ed. May 20, 2010) (amending the bill).*

Response: The Senate-passed bill is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of draft legislation, to which the Court is respectfully referred for a full and accurate statement of its contents.

6. *The Majority Report of the Senate Committee on Banking, Housing, and Urban Affairs stated in part that CFPB was supposed to remedy "the failure of the federal banking and other regulators to address significant consumer protection issues" which led to "what has become known as the Great Recession." S. Rep. 111-176, at 9 (2010).*

Response: The Committee's Report is not a material fact. In addition, this paragraph

constitutes Plaintiffs' characterization of that report, to which the Court is respectfully referred for a full and accurate statement of its contents.

7. *Michael S. Barr, Assistant Secretary for Financial Institutions, Department of the Treasury, stated before Congress that "[w]e believe that the Federal regulatory structure for consumer protection needs fundamental reform. We have proposed to consolidate rule-writing, supervision, and enforcement authority under one agency, with marketwide coverage over both nonbanks and banks that provide consumer financial products and services." Creating A Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation, Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs, S. Hrg. 111-274 (2009) (statement of Michael S. Barr, Assistant Secretary for Financial Institutions, Department of the Treasury).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' selective quotation of this statement, to which the Court is respectfully referred for a full and accurate statement of its contents.

8. C*hristopher Dodd, Chairman, Committee on Banking, Housing, and Urban Affairs, stated "[a]n independent consumer protection agency can and should be very good for business, not just for consumers. It can and should protect the financial well-being of American consumers so that businesses can rely on a healthy consumer base as they seek to build long-term profitability. It can and should eliminate the regulatory overlap and bureaucracy that comes from the current Balkanized system of consumer protection regulation. It can and should level the playing field by applying a meaningful set of standards, not only to the highly regulated banks but also to their nonbank competitors that have slipped under the regulatory radar screen." Creating a Consumer Financial Protection Agency: A Cornerstone of America's*

*New Economic Foundation, Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs, S. Hrg. 111-274 (2009).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' selective quotation of this statement, to which the Court is respectfully referred for a full and accurate statement of its contents.

9. *Travis B. Plunkett, Legislative Director, Consumer Federation of America, stated that "the new agency would consolidate and streamline Federal consumer protection for credit, savings and payment products that is now required in almost 20 different statutes and divided between seven different agencies." Id. (statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' selective quotation of this statement, to which the Court is respectfully referred for a full and accurate statement of its contents.

10. *Richard Blumenthal, Attorney General for Connecticut, stated before Congress that the new agency would be a "Federal Consumer Financial Super Cop." Id. (statement of Richard Blumenthal, Attorney General, State of Connecticut).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' selective quotation of this statement, to which the Court is respectfully referred for a full and accurate statement of its contents.

11. *Rachel Barkow, Professor of Law, New York University School of Law, stated "[m]any of these agencies fall short in their efforts to protect consumers because they become captured by the industries they are charged with regulating. The experience of these agencies therefore offers some valuable insights in thinking about how to structure the CFPA . . .*

*Agency capture is further exacerbated by the fact that industry groups are also well positioned to contribute to political campaigns and to lobby, which in turn gives them influence with the agency's legislative overseers." Proposed Consumer Financial Protection Agency, Hearing Before Subcomm. on Commerce, Trade, and Consumer Protection, 111th Cong. (available at http://democrats.energycommerce.house.gov/Press_111/20090708/testimony_barkow.pdf) (last visited Aug. 5, 2013).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' selective quotation of this statement, to which the Court is respectfully referred for a full and accurate statement of its contents.

12. *Richard Christopher Whalen, Senior Vice President and Managing Director of Institutional Risk Analytics stated that "[a] unified federal supervisor should combine the regulatory resources of the Federal Reserve Banks, SEC, the OCC, and the Office of Thrift Supervision, to create a new safety-and-soundness agency explicitly insulated from meddling by the Executive Branch and the Congress." Modernizing Bank Supervision and Regulation-Part II, Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs, S. Hrg. 111-137 (2009) (statement of Richard Christopher Whalen, Senior Vice President and Managing Director, Institutional Risk Analytics).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' selective quotation of this statement, to which the Court is respectfully referred for a full and accurate statement of its contents.

13. *On July 21, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), as "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 111-176,*

*at 2 (2010).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' selective quotation of the Senate Report, to which the Court is respectfully referred for a full and accurate statement of its contents.

14. *Title X of the Dodd-Frank Act created CFPB. 12 U.S.C. §§ 5491.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

15. T*itle X established CFPB as a new "Executive Agency" that is an "independent bureau" "established in the Federal Reserve System."* 12 U.S.C. § 5491(a).

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

16. *The Director of CFPB must be appointed by the President. 12 U.S.C. § 5491(b)(2).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

17. T*he Director of CFPB receives a five-year term in office and may be removed by the President for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(b)(2) and (c).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for

a full and accurate statement of its contents.

18. *The Director of CFPB is authorized to appoint his own deputy. 12 U.S.C. § 5491(b)(5).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

19. *The Dodd-Frank Act authorizes CFPB to fund itself by unilaterally claiming funds from the Federal Reserve Board. 12 U.S.C. § 5497(a)(1).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

20. *The Dodd-Frank Act authorizes CFPB to claim an increasing percentage of the Federal Reserve System's 2009 operating expenses, beginning in fiscal year 2011 at up to 10 percent of those expenses, and reaching up to 12 percent in fiscal year 2013 and thereafter, adjusted for inflation. 12 U.S.C. § 5497(a)(2)(A).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

21. *This structure will permit CFPB's Director to unilaterally requisition up to $597,600,000 in 2013, and thereafter, adjusted for inflation. See Consumer Financial Protection Bureau, Fiscal Year 2013 Congressional Budget Justification, at 7 (available at http://files.consumerfinance.gov/f/2012/02/budget-justification.pdf) (last visited Aug. 2, 2013).*

Response: This statement is not a material fact. In addition, this paragraph constitutes

Plaintiffs' characterization of the report, to which the Court is respectfully referred for a full and accurate statement of its contents.

22. *CFPB's automatic budget authority is nearly double the FTC's budget request to Congress for fiscal year 2013. See Federal Trade Commission, Fiscal Year 2013 Congressional Budget Justification (requesting $300,000,000) (available at http://www.ftc.gov/ftc/oed/fmo/2013_CBJ.pdf) (last visited Aug. 2, 2013).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the report, to which the Court is respectfully referred for a full and accurate statement of its contents.

23. *The Dodd-Frank Act prohibits the House and Senate Appropriations Committees from reviewing CFPB's self-funded budget. 12 U.S.C. § 5497(a)(2)(C) ("Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.").*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

24. *Section 1022(b)(4)(B) of the Dodd-Frank Act requires courts to grant the same deference to CFPB's interpretation of federal consumer financial laws that they would "if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." 12 U.S.C. § 5512(b)(4)(B).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for

a full and accurate statement of its contents.

25. *The Dodd-Frank Act established CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

26. *CFPB's power includes the ability to promulgate rules "necessary or appropriate to enable [CFPB] to administer and carry out the purposes and objectives of the Federal Consumer financial laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

27. *CFPB's regulations can be overturned by the Financial Stability Oversight Council ("FSOC") only if "the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U.S.C. § 5513(a).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

28. *CFPB's regulations can be overturned by FSOC only if two thirds of FSOC so vote. 12 U.S.C. § 5513(c)(3)(A).*

Response: This statement is not a material fact. In addition, this paragraph constitutes

Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

29. *Congress established FSOC through Title I of the Dodd-Frank Act. 12 U.S.C. § 5321(a).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

30. *FSOC has ten members. 12 U.S.C. § 5321(b).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

31. *One of the members of FSOC is the Director of CFPB. 12 U.S.C. § 5321(b)(1)(D).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

32. *Thus, seven of the remaining nine members of FSOC would have to vote to overturn any CFPB regulation. 12 U.S.C. § 5513(c)(3)(A).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

33. *This FSOC oversight applies to CFPB regulations, not enforcement activity. 12 U.S.C. § 5513.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

34. *The "Federal consumer financial laws" that CFPB is authorized to regulate include: (1) the Alternative Mortgage Transaction Parity Act, of 1982, 12 U.S.C. § 3801; (2) the Consumer Leasing Act of 1976, 15 U.S.C. § 1667; (3) the Electronic Funds Transfer Act, 15 U.S.C. § 1693 (except with respect to section 920); (4) the Equal Credit Opportunity Act, 15 U.S.C. § 1691, (5) the Fair Credit Billing Act, 15 U.S.C. § 1666; (6) the Fair Credit Report Act, 15 U.S.C. § 1681 (except with respect to sections 615(e) and 628); (7) the Home Owners Protection Act of 1998, 12 U.S.C. § 4901; (8) the Fair Debt Collections Practices Act, 15 U.S.C.§ 1692; (9) subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831t(c)-(f); (10) sections 502 through 509 of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802-6809 (except section 505 as it applies to section 501(b)); (11) the Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801; (12) the Homeownership and Equity Protection Act of 1994, 15 U.S.C. § 1601; (13) the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601; (14) the S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. § 5101; (15) the Truth in Lending Act, 15 U.S.C. § 1601; (16) the Truth in Savings Act, 12 U.S.C. § 4301; (17) section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111-8); and (18) the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701. 12 U.S.C. § 5481(12)-(14).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

35. *The Dodd-Frank Act transferred to CFPB authority from seven different*

*agencies. See 12 U.S.C. § 5581(a)(2)(A) ("Board of Governors (and any Federal reserve bank . . ., the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development").*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

36. *In addition to enforcing other laws, Section 1031(a) of the Dodd-Frank Act empowers CFPB to take any of several enumerated actions, including direct enforcement action, to prevent a covered person from engaging in "unfair," "deceptive," or "abusive act[s] or practice[s]" ("UDAAP" authority). 12 U.S.C. § 5531(a).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

37. *The Dodd-Frank Act authorizes CFPB to prescribe rules identifying such practices under Federal law. 12 U.S.C. § 5531(b).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

38. *Section 1031(d) leaves the term "abusive" to be defined by CFPB, subject only to the limitations that the act or practice "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; (2) takes unreasonable advantage of (A) a lack of understanding on the part of the consumer of the*

*material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." 12 U.S.C. § 5531(d).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

39. *During a January 24, 2012 hearing before a subcommittee of the U.S. House Committee on Oversight and Government Reform, Director Cordray stated that the Act's use of the term "abusive" is "a little bit of a puzzle because it is a new term"; CFPB has "been looking at it, trying to understand it, and we have determined that that is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs." How Will the CFPB Function Under Richard Cordray, Hearing Before the Subcomm. on TARP, Financial Services, and Bailouts of Public and Private Programs, 112th Cong., 112-107, at 69 (2012).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization and selective quotation of testimony, to which the Court is respectfully referred for a full and accurate statement of its contents.

40. *CFPB has discretion under Section 1022(b)(3) to exempt any class of covered person, service providers, or consumer financial products or services from the scope of any rule promulgated under Title X. 12 U.S.C. § 5512(b)(3).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

41. *CFPB is empowered to engage in investigations, issue subpoenas, civil investigative demands, and commence judicial proceedings. 12 U.S.C. § 5562.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

42. *CFPB is empowered to conduct hearings and adjudicative proceedings to ensure or enforce compliance with the Dodd-Frank Act, any rules promulgated thereunder, or any other Federal law that CFPB is authorized to enforce. 12 U.S.C. § 5563.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

43. *CFPB is empowered to commence a civil action against any person whom it deems to have violated a Federal consumer financial law, and to seek all legal and equitable relief. 12 U.S.C. § 5564.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

44. *Section 1027(e) of the Dodd-Frank Act contains an exception from the authority of CFPB for attorneys engaged in the practice of law. 12 U.S.C. § 5517(e).*

Response: This statement is not a material fact. In addition, this paragraph constitutes

Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

45. *Section 1027(e) states, under "exclusion for the practice of law":*

> *Except as provided under paragraph (2), the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law. . . . Paragraph (1) shall not be construed so as to limit the exercise by the Bureau of any supervisory, enforcement, or other authority regarding the offering or provision of a consumer financial product or service described in any subparagraph of section 5481(5) of this title (A) that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship; or (B) that is otherwise offered or provided by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service. . . . Paragraph (1) shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent such attorney is otherwise subject to any of the enumerated consumer laws or authorities transferred under subtitle F or H.*
>
> *12 U.S.C. § 5517(e).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization and selective quotation of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

46. *However, Sections 1061 to 1067 of the Dodd-Frank Act give CFPB the authority to enforce certain business practices transferred to it by other administrative agencies. 12 U.S.C.§§ 5581-5587.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provisions, to which the Court is respectfully referred for a full and accurate statement of their contents.

47. *On August 10, 2010, the Federal Trade Commission ("FTC"), in exercising its rulemaking authority amended the TSR to extend its reach to "debt relief services." The amendments of the TSR have been codified as 16 C.F.R. § 310 et seq. Telemarketing Sales Rule, 75 Fed. Reg. 48458 (Aug. 10, 2010).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

48. *The FTC explained that the purpose of the amendments was to "protect consumers from deceptive or abusive practices in the telemarketing of debt relief service." Id.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

49. *The FTC amended the TSR to accomplish the following:*

> *define debt relief services, prohibit debt relief providers from collecting fees until after services have been provided, require specific disclosures of material information about offered debt relief services, prohibit specific misrepresentations about material aspects of debt relief services, and extend the TSR's coverage to include inbound calls made to debt relief companies in response to general media advertisements.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization and selective quotation of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

50. *Under the amended TSR, the term "debt relief services" was defined to include "any program or service represented, directly or by implication to negotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or*

*more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecure creditor or debt collector." 16 C.F.R. § 310.2(m).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization and selective quotation of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

51. *The FTC explained that "an exemption from the amended rule for attorneys engaged in the telemarketing of debt relief services is not warranted." Telemarketing Sales Rule, 75 Fed. Reg. at 48468.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization and selective quotation of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

52. *The FTC based its findings on the following*:

Response: This statement is not a material fact.

53. *First, the FTC assumed that attorneys "who provide bona fide legal services," do not engage in "interstate telephonic communications in order to solicit potential clients to purchase debt relief services." Id.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization and selective quotation of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

54. *Second, the FTC assumed that attorneys generally meet their prospective clients in person before agreeing to represent them. Id.*

Response: This statement is not a material fact. In addition, this paragraph constitutes

Plaintiffs' characterization of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

55. *Third, the FTC assumed that "attorneys acting in compliance with state bar rules and providing bona fide legal services already fall outside of the TSR's coverage in most instances." Id.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

56. *Fourth, the FTC assumed that attorneys, and "those partnering with attorneys, who principally rely on telemarketing to obtain debt relief service clients engaged in the same types of deceptive and abusive practices as those committed by non-attorneys." Id.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

57. *Fifth, the FTC stated that the scope of the TSR and several other statutes and FTC rules designed to curb deception, abuse, and fraud also did not exempt attorneys from their regulations. Id. at 48469.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the rule, to which the Court is respectfully referred for a full and accurate statement of its contents.

58. *On July 21, 2011, the Federal Trade Commission ("FTC") transferred to CFPB its authority to regulate "debt relief services" under the TSR. Designated Transfer Date, 75*

*Fed. Reg. 57252, 57253 (Sept. 20, 2010).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of a Federal Register notice, to which the Court is respectfully referred for a full and accurate statement of its contents.

59. *On January 4, 2012, President Obama appointed Richard Cordray as a "recess appointment." Helene Cooper & Jennifer Steinhauer, Bucking Senate, Obama Appoints Consumer Chief, N.Y. TIMES, Jan. 4, 2012 (available at http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html?pagewanted=all&_r=0) (last visited Aug. 5, 2013).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization and selective quotation of a news article, to which the Court is respectfully referred for a full and accurate statement of its contents.

60. *The legitimacy of Mr. Cordray's appointment was called into question by Noel Canning v. NLRB, 705 F.3d 490, 514 (D.C. Cir. Jan. 25, 2013), cert. granted, 133 S. Ct. 2861 (Jun. 24, 2013) (holding constitutionally infirm other appointments the President made on January 4, 2012 to NLRB because the Senate was not in recess).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of an opinion, to which the Court is respectfully referred for a full and accurate statement of its contents.

61. *On July 16, 2013, the Senate confirmed Mr. Cordray's appointment. United States Senate Periodical Press Gallery, Senate Floor Log (available at http://www.senate.gov/galleries/pdcl/) (last visited Aug. 5, 2013).*

Response: This statement is not a material fact.

62. *Morgan Drexen is in the business of licensing its proprietary software to law firms and providing these firms with live paraprofessional and support services. Declaration of Walter Ledda [Docket No. 3-2] ("Ledda Decl.") ¶ 2.*

Response: This statement is not a material fact. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

63. *Specifically, Morgan Drexen provides non-attorney paralegal support services to attorneys in the areas of debt resolution, bankruptcy, personal injury, mass tort litigation, and tax preparation. Ledda Decl. ¶ 3.*

Response: This statement is not a material fact. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

64. *On March 13, 2012, CFPB issued a Civil Investigative Demand ("CID") to Morgan Drexen. Declaration of Randal M. Shaheen [Docket No. 3-5] ("Shaheen Decl.") at Ex. 1.*

Response: Undisputed.

65. *The CID stated the "[a]ction [r]equired" for Morgan Drexen was to "[p]roduce [d]ocuments and/or [t]angible [t]hings" and to "[p]rovide [w]ritten [r]eports and/or [a]nswers to [q]uestions" by April 13, 2012. Shaheen Decl. Ex. 1.*

Response: This statement is disputed insofar as it constitutes Plaintiffs' characterization and selective quotation of the CID, to which the Court is respectfully referred for a full and accurate statement of its contents. Shaheen Decl. Ex. 1.

66. *The CID stated: "[t]he delivery of this demand to you by any method prescribed by Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service and may subject you to a penalty imposed by law for failure to comply." Shaheen Decl.*

*Ex. 1*.

Response: This statement is disputed insofar as it constitutes Plaintiffs' characterization and selective quotation of the CID, to which the Court is respectfully referred for a full and accurate statement of its contents. Shaheen Decl. Ex. 1.

67. *Section IIB of the instructions accompanying the CID stated that "[y]ou must contact Wendy J. Weinberg . . . to schedule a meeting . . . to be held within 10 calendar days after receipt of this CID . . . ." Shaheen Decl. Ex. 1*.

Response: This statement is disputed insofar as it constitutes Plaintiffs' characterization and selective quotation of the CID, to which the Court is respectfully referred for a full and accurate statement of its contents. Shaheen Decl. Ex. 1.

68. *Instruction G of the instructions accompanying the CID stated that any petition to modify the demand "must be filed . . . within twenty calendar days after service of the CID . . ." Shaheen Decl. Ex. 1*.

Response: This statement is disputed insofar as it constitutes Plaintiffs' characterization and selective quotation of the CID, to which the Court is respectfully referred for a full and accurate statement of its contents. Shaheen Decl. Ex. 1.

69. *The information requested included communications between Morgan Drexen and Associated Attorneys concerning attorney clients, and various personal financial data (including written notes memorializing communications with clients). Shaheen Decl. Ex. 1 (Request Nos. 10 and 21).*

Response: This statement is disputed insofar as it constitutes Plaintiffs' characterization and selective quotation of the CID, to which the Court is respectfully referred for a full and accurate statement of its contents. Shaheen Decl. Ex. 1 (Request Nos. 10 and 21).

70. *Morgan Drexen responded to the CID on April 13, 2012. Shaheen Decl. ¶ 6.*

Response: Disputed. Morgan Drexen provided only a partial response to the CID on April 13, 2012. Shaheen Decl. Ex. 3.

71. *Morgan Drexen continued to respond to the CID and engaged in a dialogue concerning compliance. See generally Shaheen Decl. Exs. 1-35.*

Response: This statement is not a material fact. To the extent the Court deems this statement material, the CFPB states that Morgan Drexen provided only a partial response to the CID. *See generally Shaheen Decl. Exs. 1-35.* The CFPB disputes the statement insofar as it constitutes Plaintiffs' characterization of the correspondence between Morgan Drexen and the CFPB, to which the Court is respectfully referred for a full and accurate statement of its contents. *Id.*

72. *CFPB followed up on Morgan Drexen's responses with language requiring further production. See Shaheen Decl. Ex. 5.*

Response: The CFPB disputes this characterization. The CFPB followed up with language requiring compliance with the CID. The Court is respectfully referred to the correspondence for a full and accurate statement of its contents. Shaheen Decl. Exs. 1-35.

73. *On April 24, 2012, CFPB wrote: "In light of Morgan Drexen's unacceptable failure to provide the materials described above, it is critical that you produce them immediately and in any event by close of business Friday, April 27, 2012." Shaheen Decl. Ex. 5 (p. 4).*

Response: This statement is disputed insofar as it constitutes Plaintiffs' characterization and selective quotation of the letter, to which the Court is respectfully referred for a full and accurate statement of its contents. Shaheen Decl. Ex. 5.

74. *Over the course of the investigation, Morgan Drexen produced over seventeen thousand pages of documents to CFPB. Shaheen Decl. Ex. 26.*

Response: Undisputed.

75. *Over the course of the investigation, CFPB issued two more CIDs to Morgan Drexen, this time for oral testimony. Shaheen Decl. ¶¶ 34-36.*

Response: Disputed. The CFPB issued two CIDs to Morgan Drexen and one CID to Walter Ledda, the Chief Executive Officer of Morgan Drexen. Shaheen Decl. ¶¶ 4, 34-36.

76. *Over the course of the investigation, CFPB requested information concerning the amount of any given "engagement fee under the bankruptcy fee agreement" and any "bankruptcy filing fee" for attorneys. Shaheen Decl. Ex. 34 (p. 2).*

Response: Disputed insofar as this statement characterizes and selectively quotes the CFPB's letter, to which the Court is referred for a full and accurate statement of its contents. Shaheen Decl. Ex. 34.

77. *Over the course of the investigation, CFPB deposed Jeffrey Katz, David Walker, Laura Wiegman, and Walter Ledda, all from Morgan Drexen. Shaheen Decl. ¶¶ 35, 37.*

Response: Undisputed

78. *Morgan Drexen has "diverted substantial attention and resources, in terms of paying attorney's fees, as well as the company time necessary to provide officers for depositions, collect and review documents, and otherwise respond to CFPB's demands." Declaration of Walter Ledda [Docket No. 3-2] ("Ledda Decl.") ¶ 14(a).*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

79. *The investigation has also significantly increased Morgan Drexen's costs with respect to accessing credit. Ledda Decl. ¶ 14(b).*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

80. *For example, CFPB sent a CID to Morgan Drexen's banking partners, which led to the company's losing its credit facilities. Ledda Decl. ¶ 14(b).*

Response: The Bureau lacks knowledge about whether its investigation led to the company losing its credit facilities, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

81. *CFPB also sent a CID to US Capital which has impacted Morgan Drexen's ability to obtain reasonable financing. Ledda Decl. ¶ 14(b).*

Response: The Bureau lacks knowledge about whether the Bureau's CID impacted Morgan Drexen's ability to obtain reasonable financing, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

82. *Morgan Drexen now pays 22% interest where, before the CID, Morgan Drexen was able to obtain financing at 4.5%. Ledda Decl. ¶ 14(b).*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

83. *CFPB also demanded documents directly from certain of Morgan Drexen's*

*attorney business partners, such as Howard Law, P.C. Ledda Decl. ¶ 14(d); Shaheen Decl. Exs. 27-28.*

Response: The CFPB does not dispute that it sent a CID to Howard Law, P.C.

84. *CFPB also demanded documents directly from Kovel and Fuller, which partners with Morgan Drexen to provide marketing services to the attorneys supported by Morgan Drexen. Ledda Decl. ¶ 14(e).*

Response: The CFPB does not dispute that it sent a CID to Kovel Fuller.

85. *CFPB also demanded that Morgan Drexen produce documents that are in the files of Morgan Drexen's attorney business partners. Ledda Decl. ¶ 7; Shaheen Decl. Ex. 1 (Request Nos. 10 and 21).*

Response: This statement is disputed insofar as it constitutes Plaintiffs' characterization of the CID, to which the Court is respectfully referred for a full and accurate statement of its contents. Shaheen Decl. Ex. 1 (Request Nos. 10 and 21).

86. *CFPB's demands for attorney client files have placed Morgan Drexen in a difficult position because Morgan Drexen's attorney business partners have not authorized disclosure. See Declaration of Kimberly Pisinski [Docket No. 3-3] ("Pisinski Decl.") ¶ 5; Shaheen Decl. Exs. 27-28.*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

87. *CFPB's investigation has been stigmatizing to Morgan Drexen. Ledda Decl. ¶ 14(f).*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not

material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

88. C*FPB has threatened to send subpoenas to all of Morgan Drexen's attorney customers. Ledda Decl. ¶ 14(g).*

Response: This statement is not a material fact. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d) in order to determine the basis for this vague and unattributed statement.

89. *CFPB informed counsel to Morgan Drexen that the attorneys supported by Morgan Drexen are in violation of the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 et seq., because the attorneys charge their clients hourly fees for the preparation of bankruptcy pleadings. Shaheen Decl. ¶ 43.*

Response: Disputed. *See* Shaheen Decl. Ex. 32.

90. *Violations of the Telemarketing Sales Rule are punishable by a permanent or temporary injunction, rescission or reformation of contracts, the refund of moneys paid, restitution, disgorgement or compensation for unjust enrichment, and monetary relief, including but not limited to significant civil money penalties. See 15 U.S.C. § 6102(c) (stating that violations of the rule shall be treated as a violation of section 1031 of the Consumer Financial Protection Act, subjecting offenders to the penalties available under 12 U.S.C. § 5565).*

Response: This statement is not a material fact. The Court is respectfully referred to the relevant laws for a full and accurate statement of their contents.

91. *CFPB has initiated suits against other entities accused of violating the Telemarketing Sales Rule, seeking permanent injunctions, restitution, disgorgement, civil money penalties, and attorneys' fees. See Consumer Financial Protection Bureau v. Mission*

*Settlement Agency, No. 13-CV-3064, 2013 WL 1891278 (S.D.N.Y. May 7, 2013); Consumer Financial Protection Bureau v. Jalan, No. SACV12-02088, 2012 WL 6584110 (C.D. Cal. Dec. 3, 2012).*

Response: This statement is not a material of fact.

92. *On April 22, 2013, CFPB wrote counsel to Morgan Drexen and stated that CFPB was proceeding:*

> *in accordance with [CFPB]'s discretionary Notice and Opportunity to Respond and Advise (NORA) process. During our telephone conversation, I notified you that [CFPB]'s Office of Enforcement is considering recommending that the Bureau take legal action against your clients Morgan Drexen, Inc. and Walter Ledda, and I offered your clients the opportunity to make NORA submissions. As we discussed, the staff expects to allege that your clients violated Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. § 5536 and the Telemarketing Sales Rule, 16 CFR § 310. In connection with the contemplated action, the staff may seek injunctive and monetary relief against your clients.*
>
> *Shaheen Decl. Ex. 32.*

Response: This statement is not a material fact. To the extent the Court deems this fact material, it is respectfully referred to the CFPB's letter for a full and accurate statement of its contents. Shaheen Ex. 32.

93. *CFPB informed counsel to Morgan Drexen that it would not accept any resolution of its concerns short of Morgan Drexen refusing to support attorneys engaged by clients for both bankruptcy counseling and debt settlement. Shaheen Decl. ¶ 43.*

Response: Disputed. *See* Shaheen Decl. Ex. 32.

94. *These "engagements comprise a large percentage of Morgan Drexen's total business, and any requirement that Morgan Drexen stop providing these services to attorneys would threaten the viability of Morgan Drexen's business." Ledda Decl. ¶ 13.*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

95. *Pisinski is a lawyer practicing law in Connecticut. Pisinski Decl. ¶ 1.*

Response: Undisputed.

96. *Pisinski has spent a large portion of her career doing volunteer work serving underprivileged and at-risk women and children, including those in financial distress. See Pisinski Biography (Pisinski worked as a legislative advocate in both New York and South Carolina for various women's and children's issues and assisted in South Carolina with starting up one of the first homeless daycare centers in the country. [Pisinski] is an active member of the Canton Juvenile Review Board, the Council for Exceptional Children, and Learning Disability Association, among others) (available at http://www.zoominfo.com/p/Kimberly-Pisinski/456795667) (last visited Aug. 5, 2013).*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

97. *Pisinski contracts with Morgan Drexen to provide non-attorney/paralegal services that support her law practice. Pisinski Decl. ¶ 3; Ledda Decl. ¶ 4.*

Response: The Bureau lacks knowledge about whether this statement is true as to Ms. Pisinski, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

98. *Ms. Pisinski "depend[s] on Morgan Drexen to assist [her] in providing [her] clients with high quality and relatively low cost legal services." Pisinski Decl. ¶ 10.*

Response: The Bureau lacks knowledge about whether this statement is true as to Ms. Pisinski, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

99. *CFPB's investigation of Morgan Drexen has been disruptive to Ms. Pisinski's law practice and to her clients. Pisinski Decl. ¶ 4.*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

100. *Ms. Pisinski offers her clients bankruptcy services. Pisinski Decl. ¶ 2.*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

101. *As part of any bankruptcy engagement, clients may elect for Ms. Pisinski to first amicably resolve their debts with creditors prior to filing the bankruptcy petition. Pisinski Decl. ¶ 2.*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

102. *Ms. Pisinski's clients provide her with their "most private financial information" that she receives as part of the confidential attorney-client relationship. Pisinski Decl. ¶ 5.*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement

material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

103. *Clients have verbalized to Ms. Pisinski that they "worry about the government accessing their information and if they are not completely sure of the security of their information then they will not give [Ms. Pisinski] the information that [she] need[s] to properly counsel them." Pisinski Decl. ¶ 7.*

Response: The Bureau lacks knowledge about whether this statement is true, but it is not material to the issues before the Court. To the extent that the Court deems this statement material, the Bureau seeks discovery under Federal Rule of Civil Procedure 56(d).

104. *Congress has used a multimember commission structure for independent regulatory agencies for more than 125 years since the creation of the Interstate Commerce Commission ("ICC"). The ICC's five commissioners were appointed by the President with the consent of the Senate: "An uneven number of commissioners (5) appointed to staggered terms of a fixed period extending beyond the term of the President (6 years)." Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provisions, to which the Court is respectfully referred for a full and accurate statement of its contents.

105. *More than a century after Congress created the ICC, Congress created the Federal Election Commission ("FEC").Congress provided for a multimember commission for FEC: "There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3*

*members of the Commission appointed under this paragraph may be affiliated with the same political party." 2 U.S.C. § 437c-(a)(1).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

106. *In the intervening years, Congress used the multimember commission structure for other agencies, including the FTC (15 U.S.C. § 41); SEC (15 U.S.C. § 78d(a)); Commodity Futures Trading Commission (7 U.S.C.A. § 2); Federal Communications Commission (47 U.S.C. § 154); FERC (42 U.S.C. § 7171(b)(a)(5); and the Consumer Products Safety Commission ("CPSC") (15 U.S.C. § 2053(a)).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provisions, to which the Court is respectfully referred for a full and accurate statement of its contents.

107. *The Federal Reserve is overseen by a seven member board. 12 U.S.C. § 241*.

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

108. *Each new President has the opportunity to appoint at least two board members. See 12 U.S.C. § 242 (providing for fourteen-year staggered terms).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

109. *The Office of the Comptroller of the Currency ("OCC") has a head (the*

*Comptroller) who serves a five year term. 12 U.S.C. §§ 1-2.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

110. *The Comptroller can be removed by the President at will, upon reasons to be communicated by him to the Senate. 12 U.S.C. § 2 ("The Comptroller of the Currency shall be appointed by the President . . . and shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate").*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

111. *The now defunct Office of Thrift Supervision ("OTS") was headed by a single director who served a five year term. 12 C.F.R. § 500.10.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

112. *The Office of Legal Counsel takes the position that the OTS Director serves at the President's pleasure. See Post-Employment Restriction of 12 U.S.C. § 1812(e), 2001 WL 35911952, at *4 (O.L.C. Sept. 4, 2001) ("We do not endorse the view that tenure protection for the Director should be inferred under the statute here") (available at http://www.justice.gov/olc/2001/otspost2.pdf) (last visited Aug. 5, 2013).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited opinion, to which the Court is respectfully referred for a

full and accurate statement of its contents.

113. *The Federal Deposit Insurance Corporation is run by a five person Board of Directors. 12 U.S.C. § 1812(a)(1).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

114. *No more than three FDIC Directors may be members of the same political party. 12 U.S.C. § 1812(a)(2).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

115. *The FTC is governed by a five person Commission that serves staggered seven year terms. 15 U.S.C. § 41*.

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

116. *The President has the power to designate the Chairperson from among the five FTC Commissioners. Id.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

117. *The FTC is subject to the congressional appropriations process. 15 U.S.C. § 57c*.

Response: This statement is not a material fact. In addition, this paragraph constitutes

Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

118. *The Department of Housing and Urban Development is a cabinet-level agency. 42 U.S.C. § 3532(a).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

119. *The HUD is headed by a Secretary who serves without restrictions on the President's power to remove. Id.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

120. *The HUD is subject to the congressional appropriations process. 42 U.S.C. § 3535(s).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

121. *The SEC is composed of five Commissioners. 15 U.S.C. § 78d(a).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

122. *The SEC commissioners are appointed by the President with the advice and consent of the Senate. Id.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

123. *No more than three Commissioners may be members of the same political party. Id.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

124. *The SEC is subject to the congressional appropriations process. 15 U.S.C. § 78kk.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

125. *The CPSC is composed of "five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate." 15 U.S.C. § 2053(a).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

126. *The CPSC Commissioners serve seven-year terms, during which time they may only be removed for cause. 15 U.S.C. § 2053(a).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

127. *The Office of Legal Counsel takes the position that the President has the authority to pick the CPSC Chairman from among the Commissioners, and may replace the Chairman at will. See U.S. Department of Justice Office of Legal Counsel Memorandum Opinion, President's Authority to Remove the Chairman of the Consumer Product Safety Commission (July 31, 2001) ("We conclude that the President has the authority to remove the Chairman of the CPSC for any reason.") (available at http://www.justice.gov/olc/cpscchairmanremoval.htm) (last visited Aug. 5,2013).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited opinion, to which the Court is respectfully referred for a full and accurate statement of its contents.

128. *CPSC is subject to the congressional appropriations process. 15 U.S.C. § 2081.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

129. *The Environmental Protection Agency ("EPA") is headed by an Administrator. Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (1970); 40 C.F.R. § 1.23.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for a full and accurate statement of its contents.

130. *There are no restrictions on the President's ability to remove the Administrator. 40 C.F.R. § 1.23.*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited provision, to which the Court is respectfully referred for

a full and accurate statement of its contents.

131. *EPA is subject to the congressional appropriations process. Cong. Research Service 7-5700, Environmental Protection Agency (EPA): Appropriations for FYI2013 (available at http://www.fas.org/sgp/crs/misc/R42520.pdf) (last visited Aug. 5, 013).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the cited report, to which the Court is respectfully referred for a full and accurate statement of its contents.

132. *Even after enactment, members of Congress continue to call for a restructuring of CFPB that would require a multimember commission structure for CFPB. See News Release,Senator Jerry Moran, Sen. Moran Introduces Bill to Reform Consumer Financial Protection Bureau (Apr. 6, 2011) (stating "The Responsible Consumer Financial Protection Regulations Act of 2011, S. 737, would replace the single CFPB Director with a Senate-confirmed five-person commission – similar to the leadership structure of the Securities and Exchange Commission (SEC), Commodity Futures Trade Commission (CFTC) and Federal Trade Commission (FTC)") (available at http://www.moran.senate.gov/public/index.cfm/news-releases?ID=18419a98-8ee4-4b84-80cd-52cf6043368d) (last visited Aug. 5, 2013).*

Response: This statement is not a material fact. In addition, this paragraph constitutes Plaintiffs' characterization of the certain statements, to which the Court is respectfully referred for a full and accurate statement of its contents.

133. *In April 2013, Professor Todd J. Zywicki published an article in the George Washington Law Review explaining that CFPB's structure makes it "one of the most powerful and publicly unaccountable agencies in American history." Todd J. Zywicki, The Consumer Financial Protection Bureau: Savior or Menace? 81 GEO. WASH. L. REV. 856, 875 (Apr. 2013).*

Response: This statement is not a material fact.

134. *Professor Neomi Rao goes further and writes that the Supreme Court's decision in Free Enterprise Fund suggests that CFPB is unconstitutional because of the "removal restrictions that insulate the director from presidential oversight." Neomi Rao, Removal: Necessary and Sufficient for Presidential Control, 65 ALABAMA L. REV -- (2014) (forthcoming).*

Response: This statement is not a material fact.

135. *On June 21, 2012, two regulated entities and the Competitive Enterprise Institute filed a constitutional challenge against the Dodd-Frank Act (including Title X) in this Court. Complaint at ¶ 1, State Nat'l Bank of Big Spring v. Geithner, No. 1:12-cv-01032-ESH (D.D.C. June 21, 2012).*

Response: This statement is not a material fact.

136. *The plaintiffs in that case were represented by C. Boyden Gray and Adam J. White of Boyden Gray & Associates P.L.L.C., Gregory Jacob of O'Melveny & Myers LLP, and Sam Kazman and Hans Bader of the Competitive Enterprise Institute. Id.*

Response: This statement is not a material fact.

137. *Judge Huvelle declined to reach the merits of CFPB's constitutionality and dismissed the case for lack of standing. State Nat'l Bank of Big Spring v. Lew, No. 12-1032(ESH), 2013 WL 3945027 (D.D. C. Aug. 1, 2013).*

Response: This statement is not a material fact.

138. *On April 23, 2013, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing on the Semi-Annual Agenda of CFPB. The Consumer Financial Protection Bureau's Semi-Annual Report to Congress, Hearing Before the S. Committee on Banking, Housing, and Urban Affairs, 113th Cong. (Apr. 23, 2013) (available at*

*http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=765a704e-a287-4f96-910e-5866ac0fc352) (last visited Aug. 2, 2013).*

Response: This statement is not a material fact.

139. *At the April 23, 2013 hearing, United States Senator Mike Crapo (R-Idaho) raised concerns regarding CFPB's data collection efforts. Id. (available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Newsroom.MinorityNews&ContentRecord_id=5d06aa95-ba2d-14f0-5491-53fe83bd0be7&Region_id=&Issue_id=) (last visited Aug. 5, 2013).*

Response: This statement is not a material fact.

140. *On May 16, 2013, Senator Crapo sent a letter to CFPB Director Richard Cordray requesting that CFPB furnish information concerning its "legal authority to collect consumer lending and credit data for the agency's Big Data initiative." Letter from Senator Mike Crapo to Richard Cordray, Director, Consumer Financial Protection Bureau (May 16, 2013) (available at http://www.crapo.senate.gov/issues/banking/documents/letter.pdf) (last visited Aug. 2, 2013).*

Response: This statement is not a material fact.

141. *On May 23, 2013, Director Cordray sent a letter to Senator Crapo responding to Senator Crapo's May 16, 2013 letter and disputing that CFPB had a "Big Data initiative." Letter from Richard Cordray, Director, Consumer Financial Protection Bureau to Senator Mike Crapo (May 23, 2013) at p. 2 (available at http://www.cfpbmonitor.com/files/2013/06/CFPBdatacollection-esponse.pdf) (last visited Aug. 2, 2013).*

Response: This statement is not a material fact.

142. *On July 2, 2013, Senator Crapo wrote to the Comptroller General of GAO, requesting an investigation into CFPB's data collection practices. Letter from Senator Mike Crapo to Gene Dodaro, Comptroller General, U.S. Government Accountability Office (July 2, 2013) (available at http://www.crapo.senate.gov/issues/banking/documents/CrapoGAORequestre.CFPBData.pdf) (last visited Aug. 5, 2013).*

Response: This statement is not a material fact.

143. *On July 12, 2013, GAO accepted Senator Crapo's request as within the scope of its authority and stated that it would begin the work (i.e., investigate CFPB's data collection practices) "shortly." Letter from Katherine Siggerud, Managing Director for Congressional Relations, U.S. Government Accountability Office to Senator Mike Crapo (July 12, 2013) (available at http://www.cfpbmonitor.com/files/2013/07/GAOLetter.pdf) (last visited Aug. 5, 2013).*

Response: This statement is not a material fact.

144. *Judicial Watch President Tom Fitton stated that CFPB's actions were "a more direct assault on American citizens' reasonable [expectation] of privacy than the gathering of general phone records." Bob Unruh, Now Obama Watching American's Credit Cards, WND.com (quoting Tom Fitton) (available at http://www.wnd.com/2013/06/now-obama-watching-americans-credit-cards/) (last visited July 22, 2013).*

Response: This statement is not a material fact.

145. *Mr. Fitton has also stated that CFPB is "an out-of-control government agency that threatens the fundamental privacy and financial security of Americans. This is every bit as serious as the controversy over the NSA's activities." Id.*

Response: This statement is not a material fact.

146. *David T. Hirschmann, the President and Chief Executive Officer of the U.S. Chamber of Commerce's Center for Capital Markets, wrote in a letter to Director Cordray that CFPB "should not misuse the supervision process to demand huge amounts of data" and expressed concern that CFBP's requests are otherwise improper. Letter from David T. Hirschmann, President and Chief Executive Officer of the U.S. Chamber of Commerce's Center for Capital Markets, to Richard Cordray, Director, Consumer Financial Protection Bureau (Feb.14, 2013) (available at http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2013-2-14-CFPB-supervision-letter.pdf) (last visited Aug. 2, 2013).*

Response: This statement is not a material fact.

147. *John Berlau, a scholar of the Competitive Enterprise Institute, has called CFPB's data collection activities "an NSA-style surveillance program without any serious justification, such as terrorism." Brendan Bordelon, Consumer Financial Protection Bureau compared to NSA, THE DAILY CALLER, June 26, 2013 (quoting John Berlau) (available at http://dailycaller.com/2013/06/26/consumer-financial-protection-bureau-compared-to-nsa/) (last visited Aug. 5, 2013).*

Response: This statement is not a material fact.

148. *Randy E. Barnett, a professor of constitutional law at Georgetown University, wrote in the Wall Street Journal that NSA and CFPB's activities "dangerously violate[] the most fundamental principles of our republican form of government" (the Fourth Amendment's prohibition against unreasonable searches and seizures, and the requirement that no warrants shall issue but upon probable cause). Randy E. Barnett, Editorial, The NSA's Surveillance is Unconstitutional, WALL ST. J., Jul. 11, 2013, at A13.*

Response: This statement is not a material fact.

149. *Mr. Barnett further wrote that: "[t]he secrecy of these programs makes it impossible to hold elected officials and appointed bureaucrats accountable." Id.*

Response: This statement is not a material fact.

Respectfully submitted,

Dated: August 27, 2013

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI,**

*Plaintiffs,*

v.

**CONSUMER FINANCIAL PROTECTION BUREAU,**

*Defendant.*

Civil Action No. 13-cv-01112 (CKK)

**[PROPOSED] ORDER**

Having considered Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment; Plaintiffs' Motion for Summary Judgment; and all memoranda in support thereof and in opposition thereto, it is hereby ORDERED that Defendant's motion is GRANTED and Plaintiffs' motion is DENIED.

The above-captioned case is hereby DISMISSED.

SO ORDERED this ____ day of _____, 2013.

**Colleen Kollar-Kotelly**
United States District Judge