18-2743(L)

18-3033(Con), 18-2860 (XAP), 18-3156 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellant-Cross-Appellee,

PEOPLE OF THE STATE OF NEW YORK,
by Letitia James, Attorney General for the State of New York,
Plaintiff-Appellant-Cross-Appellee,

v.

RD LEGAL FUNDING, LLC; RD LEGAL FUNDING PARTNERS, LP; RD LEGAL FINANCE, LLC; and RONI DERSOVITZ,
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPENING BRIEF OF THE CONSUMER FINANCIAL PROTECTION BUREAU

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Christopher Deal
David A. King Jr.
Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552
(202) 435-9582
christopher.deal@cfpb.gov

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INTRODUCTION

For more than 130 years, the executive branch has included independent agencies headed by individuals who may be removed by the President only for cause. In 1887, Congress established the Interstate Commerce Commission, whose commissioners, like the Director of the Consumer Financial Protection Bureau, could be removed only for inefficiency, neglect of duty, or malfeasance in office. *See* An Act to Regulate Commerce, ch. 104, § 11 (1887). Since then, Congress has provided for-cause removal protection for the heads of many other agencies. And "[i]n every case reviewing a congressional decision to afford an agency ordinary for-cause protection, the [Supreme] Court has sustained Congress's decision, reflecting the settled role that independent agencies have historically played in our government's structure." *PHH Corp. v. CFPB*, 881 F.3d 75, 93 (D.C. Cir. 2018) (en banc).

The question in this case is whether Congress transgressed the separation of powers when it gave the Bureau's Director the same for-cause removal protection that the Supreme Court sustained for the commissioners of the Federal Trade Commission more than eighty years ago. Nearly every court to have addressed the question, including the en banc D.C. Circuit, has held that the for-cause removal provision in the

Consumer Financial Protection Act of 2010 (CFPA) is constitutional under controlling Supreme Court precedent. The district court was wrong to hold this provision unconstitutional. The district court erred further when it concluded, contrary to an express statutory severability clause, that the for-cause removal provision could not be severed from the rest of the CFPA. These errors led the district court to dismiss a Bureau enforcement action that properly alleged that the defendants engaged in substantial violations of the Federal consumer financial laws. This Court should reverse and remand.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this enforcement action pursuant to 12 U.S.C. § 5565(a)(1) and 28 U.S.C. §§ 1331 and 1345. The district court dismissed the Bureau's claims, *see* Special Appendix (SA) 1, and granted the Bureau's request for entry of final judgment against it on August 23, 2018, *see* Joint Appendix (JA) 792. The Bureau filed a notice of appeal on September 14, 2018, *see* JA 797, and, at the Bureau's request, the district court entered final judgment against the Bureau on October 29, 2018, *see* SA 122. The appeal is timely. *See* Fed. R. App. Proc. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. As it has done with the heads of many other agencies, Congress provided that the President can remove the Bureau's Director only for cause. Does this removal restriction, which is identical to the one that the Supreme Court approved for the Federal Trade Commission, violate the Constitution?

2. Congress specified that if "any provision" of the Act that established the Bureau "is held to be unconstitutional," the rest of the Act "shall not be affected thereby." 12 U.S.C. § 5302. If this Court holds the for-cause removal restriction in the Bureau's organic statute unconstitutional, should the Court hold that the Bureau's entire organic statute is invalid, contrary to this express severability provision?

STATEMENT OF THE CASE

The Consumer Financial Protection Bureau and the People of the State of New York, by Letitia James, Attorney General for the State of New

York,[1] filed this civil enforcement action pursuant to the CFPA in the United States District Court for the Southern District of New York (Preska, J.). The complaint alleged that the defendants engaged in deceptive and abusive acts and practices in extending credit to consumers entitled to money from compensation funds or settlements. The district court concluded that the CFPA is unconstitutional in its entirety and dismissed the enforcement action. *See* SA 1, 109, 116, 117, 119, 120, 122; *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018).

A. Statutory Background

The 2008 financial crisis forced millions of American families from their homes and wiped out trillions in household wealth. S. Rep. No. 111-176, at 9 (2010). "In Congress's view, the 2008 crash represented a failure of consumer protection." *PHH*, 881 F.3d at 80. At the time, seven different federal regulators—many with missions other than consumer protection—administered the Federal consumer financial laws. *See* S. Rep. No. 111-176, at 10.

[1] When this action was commenced, Eric T. Schneiderman was Attorney General for the State of New York. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Letitia James is automatically substituted for the former Attorney General.

To end this "fragmentation" and "thereby ensur[e] accountability," *id.* at 11, Congress enacted the CFPA as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The CFPA consolidated the administration of the Federal consumer financial laws in the Bureau. *Id.*; *see also* 12 U.S.C. § 5491(a). Congress directed the Bureau "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services" and that such markets "are fair, transparent, and competitive." 12 U.S.C. § 5511(a).

When Congress created the Bureau, it drew from its experience with other financial regulators and independent agencies. As it did with the Office of the Comptroller of the Currency (OCC), Congress provided that the Bureau would have a single Director who served a five-year term. *See id.* § 2 (OCC); § 5491(c)(1) (Bureau). As it did with the leaders of the Federal Trade Commission (FTC) and the Federal Energy Regulatory Commission (FERC) (among others), Congress provided that the Bureau's Director would be removable by the President only for cause—specifically, "inefficiency, neglect of duty, or malfeasance in office."[2] *See* 15 U.S.C. § 41 (FTC); 42 U.S.C. § 7171(b)(1) (FERC); 12 U.S.C. § 5491(c)(3) (Bureau); *see also PHH*, 881 F.3d at 91-92 (collecting other examples). And as it did with other financial regulators, such as the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), and the OCC, Congress chose to fund the Bureau primarily outside of the annual appropriations process. *See* 12 U.S.C. § 243 (FRB); §§ 1815(d), 1820(e) (FDIC); § 16 (OCC); § 5497 (Bureau).

Like many other financial regulators, the Bureau is authorized to write rules, *id.* § 5512, examine financial institutions, *id.* §§ 5514-5516, and bring enforcement actions, *id.* §§ 5563, 5564. The Bureau also conducts research, monitors markets, educates the public, and responds to consumer complaints. *Id.* § 5511(c). As most relevant here, Congress granted the Bureau authority, subject to certain limitations, to "commence a civil action against" "any person [who] violates a Federal consumer financial law." *Id.*

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[2] The CFPA's for-cause removal provision applied to Director Richard Cordray, who served until his resignation on November 24, 2017. This provision also applies to the Bureau's current Director, Kathleen Kraninger, who took office on December 10, 2018. This provision did not, however, apply to Acting Director Mick Mulvaney, who served as Acting Director pursuant to the Federal Vacancies Reform Act after Director Cordray's resignation. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. ___, 2017 WL 6419154 (Nov. 25, 2017).

§ 5564(a). The CFPA, which is itself one of the "Federal consumer financial laws" that the Bureau enforces, *id.* § 5481(14), makes it illegal for a "covered person … to engage in any unfair, deceptive, or abusive act or practice." *Id.* § 5536(a)(1)(B); *see also id.* § 5531(c), (d) (setting forth elements of "unfair" and "abusive" conduct). And the CFPA makes it illegal for any person "to knowingly or recklessly provide substantial assistance" to any covered person who engages in unfair, deceptive, or abusive acts or practices. *Id.* § 5536(a)(3). "Covered person[s]" under the CFPA include those who offer or provide "credit," which is "the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase." *Id.* § 5481(6), (7), (15)(A)(i).

The CFPA also empowers state attorneys general and state regulators to enforce the CFPA's provisions, including the statute's prohibition on acts and practices that are unfair, deceptive, or abusive. *See id.* § 5552(a).

B. The Compensation Funds

This case arises from contracts between RD Legal Funding, LLC; RD Legal Finance, LLC; and RD Legal Funding Partners, LLP (collectively, RD) and consumers who are eligible to receive compensation from either the

September 11th Victim Compensation Fund or the NFL Concussion Settlement.

1. The September 11th Victim Compensation Fund

Congress created the September 11th Victim Compensation Fund of 2001 "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2011." Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001) (codified as amended 49 U.S.C. § 40101 note). In 2011, President Obama signed into law the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act), Pub. L. No. 111-347, 124 Stat. 3623 (2011). The Zadroga Act reactivated the Victim Compensation Fund for those who suffered physical harm or death as a result of the September 11th attacks, and it made those who suffered physical harm or death as a result of the subsequent debris removal eligible for compensation as well. *See* 76 Fed. Reg. 54112 (Aug. 31, 2011); H.R. Rep. No. 111-648, at 3-4 (2010).[3]

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[3] In 2015, Congress again reauthorized the Fund, extended the time period for filing claims, and made other changes. *See* James Zadroga 9/11 Victim Compensation Fund Reauthorization Act, Pub. L. No. 114-113, 129 Stat. 2242 (2015); *see also* 81 Fed. Reg. 60617 (Sept. 2, 2016).

The Victim Compensation Fund is administered by a Special Master. *See* 49 U.S.C. § 40101 note (§§ 404, 405). The Special Master is authorized to make payments only to a "claimant," that is, "an individual filing a claim for compensation," who provides information concerning either "the physical harm that the claimant suffered," or, for a claim "filed on behalf of a decedent," "information confirming the decedent's death." 49 U.S.C. § 40101 note (§§ 402(5), 405(a)(1), 405(a)(2)(B), 406(a)). Claimants can assign their claims only in accordance with the Anti-Assignment Act. Under that Act, a claimant may assign "any part of a claim against the United States Government," including by granting authorization to receive payment for any part of the claim, only if the assignment is made "after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. § 3727.

2. The NFL Concussion Settlement

In February of 2015, Judge Brody of the Eastern District of Pennsylvania approved a settlement agreement between National Football League entities and a class of former NFL players (NFL Concussion Settlement). JA 586. The NFL Concussion Settlement resolved lawsuits alleging that former NFL players suffered mild traumatic brain injury as a result of concussive and sub-concussive impacts sustained while playing in the NFL and that the NFL concealed and misrepresented the link between concussions and chronic brain injury. JA 589. Among other things, the Concussion Settlement created a fund to pay monetary awards to class members who receive certain medical diagnoses and then complete a claims administration process. JA 619-26.

The NFL Concussion Settlement expressly prohibits class members from assigning their claims to third parties. *See* JA 680. In response to a question referred by the district court during this litigation, Judge Brody explained that "[t]he purpose of the anti-assignment provision is to protect the interests of Class Members by recognizing that Class Members receiving monetary awards are by definition cognitively impaired," and reiterated that "under the Settlement Agreement, Class Members are prohibited from assigning or attempting to assign any monetary claims, and any such purported assignment is void, invalid and of no force and effect." JA 770-71, 773. Accordingly, "Class Members simply cannot enter into a binding agreement that assigns or attempts to assign their claims." JA 773.

C. RD Legal

As alleged in the complaint, RD offers to advance funds to consumers who are entitled to awards from settlement or compensation funds. JA 28, 31-32. Roni Dersovitz, the founder and owner of RD, "has substantial control over and involvement in the establishment of RD's business policies and practices." JA 32. While consumers wait for payment of their awards, RD offers to advance them money in exchange for their promise to repay a considerably larger sum once they have received their awards. JA 29, 32-34. "After the fund or settlement has received final approval and the consumer has received notice of the amount of a forthcoming payment, RD enters into an agreement with the consumer that purports to take a security interest in the consumer's award." JA 32-33. As relevant here, RD transacted with consumers who have received award letters from the September 11th Victim Compensation Fund and with retired NFL players entitled to compensation from the NFL Concussion Settlement because they have been diagnosed with neurodegenerative diseases. JA 28-29, 33.

Notwithstanding the Anti-Assignment Act and the terms of the NFL Settlement, Part B *supra*, RD told consumers that these transactions were "assignments." Because such assignments are prohibited by applicable law, RD's transactions actually resulted in consumers receiving a lump sum of money in exchange for consumers' promise to directly repay a larger sum after they receive their awards. JA 33-34. In some instances, this means consumers pay the equivalent of interest rates over 250%. JA 34.

D. The Proceedings Below

The Bureau and New York filed a complaint in the Southern District of New York on February 7, 2017, jointly asserting four counts of deception and one count of abusiveness under the CFPA against RD and Roni Dersovitz (collectively, Defendants). JA 39-44. The complaint alleged that RD misled consumers about the nature of their transactions and the validity of the purported assignments of consumers' awards to RD. JA 39-40, 42-44. By telling consumers that the transactions were assignments rather than credit, RD made it difficult for consumers to understand the transactions or to compare their options. *See* JA 36, 39-41. And by telling consumers that the contracts were valid assignments, when, in fact, they were void under New York law, RD deceived consumers into thinking that these contracts created debts that could be collected lawfully. JA 38, 44. The complaint further alleged that RD claims that it "cuts through red tape" and speeds the payment of consumers' awards when, in fact, it does not do so, JA 36-37, 42, and that in some instances RD did not even deliver the funds it agreed to provide consumers by the date promised, JA 37-38, 43. For each of these counts, the Bureau and New York asserted that Roni Dersovitz knowingly or recklessly provided substantial assistance to RD. JA 40-44. (New York also asserted six state law counts.)

Defendants moved to dismiss on statutory and constitutional grounds. JA 51-52. In a June 21, 2018, Opinion and Order, the district court found that the complaint stated claims against Defendants. The court rejected Defendants' argument that RD was not subject to the CFPA. SA 60. Instead, the court concluded that the complaint properly alleged that RD's purported assignments were invalid, SA 21-45, and that—contrary to what it told consumers—RD extended credit, and was therefore a covered person subject to the CFPA. SA 45-60. The district court further concluded that each of the five counts asserted by the Bureau and New York adequately stated a claim. SA 74-90.[4]

Nonetheless, the district court dismissed the complaint. It concluded that, because the Bureau was headed by a single Director who was removable by the President only for cause, its structure was unconstitutional and it lacked authority to bring this action. SA 107. In reaching this conclusion, the district court rejected the holding of the en banc D.C. Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018). The court instead "adopt[ed] Sections I-IV of Judge Brett Kavanaugh's dissent" in that case. SA 104. The district court disagreed, however, "with Section V

[4] The court concluded that New York properly alleged that Defendants violated state law as well. SA 92-103.

of Judge Kavanaugh's opinion wherein he determined the remedy to be to invalidate and sever the for-cause removal provision and hold that the Director of the CFPB may be supervised, directed, and removed at will by the President," and instead "adopt[ed] Section II of Judge Karen LeCraft Henderson's dissent" in *PHH*, which concluded that the CFPA was invalid "in its entirety." SA 104 (quotation marks omitted).[5]

After further briefing, the court ultimately determined that because the court had concluded that the entire CFPA was invalid, "this remedy invalidates the statutory basis for [New York's] independent litigating authority under the CFPA and its CFPA claims in this case." SA 114. The

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[5] Below, the Bureau argued that the court should not reach Defendants' constitutional argument. At that time, the Bureau was headed by Acting Director Mick Mulvaney. As Acting Director, Mr. Mulvaney was not subject to the challenged for-cause removal provision and was therefore removable by the President at will. Under Acting Director Mulvaney's direction, the Bureau ratified its prior decision to bring this suit. JA 780. The Bureau argued that this ratification cured any constitutional problem with the Bureau's initiation of the case at a time when its Director was removable only for cause. JA 782. The district court rejected the Bureau's argument, reasoning that, despite the ratification, the "relevant provisions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact." SA 106. Because the Bureau is once more led by a Director who is removable only for cause, the Bureau believes that the Court should address Defendants' constitutional claims notwithstanding the ratification of this action under Acting Director Mulvaney's leadership.

district court therefore dismissed the federal and state law[6] claims brought by New York. SA 109. The district court entered final judgment against both the Bureau and New York, and this appeal followed. SA 109, 116, 117, 119, 120, 122.

SUMMARY OF ARGUMENT

When Congress created the Bureau, it specified that the President may remove the Bureau's Director only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). In *Humphrey's Executor v. United States*, the Supreme Court unanimously upheld the constitutionality of identical for-cause removal protection for the commissioners of the Federal Trade Commission. 295 U.S. 602, 619-20, 623 (1935). The question here is whether this same "limited restriction[] on the President's removal power," *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495 (2010), is unconstitutional when applied to the Bureau's Director. Under controlling Supreme Court precedent,[7] the answer is no.

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[6] Because the court declined to exercise supplemental jurisdiction over New York's state law claims, it dismissed those claims without prejudice. SA 109.

[7] The Bureau does not take a position on whether existing Supreme Court precedent was correctly decided, or whether the President has independent authority to determine whether the Bureau's structure is constitutional.

The for-cause removal restriction in the Consumer Financial Protection Act is constitutional because it does not "impede the President's ability to perform his constitutional duty" to take care that the laws are faithfully executed. *Morrison v. Olson*, 487 U.S. 654, 691 (1988). As with other "ordinary for-cause removal restrictions" that the Supreme Court has "consistently upheld," the CFPA's removal restriction preserves for the President "'ample authority to assure' that the [Director] 'is competently performing his or her statutory responsibilities.'" *PHH*, 881 F.3d at 79, 85 (quoting *Morrison*, 487 U.S. at 692). Because the President can remove the Director for cause, he can oversee the Director and hold her accountable, thereby ensuring the faithful execution of the Federal consumer financial laws. *See Free Enterprise*, 561 U.S. at 495-96, 513-14. Congress's decision to head the Bureau with a single Director does not undermine the President's oversight. If anything, the Bureau's single-director structure enhances the President's "ability to execute the laws—by holding his subordinates accountable for their conduct." *Id.* at 495-96.

That is why nearly every court to consider the question has upheld the constitutionality of the Bureau's statutory structure. The district court, however, reached the opposite conclusion. The district court was wrong.

Most significantly, the district court (through its adoption of then-Judge Kavanaugh's dissent in *PHH*) did not properly apply the controlling legal test—whether the removal restriction impedes the President's ability to perform his constitutional duty. The court concluded that the Bureau's single-director structure diminishes the President's power in comparison to "traditional" multi-member agencies because a new President has free reign to designate a member of a multi-member commission to serve as chair. But when the Supreme Court unanimously upheld for-cause protection for FTC commissioners in *Humphrey's Executor*, the President had no power to pick the chair of the FTC. The commission did. So even if the President's power to designate an agency's chair were constitutionally relevant, the FTC's structure at the time of *Humphrey's Executor* would confirm that the Bureau's structure is within constitutional bounds.

The district court (in adopting then-Judge Kavanaugh's dissent) focused instead on an alternative constitutional theory based on "history" and "liberty." Under controlling Supreme Court precedent, this analysis is beside the point. The problem is that the court's analysis depends on the faulty premise that because multi-member independent agencies are not accountable to the President, they are constitutionally permissible only because their multi-member structure serves as a substitute check to safeguard liberty. This analysis is inconsistent with the Supreme Court's decision in *Free Enterprise*. That case makes clear both that the President can hold accountable those officials he can remove for cause and that it is the President who must bear ultimate responsibility for the conduct of executive officials.

Finally, if this Court nevertheless determines that the for-cause removal provision is unconstitutional, it should sever that provision in accordance with the statute's express severability clause. It should not hold that the entire Consumer Financial Protection Act is invalid, as the district court did. In light of the statutory severability provision, concluding that the entire Act is invalid would be permissible only if there were strong evidence that Congress would have preferred no Bureau at all to a Bureau led by an official who is removable at will. No such evidence exists. This Court should therefore remedy any constitutional problem with the for-cause removal provision by holding that provision inoperative and remanding so that the Bureau can continue to pursue this consumer protection action under a Director who is removable at will.

STANDARD OF REVIEW

This Court reviews de novo the grant of a motion to dismiss pursuant to Rule 12(b)(6). *Mantikas v. Kellogg Co.*, 910 F.3d 633, 636 (2d Cir. 2018).

ARGUMENT

I. The Bureau's Structure Is Constitutional Under Controlling Supreme Court Precedent.

As nearly every court to consider the question has held, the Bureau's statutory structure is constitutional under controlling Supreme Court precedent. The district court departed from that precedent when it held the Bureau's structure unconstitutional.[8]

A. The for-cause removal provision in the Bureau's organic statute does not impede the President's ability to perform his constitutional duties.

The test for whether restrictions on the President's removal authority violate the constitutional separation of powers is "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty" to faithfully execute the laws. *Morrison*, 487 U.S. at 691; *see also Free Enterprise*, 561 U.S. at 496-98 (assessing impact of removal restriction on President's ability to ensure that the laws are faithfully executed). Applying this test requires considering both the nature of the removal protections themselves and the functions performed

[8] Because the district court "adopt[ed]" Sections I-IV of Judge Kavanaugh's *PHH* dissent and Section II of Judge Henderson's *PHH* dissent, this brief refers to the analysis in those Sections as the district court's analysis.

by the agency or official so protected. *See Morrison*, 487 U.S. at 690-92; *PHH*, 881 F.3d at 78.

Under controlling Supreme Court precedent, Congress does not impede the President's ability to ensure the faithful execution of the laws when it provides ordinary for-cause removal protection for the head of an agency like the Bureau. In *Humphrey's Executor*, the Court approved for-cause removal protection for FTC commissioners identical to that afforded the Bureau's Director. 295 U.S. at 619-20, 623. As *Morrison* later explained, *Humphrey's Executor* reflected the Court's "judgment" that, in light of the FTC's functions, "it was not essential to the President's proper execution of his Article II powers that [the agency] be headed up by individuals who were removable at will." 487 U.S. at 691. This is because the ability to remove an official for cause gives the President "ample authority to assure that the [official] is competently performing his or her statutory responsibilities." *Id.* at 692. In *Free Enterprise*, the Supreme Court reaffirmed that its approval of the "limited" for-cause removal restrictions in *Humphrey's Executor* and *Morrison* "preserved" the President's "ability to execute the laws—by holding his subordinates accountable for their conduct." *Free Enterprise*, 561 U.S. at 495-96.

Congress gave the President the authority required to assure that the Director of the Bureau is competently performing her statutory responsibilities. The removal restriction in the Bureau's organic statute and the Bureau's functions as a regulator are not materially different from those of the FTC and similar independent agencies. As a result, under binding Supreme Court precedent, the removal restriction here does not impermissibly interfere with the President's ability to meet his Article II responsibilities.

First, the restriction on removal of the Bureau's Director is identical to the limit on the removal of FTC commissioners that the Supreme Court upheld in *Humphrey's Executor*. *Compare* 15 U.S.C. § 41 (1934) ("Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."), *with* 12 U.S.C. § 5491(c)(3) ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office."). As the Supreme Court has recognized, "[t]hese terms are very broad." *Bowsher v. Synar*, 478 U.S. 714, 729 (1986).

Unlike other removal provisions that the Court has found unconstitutional, the CFPA's removal provision gives Congress no role to play in removing the Director. *See id.* at 720 (removal required joint resolution of Congress); *Myers v. United States*, 272 U.S. 52, 107 (1926) (removal required advice and consent of the Senate). And the Bureau's Director is separated from the President by only one layer of for-cause removal protection, unlike the "highly unusual" arrangement struck down by the Court in *Free Enterprise*, where certain officials were separated from the President by two layers of for-cause removal protection. *See Free Enterprise*, 561 U.S. at 502-03, 505. In that case, the Court held it was unconstitutional for officials charged with regulating the accounting industry to be removable only under "a sharply circumscribed definition of what constitutes 'good cause'" and only by SEC commissioners who were themselves removable by the President only for cause. The *Free Enterprise* Court declined, however, "to take issue with for-cause limitations in general," and, indeed, ordered a remedy that left in place the prevailing understanding that SEC commissioners could be removed only for cause. *Id.* at 501, 505, 508-09.

The Bureau's for-cause protection "is therefore unlike any removal restriction that the Court has ever invalidated as impermissibly restricting executive authority. In every case reviewing a congressional decision to afford an agency ordinary for-cause protection, the Court has sustained Congress's decision." *PHH*, 881 F.3d at 93.

Second, while "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role," *Morrison*, 487 U.S. at 690, the Bureau's Director is not such an official, *see PHH*, 881 F.3d at 80, 84 (holding that "[w]ide margins separate the validity of an independent CFPB from any unconstitutional effort to attenuate presidential control over core executive functions," like "those entrusted to a Secretary of State or other Cabinet officer").

Rather, the Director leads a financial regulatory agency entrusted with the sort of oversight, enforcement, and regulatory duties that the Supreme Court has long recognized as appropriate for independent regulators. *See, e.g.*, *Morrison*, 487 U.S. at 692 n.31 (explaining that "various federal agencies whose officers are covered by 'good cause' removal restrictions exercise civil enforcement powers" and citing the FTC and the Consumer Product Safety Commission as examples); *id.* at 724-25 (Scalia, J., dissenting) (noting that "removal restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies,'" including the FTC and the Interstate Commerce Commission, "which engage substantially" in rulemaking); *Free Enterprise*, 561 U.S. at 508-09 (holding that Public Company Accounting Oversight Board—even with its authority to conduct inspections, issue rules, and seek penalties—

could be separated from the President by a "single level of good-cause tenure").

Moreover, as the en banc D.C. Circuit explained, the Bureau's "function is remarkably similar to that of the FTC, a consumer protection agency that has operated for more than a century with the identical for-cause protection, approved by a unanimous Supreme Court." *PHH*, 881 F.3d at 94. Like the FTC, the Bureau is a regulator with a mandate to oversee numerous consumer protection laws. *Compare* 12 U.S.C. §§ 5511, 5481(14) (tasking the Bureau to implement and enforce its organic statute and rules issued thereunder as well as eighteen enumerated consumer laws, some of which the FTC also enforces), *with* 15 U.S.C. § 45 (authorizing the FTC to prevent unfair and deceptive practices in or affecting commerce), *and* FTC.gov, *Statutes Enforced or Administered by the Commission* (listing more than 70 laws the FTC plays a role in enforcing or administering), www.ftc.gov/enforcement/statutes. Like the FTC, the Bureau may define and prevent "unfair" and "deceptive" acts or practices. But the Bureau enforces the prohibition on such practices—as well as its related authority over "abusive" acts or practices—only against "covered persons" or "service providers" that engage in those practices in connection with consumer financial products and services, while the FTC exercises its unfairness and deception authority over virtually the entire economy. *Compare* 12 U.S.C. § 5531 (Bureau), *with* 15 U.S.C. § 45 (FTC).

The FTC pursues its statutory mandate by issuing rules, 15 U.S.C. §§ 57a, 57b-3; conducting administrative enforcement proceedings, *id.* § 45(b); filing suit in federal court, *id.* § 53; seeking civil penalties, *id.* § 45(l)-(m); and gathering and publishing information about commercial practices, *id.* § 46(f). So does the Bureau. *See* 12 U.S.C. § 5512 (rulemaking), § 5563 (administrative proceedings), § 5564 (suits in federal court), § 5565(c) (civil penalties), § 5512(c) (information gathering and publication). Some provisions in the Bureau's organic statute even track the FTC Act verbatim. *Compare* 12 U.S.C. § 5562(c) (authorizing the Bureau to issue administrative subpoenas in aid of its investigations), *with* 15 U.S.C. § 57b-1 (same for FTC).

In short, the Bureau's Director is subject to the same statutory protection that Congress has traditionally granted to the heads of independent agencies and that the Supreme Court approved for the FTC in *Humphrey's Executor*. And the Bureau's functions as a financial regulator are materially similar to those of the FTC and other agencies that the Supreme Court has held may be granted limited independence without impermissibly burdening the President's Article II powers. *See Free*

Enterprise, 561 U.S. at 496; *Humphrey's Executor*, 295 U.S. at 628-29. Controlling precedent compels the conclusion that the Bureau's statutory structure is constitutional, as nearly every court to consider the question has held.[9]

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[9] In addition to the en banc D.C. Circuit's decision in *PHH*, ten decisions addressing the constitutionality of the Bureau's for-cause removal provision have upheld the provision, while only two (including the decision on appeal) have held the provision invalid. *Compare*

- *CFPB v. Think Finance, LLC*, No. 17-cv-127, 2018 WL 3707911 (D. Mont. Aug. 3, 2018) (upholding the constitutionality of the Bureau);
- *CFPB v. All American Check Cashing, Inc.*, No. 3:16-cv-356 (S.D. Miss. March 21, 2018) (same), *interlocutory appeal granted*, No. 18-60302 (5th Cir. Apr. 24, 2018);
- *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-2106, 2017 WL 3948396 (N.D. Cal. Sept. 8, 2017) (same), *appeal docketed*, No. 18-15431 (9th Cir. Mar. 15, 2018);
- *CFPB v. TCF Nat'l Bank*, No. 17-cv-00166, 2017 WL 6211033 (D. Minn. Sept. 8, 2017) (same);
- *CFPB v. Seila Law, LLC*, No. 8:17-cv-01081, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017) (same), *stayed pending appeal*, No. 17-56324 (9th Cir. Sept. 13, 2017);
- *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017) (same);
- *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961 (C.D. Cal. 2017) (same), *appeal dismissed as moot*, No. 17-55721 (9th Cir. Oct. 18, 2018);
- *CFPB v. CashCall, Inc.*, No. 2:15-cv-7522, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (same), *appeal docketed*, No. 18-55479 (9th Cir. Apr. 12, 2018);
- *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015) (same); *and*

B. The Bureau's single-director structure does not impede the President's ability to perform his constitutional duties.

Congress's decision that the Bureau be headed by a single person instead of a group does not change the fact that the Director's for-cause protection is constitutional under the controlling legal test. If anything, Congress's decision to head the Bureau with a single Director rather than a commission serves to *increase* the President's "ability to execute the laws—by holding his subordinates accountable for their conduct," *Free Enterprise*, 561 U.S. at 496. As a result, the "constitutional distinction" in the district court's opinion "between the CFPB's leadership structure and that of multi-member independent agencies is untenable" under Supreme Court precedent. *PHH*, 881 F.3d at 79.

1. "Fundamentally, Congress's choice—whether an agency should be led by an individual or a group—is not constitutionally scripted and has not played any role in the Court's removal-power doctrine." *PHH*, 881 F.3d at 97. *Morrison*, for example, upheld for-cause protection for the independent

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- *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014) (same);

with

- *CFPB v. D&D Mktg.*, No. 2:15-cv-09692, 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016) (Bureau's structure is unconstitutional), *interlocutory appeal granted*, No. 17-55709 (9th Cir. May 17, 2017)).

counsel, a single official with significant powers to prosecute "high-ranking Government officials for violations of federal criminal laws." 487 U.S. at 660. Nowhere did the *Morrison* Court—or even the dissent—suggest that the fact that the independent counsel's office was run by one person instead of a group had any relevance to the constitutional analysis. *See, e.g.*, *PHH*, 881 F.3d at 113 (Tatel, J., concurring) ("[T]o uphold the constitutionality of the Bureau's structure we need scarcely go further than *Morrison* itself, which approved a powerful independent entity headed by a single official and along the way expressly compared that office's 'prosecutorial powers' to the 'civil enforcement powers' long wielded by the FTC and other independent agencies." (quoting *Morrison*, 487 U.S. at 692 n.31)).[10] Nor did *Humphrey's Executor* mention the FTC's multi-member structure in assessing the constitutionality of its for-cause removal provision, or suggest that this structure mattered. 295 U.S. at 626-32. If the Court in

[10] The district court sought to distinguish the analysis in *Morrison* on the basis that the independent counsel was an "inferior officer" while the Director of the Bureau is a principal officer. *PHH*, 881 F.3d at 195 (Kavanaugh, J., dissenting). But that distinction is a red herring—whether a removal restriction is constitutional turns on whether it "interferes with the President's constitutional duty and prerogative to oversee the executive branch and take care that the laws are faithfully executed" *PHH*, 881 F.3d at 96 n.2 (en banc). "The degree of removal constraint effected by a single layer of for-cause removal protection is the same whether that protection shields a principal or inferior officer." *Id.*

Humphrey's Executor—or any case after it—believed that the number of officials who lead an agency makes a difference to the constitutionality of removal limitations, the Court would surely have said so. Indeed, it would have been a natural way for *Humphrey's Executor* to distinguish the Court's earlier decision in *Myers*, which disapproved removal protection for a (single) postmaster.

The Supreme Court's analysis in *Free Enterprise* confirms that the number of officials that lead an agency is irrelevant to the constitutionality of a removal restriction. Instead, what matters is whether the President retains the ability to see that the laws are faithfully executed by holding his subordinates accountable for their conduct. *Free Enterprise*, 561 U.S. at 496. *Free Enterprise* involved removal restrictions applicable to the Public Company Accounting Oversight Board, which the Court described as "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy." *Id.* at 508. The removal restrictions in that case shielded members of the Board from the President with two layers of for-cause removal protection. Board members could be removed only by a formal order of the SEC upon a finding of "a sharply circumscribed definition of what constitutes 'good cause,'" *PHH*, 881 F.3d at 89, and SEC commissioners, it was assumed, could be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The Supreme Court held this arrangement unconstitutional because it "impaired" the President's "ability to execute the laws—by holding his subordinates accountable for their conduct." *Free Enterprise*, 561 U.S. at 496. With two layers of for-cause protection (as opposed to just one), the President lacked "the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee [*i.e.*, the SEC commissioners]." *Id.* "The result is a Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.* at 495.

The Court solved this problem by severing one layer of for-cause protection (the one that limited the SEC's ability to remove Board members) and retaining the other (the one that limited the President's ability to remove SEC commissioners). *Id.* at 509. Although the petitioners in that case sought broader relief, the Court held that severing one of the two layers of for-cause protection was "sufficient to ensure that the reporting requirements and auditing standards to which [the petitioners] are subject w[ould] be enforced only by a constitutional agency accountable to the Executive." *Id.* at 513. The Court's remedy ensured that the SEC "would be fully responsible for what the Board does," and that the President could "hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything it does." *Id.* at 495-96; *see also id.* at 509.

Because the Bureau's Director is as at least as accountable to the President as are FTC or SEC commissioners, the Bureau's single-director structure is constitutional under controlling law. In contrast to a multi-member body, where responsibility is more diffuse, "the CFPB Director's line of accountability to the President is clear and direct." *PHH*, 881 F.3d at 98. "[I]f the President finds consumer protection enforcement to be lacking or unlawful, he knows exactly where to turn," and he need only replace a single official to change the direction of the agency rather than undertake the more difficult task of effectuating multiple for-cause removals. *Id.* "What is more, in choosing a replacement, the President is unhampered by partisan balance or *ex-officio* requirements; the successor replaces the agency's leadership wholesale." *Id.* at 93.

2. The district court, through its adoption of Parts I-IV of then-Judge Kavanaugh's dissent in *PHH*, nevertheless concluded that the Bureau's single-director structure "diminishes the President's power to influence the direction of the CFPB, as compared to the President's power to influence the direction of traditional multi-member agencies." *PHH*, 881 F.3d at 188

(Kavanaugh, J., dissenting).[11] According to the district court, this is because at "traditional multi-member agencies, the President may designate the chair of the agency, and the President may remove a chair at will from the chair position." *Id.* This argument is mistaken.

The Supreme Court has never suggested that the "existence, strength, or particular term of agency chairs" is "relevant to the constitutionality of an independent agency." *PHH*, 881 F.3d at 100 (en banc). When the Supreme Court unanimously upheld for-cause removal protection for FTC commissioners, the *Commission*, not the President, chose the agency's chair. *See Humphrey's Executor*, 295 U.S. at 620 ("The commission shall choose a chairman from its own membership" (quoting 15 U.S.C. § 41 (1934)). Congress did not give the President power to designate the FTC's chair until 1950. *See* Reorg. Plan No. 8 of 1950, § 3, 64 Stat. 1264, 1265. So the power to designate and remove chairs at will cannot support the district court's conclusion that the for-cause removal restriction that applies to the

[11] The district court did not (and could not) conclude that giving the Bureau's Director for-cause removal protection makes the Director less *accountable* to the President than the leaders of multi-member agencies like the FTC, SEC, or Federal Reserve Board. As explained above, the touchstone of the Supreme Court's removal precedent is the President's power to oversee officials and hold them to account for their conduct in executing the laws, not the President's power to attempt to "influence" the agency's direction through appointments.

Bureau's Director diminishes the President's power any more than the identical restriction the Supreme Court approved for FTC commissioners in *Humphrey's Executor*.

The district court's chair theory not only conflicts with *Humphrey's Executor*, but also with longstanding practice. Congress has restricted the President's ability to designate the chair at other independent agencies, such as the Federal Reserve Board, 12 U.S.C. § 242 (chair serves a fixed four-year term and may be selected only with the advice and consent of the Senate), and the Federal Election Commission, 52 U.S.C. § 30106(a)(5) (chair rotates among members annually, without formal presidential input), among others.[12]

The district court's reference to the staggered terms at multi-member agencies fares no better. *See PHH*, 881 F.3d at 190 (Kavanaugh, J., dissenting). While it is true that, because the Director is appointed to a five-year term, a Director appointed by one president might serve through the term of another, "[n]one of the leaders of independent financial-regulatory

[12] The President's power to designate the chair is similarly restricted at the National Mediation Board, 45 U.S.C. § 154 (chair designated annually by the Board), and the United States Postal Service Board of Governors, 39 U.S.C. § 202(a)(1) (chair elected by the Governors). And while the President currently has the power to designate the chair of the SEC, the President did not have power until 1950. *See* 15 U.S.C. § 78d note.

agencies serves a term that perfectly coincides with that of the President, and many have longer terms than the CFPB Director." *PHH*, 881 F.3d at 99 (en banc). Indeed, because the five FTC commissioners serve staggered terms of seven years, 15 U.S.C. § 41, the President is more likely to have an opportunity to appoint the Bureau's Director in a single term than he is to appoint a controlling majority of the FTC, *see CFPB v. Navient*, 2017 WL 3380530, at *17 (80% of the time the President will have an opportunity to appoint the Bureau's Director, but only 57% of the time will the President be guaranteed an opportunity to appoint a controlling majority of the FTC). And because the seven members of the Federal Reserve Board serve staggered fourteen-year terms, 12 U.S.C. § 242, the President will *never* have the chance to appoint a majority in a single term if Board members serve their full terms in office.[13]

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[13] The district court also suggested that "Congress's ability to check the CFPB is less than its ability to check traditional independent agencies," because the Bureau is not funded through the annual appropriations process. *PHH*, 881 F.3d at 197 n.19 (Kavanaugh, J., dissenting). But Congress is not required to fund agencies through that process. *See PHH*, 881 F.3d at 95-96 (en banc). And, in fact, Congress has long funded financial regulators, including some "traditional" independent agencies, outside the annual appropriations process. *See, e.g.*, 12 U.S.C. § 243 (Federal Reserve Board); §§ 1815(d), 1820(e) (FDIC). Because Congress authorized the Bureau's funding by law, and can change that funding at any time by enacting a new law, the Bureau's funding does not present a constitutional concern.

C. The district court's analysis of history and liberty conflicts with Supreme Court precedent.

The district court, through its adoption of Parts I-IV of then-Judge Kavanaugh's dissent, held in the alternative that even if the for-cause removal provision satisfied the test for removal provisions that the Supreme Court set forth in *Morrison* and *Free Enterprise*, the provision would still be unconstitutional because Congress lacks "permission to create independent agencies that depart from history and threaten individual liberty." *PHH*, 881 F.3d at 195 (Kavanaugh, J., dissenting). But under binding Supreme Court precedent, there is no alternative constitutional test for removal provisions. So this Court need not address the district court's alternative assessment of history and liberty. *PHH*, 881 F.3d at 105-06 (en banc) ("Once the Supreme Court is satisfied that a removal restriction leaves the President adequate control of the executive branch's functions, the Court does not separately attempt to re-measure the provision's potential effect on liberty or any other separation-of-powers objective.").

In any event, as the en banc D.C. Circuit explained, the district court's history and liberty theory "lacks grounding in precedent or principle." *PHH*, 881 F.3d at 108. According to the district court, independent agencies "historically have been headed by *multiple* commissioners or board members," which "mitigate[s] the risk to individual liberty." *PHH*, 881 F.3d at 165 (Kavanaugh, J., dissenting). The district court posited that even though independent agencies are "not accountable to or checked by the President," they are constitutional so long as there are multiple members who are "accountable to and checked by" one another. *Id.*

This Court should reject the district court's alternative constitutional theory. First, the district court's theory that members of a commission provide a "substitute check" in the place of Presidential oversight is inconsistent with the Supreme Court's decisions in *Free Enterprise* and *Morrison*. Those cases make clear that the *President* is ultimately responsible for overseeing the faithful execution of the laws, and that the power to remove an official for cause (either directly or through subordinates he can remove at will) preserves the President's ability to meet that responsibility. *Free Enterprise*, 561 U.S. at 495-97; *Morrison*, 487 U.S. at 692. Second, the history cited by the district court is entirely consistent with the Supreme Court's existing removal case law; it provides no basis for this Court to develop an alternative constitutional test to assess the familiar for-cause removal protection that Congress gave the Bureau's Director.

1. Liberty

Under the theory the district court adopted: (1) for-cause removal protection prevents the President from controlling independent agencies; (2) a multi-member structure "serves as a critical substitute check on the excesses of any individual independent agency head"; and (3) because the Bureau's powers are vested in a single Director rather than in a multi-member commission, it lacks a "substitute check," which threatens individual liberty. *PHH*, 881 F.3d at 183 (Kavanaugh, J., dissenting); *see also id.* at 166. The district court is mistaken on all three fronts. *See PHH*, 881 F.3d at 80 (en banc) ("The relevance of 'internal checks' as a substitute for at-will removal by the President is no part of the removal-power doctrine, which focuses on executive control and accountability to the public, not the competing virtues of various internal agency design choices.").

First, as discussed above, *Humphrey's Executor*, *Morrison*, and *Free Enterprise* establish that the power to remove officials for cause provides the President ample authority to control independent agencies.

Second, if the President's power to remove an official for cause did not give the President sufficient authority to control independent agencies, no "substitute check" could cure that constitutional problem. The

Constitution charges the *President*, not the members of a multi-member agency, with the duty to take care that the laws be faithfully executed. And the Constitution makes the *President*, not the members of a multi-member agency, accountable to the people. *See Free Enterprise*, 561 U.S. at 497-98 ("The people do not vote for the 'Officers of the United States.'" (quoting U.S. Const. Art. II, § 2, cl. 2)). So when it comes to supervising executive officers in our system of separated powers, "[o]nly Presidential oversight" suffices. *Id.* at 500.

Third, that the Bureau lacks a multi-member structure (and the "substitute check" that such a structure ostensibly provides) does not threaten individual liberty under the separation of powers. If anything, the Bureau's single-director structure enhances the President's ability to oversee the Bureau's Director and hold her accountable. Because it subjects the Director's exercise of "executive power" to "the Executive's oversight," the CFPA's removal provision preserves both "the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Id.* at 498. Under the Constitution, it is this "structural protection[] against abuse of power" that "preserv[es] liberty"—not the alleged benefits derived from group decision-making by "*unelected* officials." *Id.* at 500, 501 (quotation marks omitted).

Nor does the exercise of "unilateral" power by the Bureau's Director, pose a threat to liberty. *See, e.g.*, *PHH*, 881 F.3d at 165-66, 171-72, 188 (Kavanaugh, J., dissenting). According to the district court, the Director has more "unilateral" power than any government official save the President. *See id.* at 166, 171-72. This claim rests on an assessment that the President cannot "check" the Bureau's Director, but controlling Supreme Court precedent makes clear that the President's power to remove the Director for cause gives the President "ample authority" to oversee the Director's exercise of her statutory responsibilities and to hold her accountable. *Morrison*, 487 U.S. at 692; *see also Free Enterprise*, 561 U.S. at 508-09, 513 (holding one level of for-cause protection left agency "accountable to the Executive"). In other words, controlling precedent establishes that the President's for-cause removal power gives him a constitutionally sufficient check over the Bureau's Director. As a result, the concentration of power in the Bureau's Director only makes her more accountable to the President than would be the case for a multi-member commission. *See Free Enterprise*, 561 U.S. at 497 ("The diffusion of power carries with it a diffusion of accountability.").

2. History

The district court contended—in reliance on *Free Enterprise*'s similar assessment of the Public Company Accounting Oversight Board—that "[p]erhaps the most telling indication of a severe constitutional problem with the CFPB is the lack of historical precedent for this entity." *PHH*, 881 F.3d at 166 (Kavanaugh, J., dissenting); *see also id.* at 183. But *Free Enterprise* does not support the creation of an alternative constitutional test to account for the Bureau's alleged novelty. Indeed, *Free Enterprise* discussed the lack of historical precedent for an agency led by officials protected by two layers of for-cause removal restrictions only in response to the government's argument that the removal protections at issue in that case were in fact consistent with "the past practice of Congress," 561 U.S. at 505, and only after applying the legal test set out in *Morrison*. *Free Enterprise* confirms that the separation of powers test that *Morrison* announced (and *Free Enterprise* applied) controls here—not any general rule against novelty.

And the Bureau's single-director structure is not even particularly anomalous. There are currently at least three other federal agencies led by such officials: the Office of Special Counsel (since 1978), 5 U.S.C. § 1211; the Social Security Administration (since 1994), 42 U.S.C. § 902(a); and the

Federal Housing Finance Agency (since 2008), 12 U.S.C. § 4512.[14] These agencies "perform important and far-reaching functions that are ordinarily characterized as executive." *PHH*, 881 F.3d at 104 (en banc). Most notably, "[t]he Social Security Administration runs one of the largest programs in the federal government … handling millions of claims and trillions of dollars." *Id.* at 104-05. And contrary to the suggestion that the Social Security Administration's function of administering the Social Security Act is outside "the core of the executive power," *see PHH*, 881 F.3d at 174-75 (Kavanaugh, J., dissenting), the Supreme Court has made clear that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law," *Bowsher*, 478 U.S. at 733.

In any event, that Congress has often chosen to create independent agencies with multiple members does not prove that those are the only kinds of independent agencies Congress may establish. This is because

[14] In addition, for more than 150 years the Office of the Comptroller of the Currency has been led by a single official with a fixed term of office who is removable only if the President sends the Senate "reasons" for removing him. 12 U.S.C. § 2. The OCC is classified as an "independent regulatory agency" under 44 U.S.C. § 3502(5) and while it is a part of the Treasury Department, the Secretary of the Treasury is prohibited from interfering with certain OCC functions, 12 U.S.C. § 1. *See also PHH*, 881 F.3d at 91-92 (analyzing the OCC).

"[o]ur constitutional principles of separated powers are not violated … by mere anomaly or innovation." *Mistretta v. United States*, 488 U.S. 361, 385 (1989); *accord PHH*, 881 F.3d at 103 ("Other constitutional principles beyond novelty must establish why a specific regime is problematic."). Indeed, in both *Humphrey's Executor* and *Morrison*, the Court upheld then-novel forms of removal restriction that it had not previously considered.

Moreover, contrary to the district court's suggestion, the constitutional holding in *Humphrey's Executor* was not implicitly based on Congress's intention for the FTC to be "nonpartisan" and "to exercise the trained judgment of a body of experts appointed by law and informed by experience." *PHH*, 881 F.3d at 170 (Kavanaugh, J., dissenting); *see also id.* at 194 ("*Humphrey's Executor* drew (at least implicitly) the same distinction between multi-member agencies and single-Director agencies that I am drawing in this case."). The district court's assessment leaves out that the Court made its observations about the FTC as a "body of experts" only in its *statutory* analysis, which asked whether the removal provision of the FTC Act—a provision that had not previously been interpreted—was intended "to limit the executive power of removal to the causes enumerated [therein]." *Humphrey's Executor*, 295 U.S. at 624, 626.

The *Humphrey's Executor* Court did not rely on the FTC's multi-member structure at all in its constitutional analysis. *Id.* at 626-31; *see also PHH*, 881 F.3d at 98-99. Instead, the Court's constitutional analysis focused on the FTC's functions and responsibilities, not the number of officers charged with leading the agency. While the Court in *Humphrey's Executor* did refer to the FTC as an "administrative body" in its constitutional analysis, the Court's use of that term provides no support for the district court's theory that the Court was implicitly endorsing a constitutional distinction based on whether an agency is led by one as opposed to multiple officers. For instance, in another case decided the same year as *Humphrey's Executor*, the Supreme Court repeatedly referred to the Oregon Department of Agriculture as an "administrative body" even though it was led by a single "Director of Agriculture." *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 178, 182, 185-86 (1935); *see also Gray v. Powell*, 314 U.S. 402, 404, 412 (1941) (referring to the single-director Bituminous Coal Division within the Department of Interior as an "administrative body").

II. Any Constitutional Defect with the For-Cause Removal Provision Would Be Remedied by Severance and Remand.

If this Court concludes that the for-cause removal provision is unconstitutional, it should sever that provision, consistent with the Dodd-

Frank Act's severability provision and the Supreme Court's decision in *Free Enterprise*. The Court should then remand this action to the district court to permit the Bureau to continue this action under the leadership of a Director who is removable by the President at will.

1. As the Supreme Court explained in *Free Enterprise*, "[b]ecause the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial, rather than facial, invalidation is the required course." 561 U.S. at 508 (citations, quotation marks, and alterations omitted). In *Free Enterprise*, the Supreme Court applied this rule to reject a request to enjoin the continued operations of the Public Company Accounting Oversight Board. The Court reasoned that although the statutory removal restrictions were unconstitutional, "the existence of the Board does not violate the separation of powers." *Id*. at 508-09. So the Court "limit[ed] the solution to the problem," and held the removal restrictions were invalid but left the rest of the Board's organic statute intact. *See id*. at 508-09, 513 (quotation marks omitted).

This principle of restraint applies with even greater force in this case. Unlike the statute in *Free Enterprise,* Congress expressly provided in the Dodd-Frank Act (of which the CFPA is one part) that "if any provision of this Act … is held to be unconstitutional," the rest of the Act "shall not be affected thereby." 12 U.S.C. § 5302. Congress's decision to include this severability clause "creates a presumption that Congress did not intend the validity of the statute … to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). To overcome this presumption, there must be "strong evidence" that Congress would have preferred no Bureau at all to a Bureau led by an official who is removable at will.[15] *See id.*

There is no evidence, let alone strong evidence, that Congress would have preferred that the Bureau, let alone the CFPA as a whole, not exist. *See PHH*, 881 F.3d at 198-200 (Kavanaugh, J., dissenting) (opining that "the Supreme Court's case law requires us to impose the narrower remedy of simply severing the for-cause removal provision"). Instead, the legislative record makes plain that invalidating the entire CFPA would not vindicate Congress's intent, but defeat it. Congress's primary goal in creating the Bureau was to consolidate the administration and enforcement of Federal consumer financial law in a single agency with a dedicated consumer

[15] Although the district court doubted that the CFPA's severability clause means what it says, the court appears to have conceded that the clause created a presumption of severability that can only be rebutted by strong evidence. *See PHH*, 881 F.3d at 163 (Henderson, J., dissenting).

protection mission. *See* 12 U.S.C. §§ 5491(a), 5511(a)-(b); S. Rep. No. 111-176, at 10-11. Before the Bureau was created, the administration of those laws was spread among seven different federal regulators—many with the mission of ensuring the safety and soundness of regulated institutions, a mission that potentially conflicts with the goals of the Federal consumer financial laws. *See* S. Rep. No. 111-176, at 10. This meant that different actors in the same consumer financial marketplace were subject to differing levels of oversight and accountability. Many in Congress believed that this system of "conflicting regulatory missions, fragmentation, and regulatory arbitrage" had catastrophic consequences: It "helped bring the financial system down." *Id.* at 10, 166.

In response, Congress created the Bureau as a stand-alone agency to focus exclusively on consumer protection. Congress directed the Bureau to use its consolidated authority to enforce the law "consistently" across the consumer financial marketplace so that consumers have access to markets that are fair, transparent, and competitive. 12 U.S.C. § 5511(a), (b)(3). The CFPA also gave the Bureau new powers to supervise nonbanks, to stop abusive acts and practices, and to issue rules governing mortgages and debt collection (among other topics). *See, e.g.*, 12 U.S.C. § 5514 (nonbank supervision), § 5531 (abusive practices); 15 U.S.C. § 1604 (integrated mortgage disclosure rule), § 1692*l*(d) (debt collection rules).

Congress delegated these powers to the Bureau without regard to whether the Bureau was headed by a Senate-confirmed Director removable only for cause, an Acting Director removable at will, or a Senate-confirmed Director who has held over past the end of her term under 12 U.S.C. § 5491(c)(2), and is therefore removable at will, *see Swan v. Clinton*, 100 F.3d 973, 988 (D.C. Cir. 1996) (concluding that holdover members of the Board of the National Credit Union Administration would not have removal protection, even if they would have such protection during their terms).

Nevertheless, the district court, through its adoption of Part II of Judge Henderson's *PHH* dissent, held that the for-cause removal provision could not be severed from the rest of the CFPA. The district court speculated that the CFPA would have been too "controversial" to pass the 111th Congress if the Bureau's Director could be removed by the President at will. *PHH*, 881 F.3d at 163 (Henderson, J., dissenting).

As evidence for this contention, the district court relied first on the fact that at the beginning of the CFPA, Congress "established" the Bureau as "an independent bureau." *Id.* at 161 (quoting 12 U.S.C. § 5491(a)). According to the district court, because independent agencies are commonly understood as ones run by principal officers who are removable only for cause, "section 5491(a) ties the CFPB's very existence to its freedom from the President" and therefore presents "powerful evidence the Congress opposed the idea of a CFPB answerable to him." *Id.*

But section 5491(a) says nothing about for-cause removal. Instead, it "establishe[s] in the Federal Reserve System, an independent bureau … which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). In this context, Congress's reference to the Bureau as an "independent bureau" is better understood as describing the Bureau's place within the Federal Reserve System, and not as an overarching statement about for-cause removal.[16] At a minimum, this is not "strong evidence" sufficient to overcome the statute's express severability clause.

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[16] For instance, this Court and others have referred to the IRS's Office of Appeals as an "independent bureau of the IRS," *Larson v. United States*, 888 F.3d 578, 586 (2d Cir. 2018) (quoting *Our Country Home Enters., Inc. v. Comm'r of Internal Revenue*, 855 F.3d 773, 789 (7th Cir. 2017)), in recognition of the "measure of independence between Appeals and other arms of the IRS," *Tucker v. Comm'r of Internal Revenue*, 676 F.3d 1129, 1131 (D.C. Cir. 2012). And courts have often referred to the OCC—whose head the district court elsewhere concluded did not have for-cause protection, *see PHH*, 881 F.3d at 177 n.4 (Kavanaugh, J., dissenting)—as an independent bureau in the Treasury Department, *see, e.g.*, *In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d 772, 775 n.1 (4th Cir. 2012) ("OCC is

What is more, section 5491(c)(3) specifies that the President can remove the Bureau's Director only for cause, but does not grant such protection to an Acting Director or to a Director who holds over after the expiration of her term. So section 5491 as a whole contradicts the district court's conclusion that Congress tied the Bureau's "very existence" to the application of the for-cause provision.

The district court likewise erred in relying on evidence that, at most, showed that Congress wanted the Bureau's Director to have for-cause removal protection. For instance, the district court pointed to evidence that the CFPA's supporters believed that protecting the Bureau's Director from at-will removal was a valuable feature of the statute. *PHH*, 881 F.3d at 162. There is no dispute that Congress wanted the Bureau's Director to have for-cause protection—that's why Congress included a for-cause removal provision. The real question is whether there is strong evidence that Congress would rather have the Bureau not exist than have it led by a

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an independent bureau of the U.S. Department of the Treasury ...."); *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. FDIC*, 132 F. Supp. 3d 98, 106 (D.D.C. 2015) ("Defendant OCC is an independent Bureau within the U.S. Department of the Treasury ...."). Congress likewise established the Office of Personnel Management and Peace Corps as "independent" establishments without giving their Directors for-cause removal protection. 5 U.S.C. § 1101 (OPM); 22 U.S.C. § 2501-1 (Peace Corps).

Director who is removable at will. And on that score, even the legislative history that the district court cited shows that the CFPA's supporters were focused less on establishing for-cause removal protection for the Director (after all, many of the existing consumer financial regulators were independent in this sense),[17] and more on ensuring that the Bureau would be independent from other institutional missions besides consumer protection.[18] Similarly, the district court emphasized that the CFPA's "strongest backers" had filed briefs in *PHH* highlighting the importance of

[17] The district court thought that because independent agencies had previously exercised some of the Bureau's authorities, Congress would have opposed severance of the for-cause removal provision on the grounds that severance "would by judicial decree transfer to the executive branch" powers previously exercised by independent agencies. *PHH*, 881 F.3d at 161-62 (Henderson, J., dissenting). The district court did not explain, however, why Congress would have preferred that the court invalidate the entire CFPA by "judicial decree" rather than simply sever the for-cause removal provision.

[18] *See, e.g.*, 156 Cong. Rec. H5239 (Rep. Maloney) (explaining Bureau would have "an independently appointed director, an independent budget, and an autonomous rulemaking authority"—which would mean consumers "will have a Federal agency on their side to protect them"—in contrast to the prior regime, where "any concerns about consumer protection came in a distant second or a third"); *id.* at S3187 (Sen. Kaufman) ("Most importantly, the head of this agency must not be subject to the authority of any regulator responsible for the 'safety and soundness' of the financial institutions."); *id.* at S7481 (Sen. Dodd) ("[B]y setting up this agency in the Federal Reserve, we are giving them independent rulemaking authority, appointed by the President, confirmed by the Senate … so we don't end up with a conflict between … safety and soundness … and the consumer protection issues.").

for-cause removal protection to the Bureau's achievement of its statutory mission. *PHH*, 881 F.3d at 162 (Henderson, J., dissenting). But these briefs, filed by consumer groups, current and former members of Congress (including Senator Warren, former Senator Dodd, and former Congressman Frank), and separation-of-powers scholars argued that for-cause protection is constitutional; they did not argue that they would have preferred no Bureau to one led by a Director who is removable at will. Indeed, the members of Congress emphasized in their brief that "the creation of the CFPB" as an "agency with the sole responsibility of protecting consumers from harmful practices of the financial services industry" was "[c]ritical to the Act's legislative plan." Brief Amici Curiae of Current and Former Members of Congress in Support of Respondent at 12, *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) (No. 15-1177), 2017 WL 1196117.[19]

Moreover, the district court's speculation that Congress would not have passed the CFPA without for-cause removal protection for the

---

[19] In any event, statements made by the CFPA's supporters (many of whom are not even members of Congress) years after the law was enacted provide limited insight into the intent of the Congress that enacted the CFPA. *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010) (determining that post-enactment letter by statute's primary sponsors "does not qualify as legislative 'history'" and was "consequently of scant or no value" in interpreting statutory provision).

Bureau's Director is belied by the fact that the CFPA does more than just create the Bureau. The CFPA also empowers states to enforce its provisions, 12 U.S.C. § 5552(a), as happened in this case. The district court gave no reason to think that if the Bureau's Director were removable at will, Congress would not have wanted state enforcement of the CFPA. So too with respect to the many provisions of the CFPA that only concern other federal regulators. *See, e.g.*, Pub. L. No. 111-203, § 1044 (codified at 12 U.S.C. § 25b) (setting standards for OCC preemption determinations); *id.* § 1075 (codified at 15 U.S.C. § 1693*o*-2) (authorizing FRB to issue rules concerning interchange fees for debit card transactions); *id.* § 1079A(b) (codified at 18 U.S.C. § 3301) (extending statute of limitations for securities fraud offenses).

In sum, the district court failed to identify evidence, let alone strong evidence, that Congress would have preferred that there be no Bureau (and no CFPA more broadly) than have the Bureau led by a Director who is removable at will. If this Court finds a constitutional problem with the CFPA, the proper course would be to "invalidate the smallest possible portion of the statute," not to hold that the entire statute is invalid. *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 772-73 (2d Cir. 1999), *aff'd on other grounds*, 531 U.S. 533 (2001); *see also Red Earth LLC v. United*

States, 657 F.3d 138, 145 (2d Cir. 2011) ("The Supreme Court has instructed courts to refrain from invalidating more of the statute than is necessary." (quotation marks omitted)). So if the for-cause removal provision is unconstitutional, this Court should follow the CFPA's express severability provision and sever that provision.[20]

2. With the for-cause removal provision severed, the Bureau would continue to administer and enforce the consumer laws. *See PHH*, 881 F.3d at 199-200 (Kavanaugh, J., dissenting); *see also Free Enterprise*, 561 U.S. at 508-09, 513. Therefore, if this Court concludes that the removal provision is unconstitutional, it should declare that provision inoperative and remand this case to the district court to permit a reconstituted Bureau to continue to pursue this action. *Cf. Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (remanding for a "new 'hearing before a properly appointed' official"

[20] Depending on the nature of any constitutional flaw that the Court identifies with the for-cause removal provision, the Court may apply a narrower remedy still. For instance, if the Court found the for-cause removal provision unconstitutional on the theory that it limits a new President's influence over a Director appointed by a prior President, *see, e.g.*, *PHH*, 881 F.3d at 166-67, 192-93 (Kavanaugh, J., dissenting), the Court should, consistent with the severability clause, find this application of the for-cause removal provision unconstitutional "while leaving other applications in force." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006); *accord* 12 U.S.C. § 5302 (providing that if any "application" of the Act's provisions "to any person or circumstance is held to be unconstitutional, the remainder of this Act … and the application of the provisions of such to any person or circumstance shall not be affected").

(quoting *Ryder v. United States*, 515 U.S. 177, 188 (1995))); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) (holding that ratification by a reconstituted agency cured constitutional defect resulting from agency's initiation of enforcement action when it was improperly constituted). Remand would be particularly appropriate because the Bureau's complaint has already been approved under the direction of an official (Acting Director Mulvaney) who was removable by the President at will. *See* JA 780.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's dismissal of the Bureau's complaint and remand this action to the district court for further proceedings.

Respectfully submitted,

/s/ Christopher Deal

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Christopher Deal
David A. King Jr.
Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-9582 (telephone)
(202) 435-7024 (facsimile)
christopher.deal@cfpb.gov

Counsel for
Plaintiff-Appellant-Cross-Appellee
Consumer Financial Protection Bureau

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,895 words, excluding exempt material, according to the count of Microsoft Word.

/s/ Christopher Deal
Christopher Deal
Counsel for Plaintiff-Appellant-Cross-Appellee Consumer Financial Protection Bureau

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Christopher Deal
Christopher Deal
Counsel for Plaintiff-Appellant-Cross-Appellee Consumer Financial Protection Bureau

18-2743(L)

18-3033(Con), 18-2860 (XAP), 18-3156 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellant-Cross-Appellee,

PEOPLE OF THE STATE OF NEW YORK,
by Letitia James, Attorney General for the State of New York
Plaintiff-Appellant-Cross-Appellee,

v.

RD LEGAL FUNDING, LLC; RD LEGAL FUNDING PARTNERS, LP; RD LEGAL FINANCE, LLC; and RONI DERSOVITZ
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SPECIAL APPENDIX

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Christopher Deal
David A. King Jr.
Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552
(202) 435-9582
christopher.deal@cfpb.gov

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMER FINANCIAL PROTECTION BUREAU and THE PEOPLE OF THE STATE OF NEW YORK, BY ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL FOR THE STATE OF NEW YORK,

Plaintiffs,

-against-

RD LEGAL FUNDING, LLC; RD LEGAL FINANCE, LLC; RD LEGAL FUNDING PARTNERS, LP; and RONI DERSOVITZ,

Defendants.

17-cv-890 (LAP)

OPINION & ORDER

Attorneys and Law Firms

BENJAMIN KONOP, HAI BINH T. NGUYEN, Bureau of Consumer Financial Protection, Washington, DC, JANE M. AZIA, MELVIN L. GOLDBERG, People of the State of New York by Eric T. Schneiderman, Attorney General for the State of New York, New York, NY, for Plaintiffs.

MICHAEL D. ROTH, JEFFREY M. HAMMER, DAVID K. WILLINGHAM, Boies Schiller Flexner LLP, Los Angeles, CA, ERIC T. KANEFSKY, Calcagni & Kanefsky LLP, Newark, NJ, for Defendants.

CAROLINA A. FORNOS, Pillsbury Winthrop Shaw Pittman, LLP, New York, NY, for Amicus Curiae American Legal Finance Association.

CHRISTOPHER A. SEEGER, TERRIANNE BENEDETTO, Seeger Weiss LLP, New York, NY, DIOGENES P. KEKATOS, Seeger Weiss LLP, Ridgefield Park, NJ, for Proposed Amicus Curiae Plaintiff Settlement Class in In re National Football League Players' Concussion Injury Litigation.

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Loretta A. Preska, Senior United States District Judge:

This is an action by Plaintiffs Consumer Financial Protection Bureau (the "CFPB") and the People of the State of New York, by Eric T. Schneiderman, Attorney General for the State of New York ("NYAG" or the "Attorney General") (collectively, the "Government"), against Defendants RD Legal Funding, LLC; RD Legal Finance, LLC; RD Legal Funding Partners, LP (collectively, the "RD Entities"); and Roni Dersovitz, the founder and owner of the RD Entities (together with the RD Entities, the "Defendants"). The Government asserts that the Defendants violated certain provisions of the Consumer Financial Protection Act ("CFPA" or the "Act"). NYAG independently asserts that the RD Entities are liable under New York law for the same actions and events that form the basis of the CFPA claims. Defendants move to dismiss the Complaint (ECF No. 1) on three principal grounds. First, Defendants argue that the CFPB is unconstitutionally structured and therefore lacks the authority to bring claims under the CFPA. Second, Defendants contend that the Court lacks federal jurisdiction because the RD Entities are not "covered persons" under the CFPA and therefore do not come within the Act's jurisdictional purview. Third and finally, the RD Entities move to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for relief.

As set out below, because the CFPB's structure is unconstitutional, it lacks the authority to bring claims under the CFPA and is hereby terminated as a party to this action. The NYAG, however, has independent authority to bring claims under the CFPA. The Court concludes that NYAG has alleged plausibly claims under the CFPA and under New York law. Accordingly, Defendants' motion to dismiss the Complaint is denied. (ECF No. 39.)

I. Factual Background

The following facts are drawn from the Complaint, (Complaint ("Compl."), ECF No. 1), the Assignment and Sale Agreements (hereinafter the "Purchase Agreements") attached as exhibits to the Affidavit of Roni Dersovitz, (Affidavit of Roni Dersovitz ("Dersovitz Aff."), Exs. A-1 to A-20, B-1 to B-5, ECF No. 41-1), and the National Football League ("NFL") Concussion Litigation Settlement Agreement ("NCLSA"), (Dersovitz Aff. Ex. 6), which Defendants attached to their motion to dismiss. The allegations in the Complaint are accepted as true for purposes of the instant motion.[1]

[1] As Defendants note in their motion to dismiss, "[t]he Court may consider the Zadroga Fund agreements [(Dersovitz Aff. Exs. A-1 to A-20)], and the NFL Settlement Fund agreements [(Dersovitz Aff. B-1 to B-5)], because the Complaint refers to them extensively and 'relies heavily upon [their] terms and effect, which renders the document[s] integral to the complaint.'" Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002) (citation and some internal quotation marks omitted);

The CFPB and NYAG bring this action against the RD Entities and their founder and owner, Roni Dersovitz. (Compl. ¶¶ 15-19.) The RD Entities are companies that offer cash advances to consumers waiting on payouts from settlement agreements or judgments entered in their favor. The Government alleges that Defendants misled these consumers into entering cash advance agreements that the Defendants represented as valid and enforceable sales but, in reality, functioned as usurious loans that were void under state law. (Compl. ¶ 19.)

At issue in this case are two specific groups of consumers (collectively, the "Consumers") with which the RD Entities transacted: (1) class members in the National Football League ("NFL") Concussion Litigation class action ("NFL Class Members" or "Class Members") and (2) individuals ("Eligible Claimants")

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accord Capela v. J.G. Wentworth, LLC, No. CV09-882, 2009 WL 3128003, at *1 n.2 (E.D.N.Y. Sept. 24, 2009). Furthermore, according to Defendants, the Purchase Agreements attached as exhibits to Defendants' motion to dismiss were among the 218 contracts that Defendants produced to the CFPB pursuant to a civil investigative demand ("CID"). (Defendants' Mot. to Dismiss ("Def. Br.") 6, ECF No. 49.) Therefore, it is reasonable to assume that the CFPB relied on these Purchase Agreements in drafting the Complaint. The Court also notes that, all at once, the Government objects to the inclusion of the Purchase Agreements in deciding the instant motion to dismiss (Plaintiff's Opp'n ("Pl. Opp.") 36 n.13, ECF No. 36) but in the same breath relies on the Purchase Agreement exhibits in support of its arguments in its opposition briefing. (Pl. Opp. 35-36.) For these reasons, the Court concludes that the Purchase Agreements are "integral" to the Complaint and therefore may be considered for purposes of deciding the instant motion. Chambers, 282 F.3d at 152-53.

who qualify for compensation under the September 11th Victim Compensation Fund of 2001 ("VCF"). 49 U.S.C. § 40101.

a. The NFL Class Members

On January 31, 2012, a federal multidistrict litigation was created in United States District Court for the Eastern District of Pennsylvania for lawsuits on behalf of former NFL players who suffer from mild traumatic brain injury due to playing professional football. See Settlement Agreement (hereinafter "Settlement Agreement") Preamble, In re NFL Players' Concussion Injury Litig., MDL No. 2323 (E.D. Pa. Feb. 13, 2015) (ECF No. 6481-1). Defendants in that case, the NFL and NFL Properties LLC, ultimately agreed that settlement of the claims in that complex putative class action was appropriate. Id. Recitals (K). Accordingly, on February 13, 2015, a federal district court in the Eastern District of Pennsylvania approved the NFL Concussion Litigation Settlement Agreement ("NCLSA") between the Class Members, by and through class counsel, and defendants NFL and NFL Properties LLC. Id. Preamble.

The NFL Class Members at issue in this case are former NFL players who have been diagnosed with neurogenerative diseases such as chronic traumatic encephalopathy ("CTE"), Alzheimer's, or Parkinson's disease and who have received notification of their entitlement to a settlement award under the NCLSA for these injuries. (Compl. ¶¶ 22-23.)

b. <u>September 11, 2001 James Zadroga Victims Compensation Fund Eligible Claimants</u>

In January 2011, President Obama signed the James Zadroga 9/11 Health and Compensation Act of 2010 (“Zadroga Act”), which served to renew the September 11th Victim Compensation Fund of 2001 (the “VCF”). 49 U.S.C. § 40101. Congress created the VCF to provide compensation to individuals and personal representatives of deceased individuals who suffered physical injury or were killed as a result of the September 11, 2001 terrorist attacks or were harmed during the removal of debris immediately following those attacks. Proposed Rule, Federal Register, Vol. 76 No. 119 (Jun. 21, 2011). The Zadroga Act authorizes a Special Master appointed by the Attorney General to carry out the administration of the VCF by enacting substantive and procedural rules, including making determinations as to what award amount an eligible individual (“Eligible Claimant”) is entitled to under the VCF. 28 C.F.R. § 104.51.

According to the Complaint, the Eligible Claimants with whom the RD Entities transact have received an award letter from the VCF’s Special Master indicating the amount of compensation to which they are entitled under the VCF. (Compl. ¶¶ 22-23); 49 U.S.C. §§ 405(b)(1), 405(c), 406(a). Eligible Claimants who are entitled to compensation include individuals who suffer from respiratory illnesses and cancers related to their exposure to dust and debris at the World Trade Center site as well as from post-traumatic stress disorder, depression, anxiety disorder, and memory loss following the September 11th, 2001 terrorist attacks. (Compl. ¶ 22.)

c. <u>The Purchase Agreements</u>

According to the Complaint, after a Consumer has received final approval and a notice of the award amount to which he or she is entitled, the RD Entities offer to take a security interest in the Consumer's settlement award or a portion thereof (the "Property" or "Property Amount"). (Compl. ¶ 20.) In the contracts that Defendants enter into with Consumers, the RD Entities purport to "acquire the full risks and benefits of ownership of the Property and acquire the full right, title and interest in the Property." (Def. Br. Ex. 1.) In exchange, the RD Entities offer Consumers an immediate "lump sum" cash payment that represents a portion of the total award to which the Consumer is entitled. (Compl. ¶ 24.) In return, the Consumer agrees to repay a larger amount, <u>i.e.</u>, the Property Amount, to the RD Entities after receiving its settlement payment. (<u>Id.</u>) The Purchase Agreements contain a no recourse provision that relieves the Consumer of his or her obligation to repay the RD Entities in the event that the RD Entities are unable to recover the settlement award from the Consumer's third-party obligor, <u>i.e.</u>, the NFL Settlement Fund or the VCF. (Def. Br. Ex. 1.)

The RD Entities enter into two types of contracts with Consumers. Under the first, the RD Entities advance a lump sum of cash to the Consumer. The repayment amount that the Consumer owes to RD remains the same, regardless of when the Consumer receives the award from the VCF or the NFL Settlement Fund. (Compl. ¶ 31.) Under the second type of contract, the amount the Consumer repays turns on when the claims administrator disburses the Consumer's award. The longer it takes for the Consumer to receive his or her settlement payment, the more the Consumer owes to the RD Entities. (Id.)

After entering into the Purchase Agreement, Consumers are obligated immediately to forward any monies received from the NFL Claims Administrator or the VCF to the RD Entities until the Consumer has paid off the agreed-upon amount. (Compl. ¶ 26.) After the amount due under the agreement has been paid to the RD Entities, the Consumer is entitled to keep any balance in excess of that amount that he or she receives from the NFL Settlement Fund or VCF Claims Administrator. (Id.)

d. Claims Against the RD Entities

i. CFPA Claims

The Complaint alleges five CFPA claims against the RD Entities: (1) Count I alleges that the RD Entities engaged in deceptive acts or practices, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B), by misrepresenting that the Purchase Agreements constituted valid and enforceable assignments and that Dersovitz knowingly or recklessly provided substantial assistance to the RD Entities in carrying out these violations, 12 U.S.C. § 5536(a)(3) (Compl. ¶ 63); (2) Count II alleges that the RD Entities engaged in abusive acts or practices, 12 U.S.C. §§ 5531(d), 5536(a)(1)(B), by misrepresenting that the Purchase Agreements constituted valid and enforceable assignments and that Dersovitz knowingly or recklessly provided substantial assistance to the RD Entities in carrying out these violations, 12 U.S.C. § 5536(a)(3) (Compl. ¶¶ 72-73); (3) Count III alleges that the RD Entities engaged in deceptive acts or practices, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B), by misrepresenting that they could “cut through red tape” and expedite a Consumer’s award payment when in fact they could not and that Dersovitz knowingly or recklessly provided substantial assistance to the RD Entities in carrying out these violations, 12 U.S.C. § 5536(a)(3) (Compl. ¶ 79); (4) Count IV alleges that the RD Entities engaged in deceptive acts or practices, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B), by misrepresenting when the RD Entities would deliver Consumers’ cash payments because, in some instances, the RD Entities made payment after the promised payment date, and that Dersovitz knowingly or recklessly provided substantial assistance to the RD Entities in carrying out these violations, 12 U.S.C. § 5536(a)(3), (Compl. ¶ 86); and (5) Count V alleges that the RD Entities engaged in deceptive acts or practices, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B), by collecting on contracts that functioned as loans with usurious interest rates under state law and on which no payment was due, and that Dersovitz knowingly or recklessly provided substantial assistance to the RD Entities in carrying out these violations, 12 U.S.C. § 5536(a)(3). (Compl. ¶ 93.)

ii. Claims Arising Under New York Law

The NYAG brings independently various claims arising under New York law, each of which is asserted against each of the named Defendants: Count IX asserts a claim of deceptive practices under New York General Business Law ("NY GBL") § 349 against all of the named Defendants based on the same alleged deceptive conduct underlying Counts I, III, IV, and V of the Complaint, (Compl. ¶¶ 119-22); Count X asserts a claim of false advertising against all of the named Defendants under NY GBL § 350 based on the RD Entities' alleged misrepresentations that the transactions at issue were sales, not loans, and that the RD Entities had the ability to expedite payment of Consumers' awards when in fact they did not, (Compl. ¶¶ 123-26); Count XI asserts a claim under New York Executive Law § 63(12) for fraudulent conduct based on the same factual allegations underlying Counts I-V of the Complaint (Compl. ¶¶ 127-30); Counts VI and VII allege that, through the Purchase Agreements, Defendants charged Consumers rates of interest that violated New York's civil and criminal usury laws, N.Y. Banking Law § 14-a, and N.Y. Penal Law §§ 190.40 and 190.42, respectively (Compl. ¶¶ 99-105, 106-10); and finally, Count VIII alleges that Defendants violated New York General Obligations Law ("NY GOL") § 13-101 because they entered into contracts that constituted an unlawful assignment of individual claims to recover for personal injuries under New York law. N.Y. Gen. Oblig. Law § 13-101; (Compl. ¶¶ 111-18.)

II. Procedural History

The instant case has a circuitous history in this Court. In January 2017, RD Legal Funding, LLC filed a complaint against the CFPB in the Southern District of New York seeking relief in the form of, inter alia, a declaration that the purchase of legal receivables from customers are true sales and that, therefore, RD Legal Funding, LLC's business is not within the CFPB's jurisdiction. RD Legal Funding, LLC v. Consumer Fin. Prot. Bureau, No. 17-cv-00010 (LAP) (S.D.N.Y.) (ECF No. 1); (Def. Br. 7.) According to Defendants, RD Legal Funding, LLC filed that action in response to civil investigative demands ("CID") that the CFPB served on RD Legal Funding, LLC as well as a formal request from the CFPB to depose an RD Legal Funding, LLC representative in connection with the CFPB's investigation of the RD Entities. (Def. Br. 6.)

Two days after filing suit in federal court against the CFPB, RD Legal Funding Partners, LP and RD Legal Funding, LLC filed a similar suit in New York state court against NYAG seeking a declaration that the VCF Purchase Agreements are true sales. RD Legal Funding, LLC, et al. v. Schneiderman, et al., No. 17-cv-00681 (LAP) (S.D.N.Y.) (ECF No. 1).

Following RD Legal Funding, LLC and RD Legal Funding Partners, LP's actions against the CFPB and NYAG in this Court and New York state court, the CFPB and NYAG filed this enforcement action against the RD Entities on February 7, 2017. (ECF No. 1.) On May 15, 2017, the RD Entities moved to dismiss the Complaint on several grounds, including lack of federal jurisdiction due to the CFPB's unconstitutional structure, the CFPB's lack of jurisdiction over the RD Entities as "covered persons" under the CFPA, and for failure to state a claim on which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 39.)

In July 2017, class counsel for the NFL Class Members requested that this Court allow it to file an amicus brief in opposition to the RD Entities' motion to dismiss or, in the alternative, that determination of the validity of the assignment provisions in the NFL Purchase Agreements be referred to United States District Court for the Eastern District of Pennsylvania. (ECF No. 45.) Class counsel stated that it believed referral of this question to the Eastern District of Pennsylvania would be appropriate because that court has continuing jurisdiction over the administration and interpretation of the NCLSA. (Id.); see also Settlement Agreement § 27.1 ("The Court retains continuing and exclusive jurisdiction over this action including jurisdiction over . . . all Settlement Class Members . . . ."). Class counsel explained that referral of this question would ensure uniformity of adjudication through "a single up-or-down ruling that [would] apply not only to Defendants in this action but also to other potential lenders to class members who might assert the same defense." (Id.) Because interpretation of the NCLSA's terms falls squarely within "the administration and interpretation of the [NCLSA]" and referral would promote judicial economy, this Court concluded that referral of the anti-assignment clause question to the Eastern District of Pennsylvania was appropriate. (ECF No. 59.) On September 15, 2017, this Court referred the assignment question to the Honorable Anita B. Brody in the Eastern District of Pennsylvania, who was presiding over the NFL Concussion Litigation. (ECF No. 60.)

On December 8, 2017, Judge Brody issued an Explanation and Order which concluded that the anti-assignment clause in the NFL Concussion Litigation Settlement Agreement "unambiguously prohibits" NFL class members "from assigning or attempting to assign any monetary claims [under the NFL Settlement Agreement]," thereby rendering "any such purported assignment . . . void, invalid and of no force and effect" under New York law. See Explanation and Order (hereinafter, "Explanation and Order"), In re NFL Players' Concussion Injury Litig., No. 2:12-md-2323-AB (E.D. Pa. Dec. 8, 2017) (ECF No. 9517) (citing Neuroaxis Neurosurgical Assocs., P.C. v. Costco Wholesale Co., 919 F. Supp. 2d 345, 352 (S.D.N.Y. 2013)). In New York, an anti-assignment clause is enforceable only if it contains "clear, definite and appropriate language" restricting the assignment of money due under the contract. Allhusen v. Caristo Constr. Corp., 103 N.E.2d 891, 893 (N.Y. 1952); Neuroaxis Neurosurgical, 919 F. Supp. 2d at 352. Under this framework, Judge Brody concluded that the term "relating to" in the NCLSA's anti-assignment clause, which prohibits Class Members from assigning claims "relating to the subject matter of the Class Action Complaint," encompassed assignment of Class Members' claims to settlement awards under the NCLSA. See Explanation and Order at 3, 4 n.6. In reaching this conclusion, Judge Brody concluded that the phrase "relating to" in the NCLSA's anti-assignment clause was "sufficiently express" under New York law to include assignment of Class Members' claims to settlement awards under the NCLSA. Explanation and Order at 3-4.

As a result of this finding, Judge Brody held that Class Members' Purchase Agreements with the RD Entities were void. Explanation and Order at 5-6. Accordingly, she ordered the NFL Class Members to return to the RD Entities any amount that the RD Entities had already paid them. Id.

On August 1, 2017, after Defendants filed the instant motion to dismiss, the American Legal Finance Association ("ALFA") moved for leave to file an amicus curiae brief in opposition to Defendants' motion to dismiss. The Court granted ALFA's request, and ALFA filed its amicus curiae brief on August 15, 2017. (See Br. for ALFA as Amicus Curiae ("ALFA Br."), ECF No. 56.)

After receiving briefing from all parties on Defendants' instant motion to dismiss, the Court requested supplemental briefing from the parties on February 23 and 28, 2018, on two legal questions pertaining to the VCF Purchase Agreements. (ECF Nos. 71, 72.) The first question asked what the effect of the underlying agreement between the Defendants and Eligible Claimants would be if the Court were to conclude that the assignments in the VCF Purchase Agreements were impermissible pursuant to the Anti-Assignment Act, 31 U.S.C. § 3727. As a follow-on to the first inquiry, the Court also asked how the effect of any such underlying agreement between Defendants and Eligible Claimants would impact the Government's assertion of jurisdiction over the RD Entities as "covered persons" under the CFPA. (ECF No. 72.)

On March 5, 2018, the Government filed a letter in response to the Court's February 23 and 28 orders. (ECF No. 73.) On March 12, 2018, Defendants filed a letter in response to the Government's March 5, 2018 letter addressing these issues. (ECF No. 74.)

III. Legal Standard

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must "accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." Phelps v. Kapnolas, 308 F.3d 180, 184 (2d Cir. 2002) (citation and internal quotation marks omitted). Though a court must accept all factual allegations as true, it gives no effect to "legal conclusions couched as factual allegations." Stadnick v. Vivint Solar, Inc., 861 F.3d 31, 35 (2d Cir. 2017) (quoting Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference

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that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. This "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (citations omitted). Deciding whether a complaint states a claim upon which relief can be granted is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Rahman v. Schriro, 22 F. Supp. 3d 305, 310 (S.D.N.Y. 2014) (quoting Iqbal, 556 U.S. at 679).

> In certain circumstances, the court may permissibly consider documents other than the complaint in ruling on a motion under Rule 12(b)(6). Documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered. In addition, even if not attached or incorporated by reference, a document "upon which [the complaint] solely relies and which is integral to the complaint" may be considered by the court in ruling on such a motion.

Tolliver v. Lilley, No. 12-cv-971, 2014 U.S. Dist. LEXIS 184770, at *21–*22 (S.D.N.Y. Oct. 24, 2014) (citing Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007)).

IV. Discussion

In addressing the various arguments that Defendants assert in support of dismissal, the Court first addresses Defendants' contention that this Court lacks federal jurisdiction to hear the CFPA claims because the RD Entities are not "covered persons" and thus do not come within the CFPA's jurisdictional reach. Next, the Court addresses Defendants' argument that the

Complaint fails to state a claim on which relief can be granted pursuant to Rule 12(b)(6). In line with the doctrine of constitutional avoidance, the Court addresses Defendants' constitutionality argument last.

a. Federal Jurisdiction

i. The RD Entities as "Covered Persons" Under the CFPA

The CFPA regulates "covered person[s] or service provider[s]" who are engaged in "unfair, deceptive, or abusive act[s] or practice[s] under Federal law." 12 U.S.C. §§ 5531(a), 5536(a). The Act defines "covered person" as "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6)(A). The term "financial product or service" is defined in relevant part as "extending credit and servicing loans." Id. § 5481(15)(A)(i). The CFPA defines "credit" as "the right granted by a person to a consumer to [1] defer payment of a debt, [2] incur debt and defer its payment, or [3] purchase property or services and defer payment for such purchase." Id. § 5481(7).

The Government asserts four claims of deceptive acts or practices and one claim of abusive acts or practices under the CFPA against the RD Entities. Id. §§ 5531(a), 5536(a)(1)(B); Id. § 5531(d)(1), (2)(B). Defendants move to dismiss the CFPA deceptive and abusive acts or practices claims on the grounds that the RD Entities are not “covered person[s]” under the CFPA, Id. § 5481(6)(A), and therefore do not come within the Act’s jurisdictional reach. (Def. Br. 17.)

The Government asserts that the RD Entities are “covered persons” under the CFPA because they extend “credit” and service loans. The Government alleges that the RD Entities engage in this activity because the assignments in the Purchase Agreements are void. See N.Y. U.C.C. § 9-408(d)(1); 31 U.S.C. § 3727; (Compl. ¶¶ 19, 43, 52-54, 61-69, 70-77.) In turn, these agreements do not constitute valid sales of Consumers’ interest in their settlement awards. (Compl. ¶¶ 19, 43, 61-69, 70-77.) The Government argues that the effect of this is to encumber Consumers with “debt” and an obligation to repay the RD Entities in spite of what the Purchase Agreements say. (Compl. ¶¶ 19, 34-43.)

The RD Entities reject this characterization. They argue that the assignments are legally permissible and therefore effectuate true sales of Consumers’ interest in their settlement awards. (Def. Reply 5-6.) Under this approach, the Consumer incurs no repayment obligation in the event that the RD Entities are unable to collect the purchased receivable. (Def. Br. 19.) Therefore, the RD Entities assert that the consumer incurs “no debt,” “no repayment obligation,” and that “[t]here is certainly no right granted to defer payment of a debt" to the Consumer. (Id.)

Both parties' arguments as to the Government's jurisdiction over Defendants as "covered persons" turns on the validity of the assignments. If the assignments are valid, as Defendants suggest, the entire basis of the Government's jurisdictional theory under the CFPA would fall apart.

Accordingly, in deciding whether the RD Entities are "covered persons" under the CFPA, the Court must first determine whether the assignments embodied in the NFL Purchase Agreements and the VCF Purchase Agreements are valid. 12 U.S.C. § 5481(6)(A).

1. The NFL Concussion Litigation Settlement Agreement Claims

Following the issuance of Judge Brody's Explanation and Order that found the assignments in the NFL Purchase Agreement void based on the NCLSA's anti-assignment provision, Defendants filed a letter in this Court objecting to Judge Brody's conclusion. (See ECF No. 62.) As explained below, the Court rejects Defendants' arguments in support of these objections in all respects. Accordingly, the Court adopts the Explanation and Order's finding that the NCLSA's anti-assignment provision is valid, thereby rendering the assignments in the NFL-related Purchase Agreements void.

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a. The NCLSA's Anti-Assignment Provision

The express terms of the NCLSA restrict Class Members' ability to assign their rights or claims "relating to the subject matter of the Class Action Complaint," Explanation and Order at 2 (citing Settlement Agreement (hereinafter "Settlement Agreement") § 30.1, In re NFL Players' Concussion Injury Litig., MDL No. 2323 (E.D. Pa. Feb. 13, 2015) (ECF No. 6481-1)):

> Section 30.1 No Assignment of Claims. Neither the Settlement Class nor any Class or Subclass Representative or Settlement Class Member has assigned, will assign, or will attempt to assign, to any person or entity other than the NFL Parties any rights or claims relating to the subject matter of the Class Action Complaint. Any such assignment, or attempt to assign, to any person or entity other than the NFL Parties any rights or claims relating to the subject matter of the Class Action Complaint will be void, invalid, and of no force and effect and the Claims Administrator shall not recognize any such action.

Settlement Agreement § 30.1 (emphasis added).

The Government asserts that the assignments in the NFL Purchase Agreements are void because the NCLSA's express terms prohibit class members from assigning "any rights or claims relating to the subject matter of the Class Action Complaint," which include their interest in their settlement award (or a portion thereof) under the NCLSA. (Compl. ¶ 35) (emphasis added). In response, the RD Entities contend that the NCLSA's anti-assignment provision violates New York's general prohibition of contractual anti-assignment clauses[2] and, therefore, does not prevent the NFL Class Members from assigning their rights to settlement compensation under the NCLSA. (Def. Br. 18-21.)

b. Legal Standard Regarding the Scope of the Anti-Assignment Provision

First, Defendants contend that Judge Brody did not construe the anti-assignment language "narrowly" when interpreting the phrase "relating to" as required under New York law. In particular, they note that the anti-assignment provision does not specifically prohibit Class Members from assigning their right to a settlement award under the NCLSA, and therefore is not "sufficiently express" to be upheld under New York law. (ECF No. 62-4 at 10-17); C.U. Annuity Serv. Corp. v. Young, 722 N.Y.S.2d 236, 236 (N.Y. App. Div. 2001). Defendants also assert that the anti-assignment provision's reference to "the subject matter of the Class Action Complaint" limits assignment only of Class Members' personal injury claims, not Class Members' rights to settlement awards stemming from a later-dated settlement agreement. (ECF No. 62-1 at 10; ECF No. 62-4 at 12-15; ECF No. 62.)

[2] The NFL Concussion Litigation Settlement Agreement contains a New York choice-of-law provision.

As a matter of policy, New York generally permits parties to assign their interests unless "the relevant provision of the contract contains 'clear, definite, and appropriate language declaring an assignment invalid.'" Au New Haven, LLC v. YKK Corp., 210 F. Supp. 3d 549, 554 (S.D.N.Y. 2016) (quoting Purchase Partners, LLC v. Carver Fed. Sav. Bank, 914 F. Supp. 2d 480, 505 (S.D.N.Y. 2012)). To this end, New York law requires that courts construe contractual anti-assignment language "narrowly." (ECF No. 62) (quoting Au New Haven, 210 F. Supp. 3d at 556).

It is well-settled that, in interpreting a contract's terms, courts must give effect to the plain meaning of its words or terms. This basic principle encompasses phrases, including "relating to." State v. Philip Morris Inc., 813 N.Y.S.2d 71, 75 (N.Y. App. Div. 2006) ("The terms 'arising out of,' and most particularly 'relating to,' certainly evince a broad arbitration clause"), aff'd, 869 N.E.2d 636 (N.Y. 2007).

In relevant part, the term "relate to" is defined as "to have relationship or connection." Relate, Merriam Webster (May 24, 2018), https://www.merriam-webster.com/dictionary/relate. In accord with its dictionary definition, courts in New York have given effect to the plain meaning of the phrase "relating to" when interpreting contracts in the past. See, e.g., Coregis Ins. Co. v. Amer. Health Found., Inc., 241 F.3d 123, 128–29 (2d

Cir. 2001) ("The term 'related to' is typically defined more broadly."); Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 20 (2d Cir. 1995) (discussing that, in the context of arbitration clauses, the phrase "'arising out of or relating to th[e] agreement,' is the paradigm of a broad clause").

Rights to settlement awards under the NCLSA indisputably "relat[e] to the subject matter of the Class Action Complaint." As the Explanation and Order correctly notes, monetary awards under the NCLSA would not exist but for the events giving rise to the Class Action Complaint. Explanation and Order at 3-4. The "relationship" or "connection" between rights to settlement awards under the NCLSA and the "subject matter of the Class Action Complaint" is straightforward.

Defendants' repeated reliance on Au New Haven, LLC v. YKK Corp., 210 F. Supp. 3d 549 (S.D.N.Y. 2016), does not help them. There, the Court analyzed the term "hereunder" in interpreting the scope of a contractual anti-assignment provision. Id. at 554-56. In conclusion, the Court gave effect to the "plain-language definition" of the word "hereunder" in finding that a patent, though the subject of the licensing agreement at issue, did not originate from the licensing agreement and therefore was not subject to the bar on assignments of any interest "hereunder." Id. 554-55. Similarly here, the Explanation and Order gives effect to the plain meaning of the term "relating to" by employing the same "narrow" interpretation that the Court invoked in Au New Haven. No incongruity exists between the standard that Judge Brody used in interpreting the term "relating to" and the standard in Au New Haven.

In sum, Judge Brody's interpretation of the term "relating to" complies with New York contract law and basic principles of contract interpretation by giving meaning to the plain meaning of the phrase. Accordingly, the Court agrees with the Explanation and Order's conclusion. The NCLSA's terms state clearly that the anti-assignment provision validly applies to the assignment of Class Members' claims to settlement awards under the NCLSA.

c. Assignability of "Settlement Proceeds" Versus "Monetary Claims"

Defendants also assert that Judge Brody's Explanation and Order refers to the assignment of "monetary claims," while the Purchase Agreements at issue purport to assign Class Members' right to "settlement proceeds." (ECF No. 62.) Defendants argue that the Explanation and Order's use of the term "monetary claims" rather than "settlement proceeds" shows that Judge Brody conflated legally distinct concepts under New York law. Specifically, Defendants note that although New York law prohibits the assignment of claims, it does not similarly prohibit the assignment of settlement proceeds. For this reason, Defendants argue that the Explanation and Order's findings, which use the term "monetary claims," are inapplicable to the assignment of "settlement proceeds" at issue in the NFL-related Purchase Agreements. (ECF No. 62); Explanation and Order at 3-4.

Defendants' argument is a combination of mere word mincing and misconstruction of the law. As to misconstruction of the law, the assignments in the NFL-related Purchase Agreements purport to effectuate a transfer of Class Members' full ownership rights and interest in the Property Amount to RD Legal Finance, LLC. (Dersovitz Aff. Exs. B-1 to B-7.) Through these Purchase Agreements, RD Legal Finance, LLC purports to "step into the shoes of the assignor" and obtain the full right to demand direct payment of the Property Amount from NFL Monetary Award Fund through a limited irrevocable power of attorney. (See Dersovitz Aff. Ex. B-5 at 12.) Defendants fail to note that the right to demand direct payment from the NFL Monetary Award Fund in itself is a "claim" that "clearly encompasses a cause of action for nonpayment." Renfrew Ctr. v. Blue Cross Blue Shield of Central N.Y., Inc., No. 94-cv-1527 (RSP/GJD), 1997 WL 204309, at *4 (N.D.N.Y. Apr. 10, 1997). Although the NCLSA does not define the word "claim," the assignment attempts to transfer all of the Class Members' rights and interests in the Property Amount to RD Legal Funding, LLC. (See, e.g., Dersovitz Aff. Ex. B-5.) The RD Entities provide no basis for believing that this bundle of ownership rights includes anything less than the full benefits of ownership, and that includes the right to sue the NFL Monetary Award Fund in the event of nonpayment. Accordingly, Judge Brody's Explanation and Order addresses squarely the scenario at issue in the NFL Purchase Agreements by analyzing the assignment of "monetary claims" under it.

Defendants' assertion that the NFL Purchase Agreements are assignments of the "right to settlement proceeds" under the NCLSA is unavailing. Defendants cite Grossman v. Schlosser, 244 N.Y.S.2d 749, 749-50 (N.Y. App. Div. 1963), in an attempt to illustrate that the NFL Purchase Agreements involve the assignment of "settlement proceeds," a concept that is legally distinct from the assignment of a "claim" for settlement proceeds in New York. In Grossman, the court held that the "assignment of proceeds of a [cause of action for personal injury], prior to its settlement or adjudication, [is] valid and effectual as an equitable assignment against the assignor and his attaching creditor." Id. (emphasis added). This arrangement gives an equitable assignee "no legal estate or interest in the fund" but rather "constitute[s] an equitable lien on the property." Matter of Hoffman, 435 N.Y.S.2d 235, 237 (N.Y. Surr. Ct. 1980); see also In re Mucelli, 21 B.R. 601, 603

(S.D.N.Y. 1982); United States v. Colby Academy, 524 F. Supp. 931, 934 (E.D.N.Y. 1981) (holding that settlement proceeds are assignable as "an equitable interest only" and "d[o] not become a legal assignment until the proceeds have come into existence") (applying New York law).

Thus, New York law permits, at most, the creation of an equitable lien on future settlement proceeds. Id. "An equitable lien is 'a right . . . to have a fund, specific property, or its proceeds, applied in whole or in part to the payment of a particular debt.'" Bank of India v. Weg & Myers, 691 N.Y.S.2d 439, 445 (N.Y. App. Div. 1999). This framework, however, still does not permit the transfer of an individual's present ownership interest in future receivables for damages to recover for personal injury, which is what the NFL Purchase Agreements attempt to do, albeit unsuccessfully. Id.

In sum, Defendants' arguments that assignments of claims to settlement award funds under the NCLSA are valid are without merit.

d. Interpretation of the New York UCC[3]

New York Uniform Commercial Code ("NY UCC") § 9-408(d)(1) establishes a general bar on anti-assignment clauses limiting

[3] The Court notes that this argument was raised for the first time in Defendants' letter objecting to the Explanation and Order's findings, after the instant motion to dismiss was fully briefed. (ECF No. 62.)

the transfer of "general intangibles." N.Y. U.C.C. § 9-408(d)(1). This provision also enumerates certain exceptions to the general rule against such clauses. Id. One such exception applies to "the right to receive compensation for injuries or sickness as described in 26 U.S.C. § 104(a)(1) and (2), as amended from time to time." Id. Section 104(a) of the Internal Revenue Code excludes certain types of compensation from gross income, including "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness[.]" 26 U.S.C. § 104(a)(2).

The RD Entities contend that because the NCLSA does not specify whether compensation from it qualifies as excludable income under Section 104, the NY UCC's exception for restrictions on assignments of monetary claims for personal injury settlements does not save the anti-assignment provision as it relates to "proceeds" from settlement of personal injury claims. Id. § 104(a); (ECF No. 62.)

It is beyond peradventure that compensation from the NFL Settlement Agreement constitutes "damages . . . received . . . on account of personal physical injuries" under Section 104 of the Internal Revenue Code. Id. § 104(a)(2). The NCLSA is rooted in the physical injuries resulting from repeated brain injuries that retired NFL players experienced while active in professional football. See Explanation and Order at 4 n.6.

Accordingly, the NY UCC does not invalidate the NFL Settlement Agreement's anti-assignment provision.

e. The NFL-related Purchase Agreements Are Void

In sum, the NCLSA validly prohibits the assignment of NFL Class Members' monetary claims. Therefore, the assignments in the NFL Purchase Agreements are void.

2. 31 U.S.C. § 3727 Invalidates the Assignment of Compensation Awards from the VCF

The RD Entities and the Government disagree over whether federal law prohibits the assignment of compensation that the VCF awards to an Eligible Claimant. On the one hand, the Government argues that the Anti-Assignment Act, 31 U.S.C. § 3727, prohibits assignment of Eligible Claimants' rights to their award amount under the VCF. See 31 U.S.C. § 3727 ("Section 3727" or the "Anti-Assignment Act"); (Pl. Opp. 13-14.) On the other hand, the RD Entities assert that because the Anti-Assignment Act bars only the assignment of a substantive claim against the United States, not the assignment of settlement proceeds, the assignments in the Purchase Agreements are permissible. (Def. Reply 5-6.)

Neither of the parties has cited to, and this Court has not been able to identify, a case addressing whether the Anti-Assignment Act applies to the VCF structure instituted by the Air Transportation Safety and System Stabilization Act, codified at 49 U.S.C. § 40101. For the reasons that follow, the Court concludes that it does.

a. The Anti-Assignment Act, 31 U.S.C. § 3727

Congress initially enacted the Assignment of Claims Act, now known as the Anti-Assignment Act, in 1853. United States v. Kim, 806 F.3d 1161, 1169 (9th Cir. 2015). The Anti-Assignment Act was intended to:

> "(1) [T]o prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government, (2) to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant, and (3) to save to the United States defenses which it has to claims by an assignor by way of set-off, counter claim, etc., which might not be applicable to an assignee."

In re Ideal Mercantile Corp., 244 F.2d 828, 831 (2d Cir. 1951) (quoting United States v. Shannon, 342 U.S. 288, 291-92 (1952)).

To this end, the Anti-Assignment Act, 31 U.S.C. § 3727, imposes restrictions on the assignment of claims against the United States Government. The statute defines an assignment as "a transfer or assignment of any part of a claim against the

United States Government or of an interest in the claim" or "the authorization to receive payment for any part of the claim." Id. Section 3727 permits assignments of a claim against the United States only after "[1] [the] claim is allowed, [2] the amount of the claim is decided, and [3] a warrant for payment of the claim has been issued." Id.

i. "Claim Against the United States"

The Anti-Assignment Act restricts the assignment of "claims against the United States." Id. As an initial matter, therefore, the Court must determine whether an Eligible Claimant's entitlement to a monetary award from the VCF is a "claim against the United States." Kim, 806 F.3d at 1170.

Although the Anti-Assignment Act does not define the term explicitly, "[w]hat is a claim against the United Stated is well understood. It is a right to demand money from the United States." Hobbs v. McLean, 117 U.S. 567, 575 (1886). This interpretation accords with the term's dictionary definition, which is "[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . [a] demand for money, property, or a legal remedy to which one asserts a right." Claim, Black's Law Dictionary (10th ed. 2014).

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Applying this definition here, an Eligible Claimant's monetary award from the VCF is a "claim against the United States" because it creates a "right to demand money from the United States" upon Eligible Claimants' receipt of their award letter. Hobbs, 117 U.S. at 575; see also Kim, 806 F.3d at 1171 ("An award of statutory attorney's fees is, at base, a right to demand money from the United States."). Although the VCF is a unique, if not unprecedented, legal creature, the Court sees no reason why a monetary award under the VCF is not a "claim against the United States." Hobbs, 117 U.S. at 575; see also Kim, 806 F.3d at 1171 (quoting United States v. Gillis, 95 U.S. 407, 413 (1877)) ("No language could be broader or more emphatic than these enactments. The words embrace every claim against the United States, however arising, of whatever nature it may be, and wherever and whenever presented") (internal quotation marks omitted).

Defendants argue that the Anti-Assignment Act only restricts the assignment of substantive claims against the United States. (Def. Rep. 5.) Applying this principle here, the RD Entities contend that the VCF Purchase Agreements assign Eligible Claimants' right to proceeds from the VCF rather than Eligible Claimants' substantive claims. Therefore, they say, Section 3727 does not bar these assignments. (Def. Reply 5); (ECF No. 74.)

In the same way that the RD Entities misconstrue the legal distinction between the assignment of "claims" and the assignment of "proceeds from claims" with the NFL-related Purchase Agreements, they do so once more here. Courts have held uniformly that an individual's right to receive payment <u>directly from</u> the United States Government is a substantive claim that may not be assigned under the Anti-Assignment Act. <u>See</u> <u>Kim</u>, 806 F.3d at 1170-71 (citing <u>United States v. Transocean Air Lines, Inc.</u>, 386 F.2d 79, 81 (5th Cir. 1967); <u>Kearney v. United States</u>, 285 F.2d 797, 800 (Ct. Cl. 1961); <u>Pittman v. United States</u>, 116 F. Supp. 576, 580 (Ct. Cl. 1953)).

Consistent with this interpretation, the Anti-Assignment Act does not restrict a would-be assignor's ability to create a legal obligation to pay a would-be assignee <u>after</u> the United States Government has paid the would-be assignor. In this situation, the would-be assignee could then "enforce[]" the agreement "by suit" if the would-be assignor did not "recognize" this agreement "<u>after</u> collection of the money." <u>Nutt v. Knut</u>, 200 U.S. 12, 20 (1906) (emphasis added). Anti-Assignment Act jurisprudence establishes clearly that a party is free to enter into an agreement that legally obligates it with respect to a future payment from the United States Government <u>after</u> the party has received the funds. <u>See, e.g.</u>, <u>Martin v. Nat'l Sur. Co.</u>, 300 U.S. 588, 595 (1937) (emphasis added) ("<u>After</u> payments have been collected and are in the hands of the contractor or subsequent payees with notice, assignments may be heeded, at all events in equity, if they will not frustrate the ends to which the [statute] was directed."); First Fed. Sav. & Loan Ass'n of Rochester v. United States, 58 Fed. Cl. 139, 157-58 (Ct. Cl. 2003) ("The assignee has no claim against the government. The assignments were of a right to proceeds – a contractual arrangement between private parties."); Saint John Marine Co. v. United States, 92 F.3d 39 (2d Cir. 1996) (holding contractual obligations between private parties regarding proceeds from the United States Government enforceable but assignment as against the United States void); In re Ideal Mercantile Corp., 244 F.2d at 832 (citing McKenzie v. Irving Tr. Co., 323 U.S. 365, 369 (1945)) (emphasis added) ("[I]t seems clear that an assignment of a claim against the United States is enforceable in many cases as between parties to that assignment, or their successors in interest, after the Government has paid the claim.").

Defendants cite to Saint John Marine for the proposition that the Purchase Agreements are valid because while "the Anti-Assignment Act 'voids the assignment as against the United States, the assignment remains enforceable as between the parties to the contract." (ECF No. 74) (citing Saint John Marine, 92 F.3d at 45)) (emphasis added). It is nose-on-the-face plain that the Court of Appeals did not mean that assignments like the ones at issue here, which purport to transfer all of Eligible Claimants' present rights and interests in a portion of their VCF award, including the right to demand payment directly from the United States Government, are permissible under the Anti-Assignment Act. (See Def. Br. Sec. III(A)(1)(b)) ("The Assignments Give the RD Entities the Right to Demand Direct Payment from the Holder of the Funds."). Rather, the Court of Appeals was reiterating a well-established legal principle in Anti-Assignment Act case law: an assignment that is void as against the United States under the Anti-Assignment Act "may amount to the creation of an equitable lien when the subject matter of the assignment has been reduced to possession and is in the hands of the assignor." Martin, 300 U.S. at 597. This general principle comports with the Anti-Assignment Act's underlying purpose. "The United States has no need to worry about fraud or any of the other evils associated with the assignment of claims against it once the proceeds of the claims have been reduced to the possession of the purported assignor." Kim, 806 F.3d at 1176-77. After the United States Government has remitted payment to the purported assignor, the Act's protective purpose "is not implicated." Id. at 1177. Therefore, an equitable lien on funds to be received in the future from the United States Government is permissible, but assignment of a right to collect payment directly from the United States Government is not.

In sum, the RD Entities' argument shows too much by arguing that Defendants purport to contract for a full ownership interest in a portion of Eligible Claimants' award, which plainly includes the right to demand payment for that portion directly from the United States Government. (Dersovitz Aff. Ex. A-1 at 16) (letter from RD Entities to VCF Claims Processing Center demanding payment be made directly to RD Entities pursuant to Purchase Agreement); (Def. Br. Sec. III(A)(1)(b)) ("The Assignments Give the RD Entities the Right to Demand Direct Payment from the Holder of the Funds."). "From the beginning . . . the Anti-Assignment Act has been concerned with <u>direct</u> payment of claims." <u>Kim</u>, 806 F.3d at 1176. The Purchase Agreements purport to transfer Eligible Claimants' right to receive payment directly from the United States Government to the RD Entities. This is precisely what the statute governs, and this is not allowed.

ii. <u>Statutory Purpose</u>

Having concluded that an award of compensation under the September 11th VCF constitutes a "claim" within the meaning of the Anti-Assignment Act, the Court must next determine whether application of the Anti-Assignment Act to the VCF's enabling statute would advance the statute's stated objectives before applying it. Saint John Marine, 92 F.3d at 49; See N.Y. Guardian Mortgagee Corp. v. Cleland, 473 F. Supp. 422, 434 (S.D.N.Y. 1979) ("[T]here must be some congruence between the Act and its purposes before it is applied.").

In passing the Anti-Assignment Act, Congress sought to protect the United States Government by restricting the assignment of claims against it. See Martin, 300 U.S. at 594 ("The provisions of the statute making void an assignment or power of attorney by a Government contractor are for the protection of the Government."). As noted above, Congress sought to limit the United States Government's exposure to three potential liabilities:

> "(1) [T]o prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government, (2) to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant, and (3) to save to the United States defenses which it has to claims by an assignor by way of set-off, counter claim, etc., which might not be applicable to an assignee."

In re Ideal Mercantile Corp., 244 F.2d at 831 (quoting Shannon, 342 U.S. at 291-92).

In spite of the Anti-Assignment Act's broad language, courts have held the statute inapplicable where enforcement would not advance its underlying purposes. See N.Y. Guardian, 473 F. Supp. at 433-34 ("Despite the broad language of the Act, numerous exceptions to it have been recognized when [its] purposes would not be served.”). For example, the Anti-Assignment Act does not bar involuntary assignments that occur by operation of law, Saint John Marine, 92 F.3d at 48, which courts have interpreted to include “corporate mergers, consolidations, and reorganizations,” First Fed. Sav. & Loan Ass’n of Rochester, 58 Fed. Cl. at 158. Voluntary assignments for the benefit of creditors, transfers imposed by judicial order, subrogation, and corporate reorganizations that result in a transfer of assets are also situations in which courts have found the Anti-Assignment Act to be inapplicable. Saint John Marine, 92 F.3d at 49 (citing Goodman v. Niblack, 102 U.S. 556 (1880); Keydata Corp. v. United States, 504 F.2d 1115 (Ct. Cl. 1974); United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949)).

After weighing the relevant factors, the Court concludes that application of the Anti-Assignment Act to 49 U.S.C. § 40101 would further Congress’s intent in passing the Act. See N.Y. Guardian, 473 F. Supp. at 434.

First, applying the Anti-Assignment Act to awards under the VCF would allow the United States Government the opportunity, if ever necessary, to set off an Eligible Claimant’s award amount against preexisting debts owed to the United States. See Shannon, 342 U.S. at 291-92; Kim, 806 F.3d at 1172.

More significantly, however, application of the Anti-Assignment Act to 49 U.S.C. § 40101 limits the possibility of multiple payments of claims, preserves United States Government resources by eliminating the need for diligence to validate an alleged assignment, and streamlines the VCF's administration by requiring the United States Government to interact with only the original claimant. See In re Ideal Mercantile Corp., 244 F.2d at 831. The Special Master of the VCF has previously stated that the potential for fraud is a primary concern in the administration of the Fund. See September 11th Victim Compensation Fund, First Annual Status Report, at 4 (Oct. 2012), https://www.vcf.gov/pdf/VCFStatusReportOct2012.pdf ("As with any government program involving compensation, it is crucial that we implement key protocols to prevent fraud."). As the Special Master has noted, "[t]hese efforts are particularly important given the cap on the total amount of money available for the Fund." Id. Limiting the number of individuals to whom the United States Government makes award payments under the VCF would undoubtedly minimize the potential for fraud.

Accordingly, application of the Anti-Assignment Act to 49 U.S.C. § 40101 and, more specifically, to monetary awards issued under the VCF would further the purposes of the Act. Therefore, the Anti-Assignment Act applies to claims arising under 49 U.S.C. § 40101.

iii. The VCF-related Purchase Agreements Do Not Comply With the Anti-Assignment Act's Requirements

The Anti-Assignment Act allows a party to assign a claim against the United States only if it is made after "[1] a claim is allowed, [2] the amount of the claim is decided, and [3] a warrant for payment of the claim has been issued." 31 U.S.C. § 3727(b).

The RD Entities appear to argue that because they entered into the Purchase Agreements with Eligible Claimants only "after the Special Master's determination of the amount due to the seller, i.e., after the claim had been allowed," (Def. Rep. 6), Defendants have complied with Section 3727's requirements and the assignment is therefore permissible.

Oddly, the RD Entities do not address their compliance with the Anti-Assignment Act's two other technical requirements. 31 U.S.C. § 3727(b); Kim, 806 F.3d at 1176. However, this is of no event. The Court of Appeals for the Ninth Circuit has noted that compliance with Section 3727's third requirement, which allows for assignment of claims only after "a warrant for payment of the claim has been issued," is almost impossible given that "the Treasury no longer uses warrants." See 31 U.S.C. § 3727(b); Kim, 806 F.3d at 1169. Because the Government may, at its choosing, "waive coverage of the Anti-Assignment Acts," Kim, 806 F.3d at 1169 (quoting Riviera Fin. of Tex., Inc. v. United States, 58 Fed. Cl. 528, 530 (2003)), the warrant's anachronistic character, coupled with Congress's inaction in updating the statute's language, gives the Government "the power to pick and choose which assignments it will accept and which it will not." Kim, 806 F.3d at 1169-70. Here, there is no indication that the United States Government has waived coverage of the Anti-Assignment Act to 49 U.S.C. § 40101. In addition, neither party has argued that the RD Entities complied with the Anti-Assignment Act's three requirements under Section 3727(b).

Accordingly, because neither the RD Entities nor the Government have argued or alleged facts that the VCF Purchase Agreements comply with Section 3727's requirements, these assignments are void as against the United States under 31 U.S.C. § 3727.

3. Eligible Claimants and NFL Class Members "Incur[red] Debt" Through the Purchase Agreements

After addressing the preliminary issue of whether the VCF and NCLSA permit the assignment of Consumers' claims to settlement awards, which they do not, the Court is able to turn to the crux of the jurisdictional question presented here: whether the Purchase Agreements cause Consumers to incur "debt" such that the RD Entities "extend[] credit" within the meaning of a "covered person" under the CFPA. 12 U.S.C. §§ 5481(6)-(7). The RD Entities argue that, even if the assignments are invalid, this fact merely renders the Purchase Agreements void and would not "transform" the Purchase Agreements into extensions of "credit." (Def. Br. 18-21.) In its rather sparse response to this contention, the Government asserts that because the Purchase Agreements are invalid, Defendants functionally offer or provide a credit transaction in which consumers incur debt and defer the right to repay. (Compl. ¶ 19.)

In spite of the puzzling paucity of case law addressing facts similar to those at issue here, the Court agrees ultimately that the assignments in the Purchase Agreements are void <u>as against the third-party obligors</u>, <u>i.e.</u>, the VCF Claims Administrator and the NFL Settlement Fund, but give rise to a relationship between Defendants and Consumers in which the RD Entities "extend[] credit" and the Consumer incurs "debt" within the meaning of 12 U.S.C. § 5481(6)-(7).

The CFPA defines "credit" as "the right granted by a person to a consumer to [1] defer payment of a debt, [2] incur debt and defer its payment, or [3] purchase property or services and defer payment for such purchase." 12 U.S.C. § 5481(7). Although the CFPA does not define the term "debt," Black's Law Dictionary defines debt, in relevant part, as "a specific sum of money due by agreement or otherwise." Debt, Black's Law Dictionary (10th ed. 2014). Both parties rely on case law interpreting whether a transaction constitutes an extension of "credit" under the CFPA or other statutes that have substantially similar definitions of the term "credit." See 15 U.S.C. § 1602(f) (Truth in Lending Act ("TILA")); 15 U.S.C. § 1691(d) (Equal Credit Opportunity Act ("ECOA")). None of those cases, however, involves an assignment that a court has declared invalid as a matter of law, as is the situation here.

In Capela v. J.G. Wentworth, LLC, the court held that a transaction involving a party's sale and assignment of its right to structured settlement payments for a personal injury claim from Allstate Settlement Corporation in exchange for an upfront, lump sum cash payment from a structured settlement company was a sale, not an extension of "credit" under TILA. No. CV09-882, 2009 WL 3128003, at *9, 10 (E.D.N.Y. Sept. 24, 2009) (citing 15 U.S.C. § 1601 et seq.). The court found that the transaction was not properly classified as a loan because the assignor "ha[d] no obligation at all to pay the settlement installments if Allstate fail[ed] to do so" under the terms of the agreement. Id. Similarly, in Reed v. Val-Chris Invs., Inc., the court found that a party's assignment of his future interest in his father's estate to a company called Advance Inheritance, LLC ("AI") in exchange for an immediate lump sum cash payment from

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AI was not an extension of "credit" under TILA because, under the transaction's terms, AI "had no recourse against Plaintiff if his potential inheritance was not sufficient to cover his assignment." No. 11cv371, 2011 WL 6028001, at *2-3 (S.D. Cal. Dec. 5, 2011).

Capela and Reed present facts that are fundamentally different from those at issue here because the assignments in those cases were not declared invalid as a matter of law. In Capela, the purchaser of the receivables petitioned for and obtained judicial approval of the transaction pursuant to New York's Structured Settlement Protection Act, N.Y. Gen. Oblig. Law § 5-1701, et seq., in New York Supreme Court, Suffolk County. Id. at *1. Similarly, in Reed, the assignment agreement was "filed with the state probate court" and, although not mentioned specifically in the case, would have been subject to judicial approval pursuant to California Probate Code § 11604.5(d)(1)-(h)(1) (West) (amended 2015). Unlike here, a court reviewed and approved the assignments at issue in Capela and Reed prior to those plaintiffs filing suit against the structured settlement companies. Rather, plaintiffs in Capela and Reed sought to have the disclosure and protection requirements of TILA and ECOA applied to their structured settlement agreements by having them classified as extensions of "credit" without challenging the validity of the underlying assignment. Capela, 2009 WL 3128003, at *2; Reed, 2011 WL 6028001, at *2. Because the assignments at issue in the NFL and VCF purchase agreements are invalid as a matter of law, the analyses in Capela and Reed have limited transferability to this case.

Here, the Court has concluded that the assignments in the VCF Purchase Agreements and the NFL Purchase Agreements are void as against the third-party obligors.[4] The relevant question thus becomes whether, looking beyond the gloss of the “assignment and sale” label that the RD Entities have affixed to the Purchase Agreements, these transactions constitute an extension of “credit” under the CFPA as between the Consumers and the RD Entities.

It is well-established that contract interpretation is the domain of state law. See Capela, 2009 WL 3128003, at *10 (looking to state law to determine nature of agreement between parties); Kim, 806 F.3d at 1175 (applying California law to determine nature of underlying agreement between parties). Therefore, the Court looks to New York law in interpreting the

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[4] The assignability of an individual’s future interest in an estate is an evolving area of law in both California and New York. See David Horton & Andrea Cann Chandrasekher, Probate Lending, 126 Yale L. J. 102, 108 (2016) (analyzing empirical evidence on 594 probate lending transactions in California and concluding in part that the practice “raise[s] serious fairness concerns” and “violat[es] . . . [California’s] usury laws on a massive scale”).

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nature of the agreement between Consumers and the RD Entities after peeling away the invalid assignments and the "assignment and sale" labels from these transactions.[5] Id.

Under New York law, an assignment of litigation proceeds takes effect as an equitable lien in favor of the "assignee." In re Minor, 482 B.R. 80, 84 (Bankr. W.D.N.Y. 2012) (quoting Williams v. Ingersoll, 89 N.Y. 508, 519 (N.Y. 1882)). "An equitable lien is 'a right . . . to have a fund, specific property, or its proceeds, applied in whole or in part to the payment of a particular debt.'" Arbor Realty Funding, LLC v. East 51st St. Dev. Co., 907 N.Y.S.2d 98 (Sup. Ct. 2009) (quoting Bank of India v. Weg & Myers, 691 N.Y.S.2d 439, 445 (N.Y. App. Div. 1999)) (emphasis added).

Here, because the assignments are void, no ownership rights are transferred to the RD Entities under the Purchase Agreements. Rather, the RD Entities are creditors with a security interest in Consumers' future – but already determined – settlement award amounts under the VCF or NCLSA. In re Minor, 482 B.R. at 85. By any measure, therefore, the lump sum cash advance that the RD Entities provide causes Consumers to "incur a debt and defer its payment" because it is a specific sum of

[5] Defendants accept for purposes of this motion only that New York law applies for purposes of characterizing the transactions as sales or loans. (Def. Br. 26 n.10.)

money due by agreement. See Debt, Black's Law Dictionary (10th ed. 2014). The idea that the Consumer's repayment obligation is legally "triggered" only upon receipt of settlement funds from the settlement administrator is illusory. (Def. Br. 19.) The repayment obligation is always with the Consumer from the moment the RD Entities disburse the lump sum cash payment to the Consumer. To that end, the Consumer "defers" payment of this debt unilaterally, in spite of Defendants' contentions to the contrary. (Def. Br. 19) ("Cases interpreting analogous federal statutory definitions of 'credit' confirm that, the 'hallmark of credit . . . is the right of one party to make deferred payment.'") (quoting Reithman v. Berry, 287 F.3d 274, 277-79 (3d Cir. 2002)). The RD Entities' lump sum cash advance is "'an extension of credit, an advance, or loan . . . with the assignment held over the [Consumer] as a sort of club or collateral security'" regardless of whether the third-party obligor remits payment to the Consumer or not. Missouri ex rel. Taylor v. Salary Purchasing Co. Inc., 358 Mo. 1022, 1028 (1949) (quoting McWhite v. State, 226 S.W. 542, 543 (Tenn. 1921)).

Bankruptcy courts frequently face the question of whether a transaction is properly characterized as a loan or a sale where the purchaser of a receivable must defend its rights against other creditors in the seller's bankruptcy proceeding. Peter V. Pantaleo et al., Rethinking the Role of Recourse in the Sale of

Financial Assets, 52 Bus. Law. 159, 160 (1996). To that end, bankruptcy courts weigh the presence or absence of certain factors in determining whether a transaction is a sale or a loan under New York law. (Def. Br. 19, 27.) Among the factors that these courts consider in this analysis is the existence of recourse. If a buyer retains recourse against the seller, this indicates that the buyer has assumed less than all of the ownership rights in a purported sale, thereby indicating that the transaction is more likely a loan. See In re Dryden Advisory Group, LLC v. Beneficial Mut. Sav. Bank, 534 B.R.612, 620-23 (Bankr. M.D. Pa. 2015) (applying New York law); Pantaleo, 52 Bus. Law. at 159 (explaining that “an issue can arise over whether to view [a] transaction as a sale or a secured loan” where recourse against the seller exists because it indicates that “less than all the risks of ownership [have been] transferred” from seller to buyer).

Courts also look to other factors in making this determination. For example, an assignee’s right to demand direct payment from the seller’s account debtor tends to indicate that a true sale has taken place. See In re Dryden Advisory Grp., 534 B.R. at 622. Conversely, a seller’s right of repurchase from the buyer tends to weigh in favor of classifying the transaction as a loan because it indicates that the seller has not fully alienated his ownership rights in the property.

See In re Joseph Kanner Hat Co., 482 F.2d 937, 940 (2d Cir. 1973) (finding pledge of security rather than true sale where underlying asset serving as security was returned upon repayment of the advanced funds). In addition, courts may also look to the intent of the parties in effectuating a sale or a loan as indicated by the language of the contract. See Platinum Rapid Funding Grp. Ltd. v. VIP Limousine Servs., Inc., No. 604613-15, 2016 WL 4478807 (N.Y. Sup. Ct. June 8, 2016).

Bearing all of these factors in mind, Defendants urge that the paramount factor in determining whether a transaction is a sale or a loan under New York law is whether the "risk of non-payment is transferred from the seller to the buyer, not the degree of risk borne by the buyer." (Def. Rep. 11-12.) Because the RD Entities purport to assume all of the risks of nonpayment in the Purchase Agreements, they argue that the Agreements are non-recourse and therefore are true sales. (Id.)

Contrary to the RD Entities' assertions, the instant case is not a line-drawing exercise. The assignments in the Purchase Agreements are void and thus do not transfer a single right of ownership from Consumers to the RD Entities in their monetary claims. This constitutes the beginning and end of the story. Because the assignments are invalid, the RD Entities retain recourse against the Consumer in the event of nonpayment.

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In spite of the lack of case law classifying structured settlement transactions as loans or sales where a court deems the assignment void as a matter of law against the third-party obligor, a single Missouri state court case contains significant factual parallels to the case at hand. In Missouri ex rel. Taylor v. Salary Purchasing Co. Inc., the Missouri Attorney General brought charges against a salary advance company that offered consumers a cash advance on their unearned wages. 358 Mo. 1022, 1024-25 (1949). At that time, the Missouri legislature had made transactions amounting to “payday loans” illegal. Id. (citing Mo. Rev. Stat. §§ 3226, 3227 (1939) (capping allowable interest rate at six percent if no rate specific and eight percent if stated in contract, respectively)). To circumvent this prohibition, the salary advance company structured the transactions as “sales” in which consumers would “assign” their future unearned wages to the salary advance company. Id. The assignment agreements contained exorbitant repayment terms that dictated repayment of the amount advanced plus fees that, in reality, functioned as usurious interest rates. Id. Additionally, although the salary advance company was authorized to notify and collect from the consumer’s employer, it never attempted to do this. Id. Ultimately, the Missouri Attorney General brought charges under state civil and criminal usury laws against the salary advance company, arguing that the assignments were actually loans with usurious interest rates. Id. In response, the salary advance company argued that the assignments were not loans subject to state usury laws, but valid sales. Id. In the alternative, the salary advance company asserted that the effect of a state statute invalidating assignments of unearned wages would not convert the assignments into loans but would only render the assignments null and void. Id. at 1026.

In rejecting the salary advance company's argument, the Supreme Court of Missouri, sitting en banc, noted that the void assignments "could be nothing but loans" because they "transferred no right or title in the unearned wages which they purported to assign." Id. In spite of the assignments' terms to the contrary, the transactions imposed a repayment obligation on the consumer because the salary advance company "did not intend to donate to the applicants the money which it advanced on such void assignments. It intended to create the relationship of debtor and creditor." Id. "The assignment was . . . taken as a security for the money advanced, and as something to be held over a customer who did not make prompt settlement. . . . this is clearly an extension of credit, an advance, or loan, to the employee, with the assignment held over the employee as a sort of club or collateral security." Id. at 1028 (quoting McWhite v. State, 226 S.W. 542, 543 (Tenn. 1921)).

In sum, because the assignments in the Purchase Agreements are void, the RD Entities obtain, at most, an equitable lien on Consumers' future settlement award proceeds that establishes a creditor-debtor relationship. Id. Accordingly, Defendants "extend[] credit," and Consumers "incur[] debt" under the Purchase Agreements, and the RD Entities are therefore "covered persons" under the CFPA.

Defendants argue that the legal effect of invalidating an assignment is to "render the agreement null and void." (Def. Rep. 7) (citing Singer Asset Fin. Co. v. Bachus, 741 N.Y.S.2d 618, 621 (N.Y. App. Div. 2002)). As discussed, the Court has determined that the assignment is void as against the third-party obligors in this case, i.e., the NFL Settlement Fund and the VCF Claims Administration. However, the remaining contractual arrangement between the RD Entities and Consumers created a creditor-debtor relationship separate and apart from the void assignments. To that end, although the assignment is "null and void" as against the third-party obligors, the Court refuses to look the other way when evaluating the true nature of the transactions. Therefore, to the extent these extensions of credit did not comply with state regulatory requirements governing loans at the time they were offered, the RD Entities will not be allowed simply to return to their pre-agreement positions without any penalties. See, e.g., Bouffard v. Befese, LLC, 976 N.Y.S.2d 510, 514 (N.Y. App. Div. 2013) (explaining that transaction must be "considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it" in determining whether it is a usurious loan).

The pre-settlement legal funding transactions referenced in ALFA's amicus curiae brief differ in a crucial respect. (See ALFA Br.) In those transactions, the pre-settlement legal funding agreements are entered into before the claim is resolved. The ALFA Member's right to repayment is contingent on the consumer's ultimate success on his or her claim. (ALFA Br. 5.) ALFA notes that Regulation Z's definition of "credit" expressly excludes "[i]nvestment plans in which the party extending capital to the consumer risks the loss of the capital advanced." 12 C.F.R. § 1026.2(a)(14) (Supp. I 2017). The transactions that the RD Entities offer present no such risk of loss because, as a prerequisite, the RD Entities require Consumers to have a settlement award letter stating the amount to which they are entitled from their respective settlement fund. (Compl. ¶¶ 20, 24-26.)

Applying this framework here, the Court concludes that the Government has alleged plausibly that the transactions at issue here functioned as extensions of "credit" in practice.

a. The RD Entities Extend "Credit" and "Service[] Loans"

Under the CFPA, a "covered person" is one who "extend[s] credit and servic[es] loans." 12 U.S.C. §§ 5481(6)(A); 5481(15)(A)(1). Having established that the Complaint alleges adequately that the Purchase Agreements at issue extend "credit," the issue remains whether the RD Entities also "servic[e] loans." The RD Entities argue that even if they extend "credit," the Government has not alleged plausibly that they also "servic[e] loans." 12 U.S.C. § 5481(15)(A)(1); (Def. Reply 8.)

Under 12 U.S.C. § 5481(6), a "covered person" is "any person that engages in offering or providing a consumer financial product or service." Id. (emphasis added). Adoption of the RD Entities' interpretation of "financial product or service" to cover only entities that both "extend[] credit and servic[e] loans" would result in rendering the "or" in "financial product or service" inconsistent with the term's definition because it would ascribe the same definition, "extend[ing] credit and servic[ing] loans," to two distinct concepts that are separated by the term "or." 12 U.S.C. §§ 5481(6)(A), 5481(15)(A)(1).

It is well-established that courts may interpret the term "and" to have a disjunctive effect in interpreting a statute's meaning. See Peacock v. Lubbock Compress Co., 252 F.2d 892, 894 (5th Cir. 1958) (holding that "and" was disjunctive in the context of a statute that required an employer to pay overtime wages to employees "engaged in the ginning and compressing of cotton"). Here, interpreting the term "and" disjunctively does not defy common sense. Not infrequently, the party that originates or makes a loan is different from the party that services that loan. Given this fact, it would make little sense for Congress to grant the CFPA jurisdiction only over loan originators that service their own loans. Such an interpretation would not capture a large section of the market that the CFPA expressly seeks to regulate.

Even if Congress did not intend the term "and" to be interpreted disjunctively, the Government has adequately pleaded that the RD Entities "servic[e] loans." The CFPA defines the term "service provider" as one who "provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service." 12 U.S.C. § 5481(26)(A). Drawing from this statutory definition of the term "service," which appears in the same section as the term "financial product or service," the Court concludes that the Government has alleged adequately that the RD Entities "servic[e] loans" because they carry out "material service[s] . . . in connection with the offering or provision . . . of a consumer financial product or service." 12 U.S.C. § 5481(26)(A). For one, the Complaint alleges that Roni Dersovitz has made phone calls to collect from Consumers and that Dersovitz has authority to determine whether RD should collect. (Compl. ¶ 54.) Collection on loans is a "material service" relating to the provision of a loan because, without collection, the loan would be a nullity.

Accordingly, the Government need only plead that the RD Entities "extend[ed] credit" or "servic[ed] loans" to allege plausibly that they are "covered persons" under the CFPA. In the alternative, the Court concludes that, even if the Government had to allege that the RD Entities also "servic[e] loans," the Complaint also alleges adequately that the RD Entities, by and through their founder and owner Roni Dersovitz, engaged in such activities by collecting on loans and making the decision to collect on loans.

4. The RD Entities Are "Covered Persons" Under the CFPA

For the reasons stated above, the Court concludes that the Government has pleaded adequately that the RD Entities are "covered persons" under the CFPA. 12 U.S.C. § 5481(6)(a).

b. Failure to State a Claim Fed. R. Civ. P. 12(b)(6)

Defendants next argue that, even if the RD Entities are "covered persons" within the meaning of the CFPA, the Complaint should be dismissed for failure to state a claim under Rule 12(b)(6).

i. Rule 9(b)'s Heightened Pleading Standard Does Not Apply to Non-Fraud Claims

Before addressing the substantive allegations in the Complaint, Defendants argue that because the Government's claims are all premised on an alleged unified course of fraudulent conduct and the Complaint fails to distinguish between fraud and non-fraudulent claims, Rule 9(b)'s heightened pleading standard should apply to all of the claims alleged in the Complaint. (See Def. Br. 24.) Proceeding under this assertion, the RD Entities argue that the Government's claims fail under Rule 9(b)'s heightened pleading standard and should be dismissed. (Id.) In response, the Government asserts that fraud and deception are separate legal concepts and that Rule 9(b)'s heightened pleading standard does not apply to the Government's deceptive conduct claims. (Pl. Opp. 19-21.)

Rule 9(b) of the Federal Rules of Civil Procedure imposes a heightened pleading standard and requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Specifically, Rule 9(b)'s heightened pleading standard requires pleadings to "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the

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speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004) (quoting Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993)) (internal quotation marks omitted).

At least two courts addressing this specific issue have concluded that Rule 9(b)'s heightened pleading standard does not apply to claims of unfair, deceptive, or abusive acts or practices under the CFPA for three reasons. See CFPB v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342, 1372 (N.D. Ga. 2015) (concluding that claims for deception under the Fair Debt Collection Practices Act ("FDCPA") and the CFPA should not be subject to Rule 9(b)); CFPB v. Navient Corp., 17-CV-101, 2017 WL 3380530, at *24 (M.D. Pa. Aug. 4, 2017) (same). First, "Rule 9(b) expressly applies only to claims alleging 'fraud or mistake,' and as the Tenth Circuit and several district courts have reasoned, consumer protection claims are not claims of fraud, even if there is a deceptive dimension to them." Navient, 2017 WL 3380530, at *24 (quoting Frederick J. Hanna, 114 F. Supp. 3d at 1372). "Second, 'the United States Supreme Court has consistently cautioned against extending this heightened pleading standard beyond claims for fraud or mistake.'" Id. Finally, application of Rule 9(b) "to consumer protection claims is not only inconsistent with some of the policy reasons for applying Rule 9(b) in the first place, but is also inconsistent with the remedial nature of consumer protection statutes." Navient Corp., 2017 WL 3380530, at *24 (quoting Frederick J. Hanna & Assocs., 114 F. Supp. 3d at 1373-74). In Navient, the court elaborated on this last reason by explaining that "unlike a fraud claim, the [CFPA] does not have an intent element" such that "requiring the CFPB to plead in conformity with Rule 9(b) would graft an intent requirement onto the claims under the FDCPA and [CFPA] that is not otherwise present." Navient Corp., 2017 WL 3380530, at *25.

The Court has identified no case in which this Court or the Court of Appeals has applied Rule 9(b)'s heightened pleading standard to claims of deceptive or abusive acts or practices under the CFPA. See, e.g., CFPB v. NDG Fin. Corp., No. 15-cv-5211 (CM), 2016 WL 7188792, at *14-15 (S.D.N.Y. Dec. 2, 2016) (applying Rule 8 to claims under CFPA). Furthermore, the Court finds the Navient court's reasoning as to why Rule 9(b)'s heightened pleading standard should not be applied to deceptive acts or practices claims under the CFPA to be persuasive. Navient, 2017 WL 3380530, at *24-25. Accordingly, the Court declines to apply Rule 9(b)'s heightened pleading standard to deceptive or abusive acts or practices claims under the CFPA. 12 U.S.C. §§ 5531(a), 5536(a)(1)(B); Fed. R. Civ. P. 9(b).

Similarly, the Court of Appeals has stated clearly that Rule 9(b)'s heightened pleading standard does not apply to New York General Business Law § 349. In so holding, the Court of Appeals has noted that "[Section] 349 extends well beyond common-law fraud to cover a broad range of deceptive practices" and that Section 349 claims "[do] not require proof of the same essential elements (such as reliance) as common-law fraud." Pelman ex rel. Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005). Accordingly, Rule 8(a)'s less stringent pleading standard applies to NYAG's claim under N.Y. Gen. Bus. Law § 349.

The question of what pleading standard should apply to the NYAG's claim under N.Y. Executive Law § 63(12) is less clear cut. New York Executive Law § 63(12) empowers the New York Attorney General to seek injunctive relief and other remedies against persons or entities that "engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business" in New York. N.Y. Exec. Law § 63(12). The statute defines the word "fraudulent" as including "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." Id. The terms "persistent fraud" or "illegality" are defined to "include continuance or carrying on of any fraudulent or illegal act or

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conduct." Id. Thus, while a claim under Section 63(12) may allege fraud and necessitate a showing of knowledge or reliance as an element of the claim, the NYAG may equally assert a cause of action under Section 63(12) that alleges "deception" or some other non-fraudulent conduct that does not include scienter as an element. See People v. Am. Motor Club, 582 N.Y.S.2d 688, 692 (N.Y. App. Div. 1992) (explaining that, under statute, "scienter is not required and false promises are sufficient" where pleadings amount to illegality under § 63(12), not fraud under § 63(12)).

Applying the same logic that the Court of Appeals has employed in determining that claims under N.Y. GBL § 349 are not subject to Rule 9(b)'s heightened pleading standards where the underlying conduct is not premised on a fraudulent scheme, the Court concludes that NYAG's claim under N.Y. Executive Law § 63(12) is also not subject to this heightened pleading standard because the underlying conduct is premised on deceptive acts or practices that do not include intent or reliance as an element of those claims. 12 U.S.C. §§ 5531(a), 5536(a)(1)(B). Accordingly, the Court applies Rule 8(a) in evaluating the Government's pleading of its claim under N.Y. GBL § 349.

1. <u>"Substantial Assistance" Claims Under the CFPA</u>

In each of the CFPA deceptive or abusive acts or practices claims brought against Defendants, the Government alleges that Roni Dersovitz, the RD Entities' owner and founder, is liable for substantially assisting the RD Entities in carrying out these purported acts.

Under 12 U.S.C. § 5536(a)(3), it is unlawful for "any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 5531 of this title [including unfair, deceptive or abusive acts or practices]." Defendants argue that Rule 9(b)'s heightened pleading standard should apply to all of the Government's claims because they are all "premised on an alleged scheme to defraud consumers." (Def. Br. 24.)

The Court concludes that the knowledge requirement for individual liability under the CFPA does not trigger Rule 9(b)'s heightened pleading requirement. As discussed, the primary violation of unfair, deceptive, or abusive acts or practices underlying the CFPA claims against Dersovitz in his individual capacity do not constitute fraud claims. <u>See</u> <u>Navient</u>, 2017 WL 3380530, at *24 ("[C]onsumer protection claims are not claims of fraud, even if there is a deceptive dimension to them"). In addition, the scienter requirements of "knowingly or recklessly" do not implicate automatically Rule 9(b)'s heightened pleading requirements. Courts in this Circuit have defined "reckless" as behavior that is "highly unreasonable" or represents "an egregious refusal to see the obvious, or to investigate the doubtful." SEC v. Yorkville Advisors, LLC, ___ F. Supp. 3d ___, 2018 WL 1725555, at *14 (S.D.N.Y. Mar. 29, 2018). Such standard is distinguishable from the scienter associated with fraud, which "encompasses a particular state of mind, an element of intent or deception" that is lacking in the Complaint's allegations. Lenartz v. Am. Superconductor Corp., 879 F. Supp. 2d 167, 191-92 (D. Mass. 2012) (internal quotation marks and citation omitted). Furthermore, the one other case that the Court has identified evaluating "substantial assistance" claims under the CFPA, 12 U.S.C. 5536(a)(3), applied Rule 8(a) in evaluating those claims on a motion to dismiss. CFPB v. Universal Debt & Payment Solutions, LLC, 15-cv-00859-RWS, 2015 WL 11439178 (N.D. Ga. Sept. 1, 2015).

Accordingly, the claims for individual liability against Dersovitz pursuant to 12 U.S.C. 5536(a)(3) are not subject to Rule 9(b)'s heightened pleading standard.

2. Specificity of Allegations Against Each Defendant Under Rule 8(a)

Rule 8(a) requires that a defendant be given "fair notice of what the . . . claim is and the grounds upon which it rests."

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). This threshold requirement allows an adverse party to "'answer the complaint and prepare for trial.'" Lazarek v. Ambit Energy Holdings, LLC, 15-CV-6361-FPG, 2017 WL 4344557, at *3 (W.D.N.Y. Sept. 28, 2017) (quoting Strunk v. U.S. House of Representatives, 68 F. App'x 233, 235 (2d Cir. 2003)).

The RD Entities contend that the Complaint fails to comply with Rule 8(a) because its allegations "lump" the three corporate Defendants together without adequately differentiating between and among them. (Def. Br. 38.) Defendants argue that the Government's failure to parse the factual basis for each claim as to each corporate Defendant deprives the RD Entities of fair notice of the claims against each of them. Id.; see Ochre LLC v. Rockwell Architecture Planning & Design, P.C., No. 12 Civ. 2837, 2012 WL 6082387, at *6 (S.D.N.Y. Dec. 3, 2012). In response, Plaintiffs assert that they refer to the Defendants collectively because each Defendant engaged in the wrongdoing alleged in the Complaint. (Pl. Opp. 35.)

Although the Complaint is hardly a model of best pleading practices, the Court concludes that its shortcomings do not amount to fatal "lumping" together of Defendants such that the Complaint warrants dismissal for failure to comply with Rule 8(a)'s pleading requirements. First, the Court of Appeals has held that dismissal pursuant to Rule 8 is proper when a complaint is “unintelligible” and does not “explain[] what conduct constituted the violations, which defendants violated which statutes . . . or how the alleged violations harmed [the plaintiff].” Vantone Grp. LLC v. Yangpu NGT Indus. Co., Ltd., No. 13-cv-7639 (LTS), 2015 WL 4040882, at *4 (S.D.N.Y. July 2, 2015) (quoting Strunk, 68 F. App’x. at 235) (internal quotation marks omitted).

Here, the Complaint states the nature of the various types of claims brought against the corporate defendants, including alleged violations of state and federal consumer protection statutes, and the conduct underlying those claims. Vantone, 2015 WL 4040882, at *4. At this stage of the proceedings, the Government is not required to plead specific details as to which entity did what during the alleged course of misconduct. See id. (quoting Hudak v. Berkley Grp., Inc., No. 13CV0089-WWE, 2014 WL 354676, at *4 (D. Conn. Jan. 23, 2014)) (“[P]rior to discovery, plaintiff need not explain the details of each defendant’s role in the planning, funding, and executing [of] defendant’s alleged joint [] scheme”). The Complaint also states adequately which Defendants are accused of violating which statutes because the Complaint avers that all three of the corporate Defendants engaged in each of the alleged violations. (Pl. Opp. 35) (“The three RD Defendants are referred to collectively because each engaged in the wrongdoing alleged in the Complaint"). "Nothing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts defendants that identical claims are asserted against each defendant." Vantone, 2015 WL 4040882, at *4 (quoting Hudak, 2014 WL 354676, at *4). Therefore, the Complaint does not warrant dismissal under Rule 8(a) for impermissibly "lumping" together Defendants.

Defendants rely on Ochre LLC v. Rockwell Architecture Planning & Design, P.C., in arguing that the Complaint "impermissibly" lumps the corporate Defendants together. No. 12 Civ. 2837, 2012 WL6082387, at *6 (S.D.N.Y. Dec. 3, 2012). In Ochre, the court concluded that the complaint failed to state a copyright-infringement claim where the plaintiff brought claims against four entirely separate entities, "a design firm, an architect, a hotel, and a procurement agent," and failed to separate out "the key allegations against each defendant." Aghaeepour v. N. Leasing Sys., Inc., No. 14-CV-5449 (NSR), 2015 WL 7758894, at *3 (S.D.N.Y. Dec. 1, 2015) (quoting Ochre, 2012 WL 6082387, at *6). Unlike in Ochre, where the defendants were entirely separate entities, the Complaint here avers that the three corporate defendants' share significant characteristics: the corporate defendants share a principal places of business at the same address, (Compl. ¶¶ 15-17), Roni Dersovitz is the founder and owner of each corporate defendant, (Compl. ¶ 18), all three corporate defendants acted in "swoop[ing] in with a 'deal'" while the Class Members and Eligible Claimants awaited payment of their settlement awards (Compl. ¶ 5), and that, based on the information in the Purchase Agreements, the ABA account number for wiring money is the same on all of the Purchase Agreements regardless of the corporate defendant named in the Purchase Agreement, (Pl. Opp. 36.) For these reasons, <u>Ochre</u> has limited applicability to the instant situation.

Accordingly, because the Complaint provides each corporate defendant with "fair notice of what the . . . claim is and the grounds upon which it rests," dismissal under Rule 8 is not warranted here. <u>Erickson v. Pardus</u>, 551 U.S. 89, 93 (2007).

ii. <u>"Substantial Assistance" Liability Under the CFPA</u>

In its Complaint, the Government brings five claims of individual liability against Roni Dersovitz for "knowingly or recklessly providing substantial assistance" to a "covered person" under the CFPA – here, the RD Entities. 12 U.S.C. § 5536(a)(3); (Compl. ¶¶ 8, 69, 77, 84, 91, 98.)

The Court has identified only one case interpreting 12 U.S.C. § 5536(a)(3), and that decision does not bind this Court. <u>See</u> <u>CFPB v. Univ. Debt & Payment Solutions, LLC, et al.</u>, 15-CV-00859-RWS, 2015 WL 11439178 (N.D. Ga. Sept. 1, 2015). Nevertheless, the Court finds the <u>Universal Debt & Payment Solutions</u> court's analysis pertaining to the scienter requirement under 12 U.S.C. § 5536(a)(3) instructive for its own analysis.

In Universal Debt & Payment Solutions, the court drew on the substantially similar requirements of individual aiding and abetting liability under federal securities laws and individual liability for providing "substantial assistance" under the CFPA, 12 U.S.C. § 5536(a)(3), in interpreting the CFPA's individual liability statute. 15 U.S.C. § 78t(e); 2015 WL 11439178, at *6. Section 20(e) imposes liability on "any person that knowingly or recklessly provides substantial assistance to another person in violation of [the securities laws]." 15 U.S.C. § 78t(e).[6]

The Court of Appeals has interpreted aiding and abetting liability under § 20(e) to require the Government to show "(1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3)

[6] Although the Federal Trade Commission Act ("FTCA") and the CFPA share structural characteristics that facilitate statutory interpretation under other CFPA provisions, the FTCA's substantial assistance provision does not contain an analogous scienter requirement and therefore has limited relevance here. See NDG Corp., 2016 WL 7188792, at *16 (noting that "courts have adopted the established meaning of other words in § 5536 [of the CFPA] from the FTCA, in acknowledgment of the two provisions' similarity" and that "the FTCA and CFPA were . . . enacted for similar purposes"). Under the FTCA, the Federal Trade Commission ("FTC") is authorized to prevent "persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2).

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'substantial assistance' by the aider and abettor in the achievement of the primary violation." SEC v. DiBella, 587 F.3d 553, 566 (2d Cir. 2009) (internal quotation marks and citation omitted).

To plead adequately the "substantial assistance" element, the Government must "establish that the aider and abettor 'in some sort associated himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his action to make it succeed.'" SEC v. DiMaria, 207 F. Supp. 3d 343, 359 (S.D.N.Y. 2016) (quoting SEC v. DiBella, 587 F.3d 553, 566 (2d Cir. 2009)). Courts have recognized that "although 'a high degree of knowledge may lessen the [Government's] burden in proving substantial assistance,' awareness and approval, without more, do not constitute substantial assistance." DiMaria, 207 F. Supp. 3d at 359 (quoting SEC v. Apuzzo, 689 F.3d 204, 215 (2d Cir. 2012)).

As to § 20(e)'s knowledge requirement, "the plaintiff must at least demonstrate recklessness" to satisfy it. Yorkville Advisors, LLC 2018 WL 1725555 at *14. "Mere negligence does not suffice." Id. "Recklessness sufficient to establish scienter involves conduct that is highly unreasonable and represents an extreme departure from the standards of ordinary care." SEC v. China N.E. Petroleum Holdings Ltd., 27 F. Supp. 3d 379, 389 (S.D.N.Y. 2014) (internal quotation marks and citation omitted).

iii. Deceptive and Abusive Conduct Under the CFPA

1. Counts I, III, IV, V: Deceptive Acts or Practices Under the CFPA

The Complaint includes four claims of deceptive acts or practices under the CFPA against all of the named Defendants. To make a prima facie case of deceptive acts or practices under the CFPA, the Complaint must allege adequately "(1) a representation, omission or practice that, (2) is likely to mislead consumers acting reasonably under the circumstances, and (3), [that] the representation, omission, or practice is material." CFPB v. NDG Fin. Corp., 15-cv-5211 (CM), 2016 WL 7188792, at *14 (S.D.N.Y. Dec. 2, 2016) (quoting FTC v. Med. Billers Network, Inc., 543 F. Supp. 2d 283, 303 (S.D.N.Y. 2008)) (alteration in original).

In essence, the RD Entities argue that each of the Complaint's deceptive acts or practices claims under the CFPA must fail because each is based on the conclusory allegation that the transactions at issue are loans, not sales. (Def. Br. 26.) Because, as a matter of law, the Purchase Agreements were void and functioned plausibly as extensions of credit, the Court rejects this defense and finds that the Complaint plausibly alleges that Defendants engaged in deceptive acts or practices in violation of the CFPA.

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a. Count I

Count I avers that the RD Entities violated the CFPA by deceptively marketing the Purchase Agreements as sales when in fact these transactions were properly characterized as loans. (Def. Br. 25.)

As discussed earlier, federal and state law, as well as the NCLSA's express terms, prohibit consumers from assigning any of their interest in their settlement awards from the VCF and NCLSA, respectively. According to the Complaint, Defendants made false representations to Consumers that its products were valid assignments of Consumers' interests in their anticipated settlement awards. (Compl. ¶ 38-39.) Defendants also labeled the Purchase Agreements as "assignment and sale" agreements when, in fact, the Purchase Agreements were not true sales. See FTC v. Verity Int'l, Ltd., 443 F.3d 48, 64 (2d Cir. 2006) (holding that making a representation to consumers that is false is sufficient to show that representation would likely mislead consumers acting reasonably in alleging claim under Section 5(a)(1) of the Federal Trade Act, 15 U.S.C. § 45(a)(1)). Such statements, which are false, could objectively mislead a consumer acting reasonably under the circumstances, thus satisfying the claim's second element.

Finally, the Government also alleges adequately that the misleading representation was material. "Express representations that are shown to be false are presumed material." Med. Billers Network, 543 F. Supp. 2d at 304 (citing FTC v. Patriot Alcohol Testers, Inc., 798 F. Supp. 851, 856 (D. Mass. 1992)). Because the Complaint alleges adequately that the Purchase Agreements were not valid sales, representations to the contrary would be material.

Accordingly, the Government alleges adequately that Defendants engaged in deceptive acts or practices in violation of the CFPA.

i. "Substantial Assistance" Claim Against Roni Dersovitz Under Count I

The Court concludes that the Government has pleaded facts sufficient to show that Dersovitz had the requisite scienter to state a claim for individual liability under 12 U.S.C. § 5536(a)(3). As to the first element and as already established, the Government has alleged plausibly that the RD Entities engaged in deceptive acts or practices in violation of 12 U.S.C. §§ 5531(a), 5536(a)(1)(B), which in turn alleges adequately an "actual violation" of § 5531(a), by misrepresenting that it is entering into contracts with Consumers for valid and enforceable assignments. (Compl. ¶ 63.)

Turning to the scienter requirement, the Court concludes that the Complaint pleads facts sufficient to allege that

Dersovitz exhibited an “extreme departure from the standards of ordinary care” in offering to enter into the Purchase Agreements with Consumers that Dersovitz must have known were likely not valid.

The Complaint alleges that Dersovitz has “significant responsibility for establishing RD’s policies and practices,” “substantial control over RD’s operations,” and “responsibility to [sic] dictate all the terms of [C]onsumer contracts.” (Compl. ¶¶ 18, 27.) In addition, Dersovitz is the founder and owner of each RD Entity named as a Defendant in this action. (Compl. ¶ 18.) Given Dersovitz’s role as founder and owner of the RD Entities and his authority to “dictate the terms of [C]onsumer contracts,” his conduct is at least “reckless” with respect to the NFL Settlement Agreement’s anti-assignment clause and the Anti-Assignment Act’s potential applicability to the VCF Purchase Agreements. (Compl. ¶¶ 34-36.)

As to the NFL Purchase Agreements, the NCLSA contains clear and unambiguous anti-assignment language. Dersovitz’s failure to inform Class Members that this existed exhibits “highly unreasonable” conduct that “represents an extreme departure from the standards of ordinary care.” Furthermore, the allegations suggest that Dersovitz was aware of the possibility that the assignments were impermissible but decided to go ahead with the transaction in spite of this. The Purchase Agreements address specifically the possibility that the assignments in the Purchase Agreements will be classified as loans by a court.

Similarly with the VCF Purchase Agreements, Dersovitz encountered several warning signs indicating a high risk that the RD Entities were misrepresenting the nature of these agreements to Consumers, specifically, that the VCF Claims Administrator refused to make payment directly to the RD Entities, in spite of its demands that it do so pursuant to the assignments, and the general disclaimer in the VCF Purchase Agreements that a court may find the sale to be a loan. In sum, the Complaint adequately alleges that Dersovitz acted recklessly in knowing that the assignments may well be invalid but holding them out as enforceable.

Finally, Dersovitz provided “substantial assistance” to the RD Entities in carrying out these CFPA violations. Dersovitz “associated himself” with the RD Entities as their founder and owner and “participated in [the enterprise] as something he wished to bring about” by continuing to craft the RD Entities’ policies and procedures and exercising authority over those Entities. Furthermore, Dersovitz “sought by his action to make [the RD Entities] succeed” by making offers to enter into Purchase Agreements to Consumers, (Compl. ¶ 54), being responsible for “solicit[ing] funds from investors” for cash advance payments to Consumers, (Compl. ¶ 51), and “[making]

phone calls to at least one New York consumer to collect from that consumer," (Compl. ¶ 54).

Accordingly, the Complaint alleges adequately a claim of "substantial assistance" liability against Roni Dersovitz in his individual capacity. 12 U.S.C. § 5536(a)(3).

b. Count III

Count III of the Complaint avers that Defendants violated the CFPA's prohibition on deceptive acts or practices by making representations that Defendants could "cut through red tape" and expedite payment of Consumers' settlement awards. (Compl. ¶¶ 44-48.) Defendants argue that this statement is not misleading because, read in the context of the entire advertisement or transaction, a reasonable Consumer would understand this to mean that the RD Entities would disburse funds more quickly than the settlement fund or claims administrator would, not that the RD Entities would actually expedite disbursements from the fund or the administrator. (Def. Br. 34.) The Court concludes that such a representation, "without appropriate disclosures . . . could deceive reasonable consumers" who are navigating a complex settlement landscape with limited knowledge of the inner workings of a settlement fund. CFPB v. Siringoringo, SACV 14-01155 JVS (AJWx), 2016 WL 102435, at *5 (C.D. Cal. Jan. 7, 2016). Such representation is also material because it could "inform the consumer's decision to engage" the Defendants in securing expedited payment. Id. (citing 12 C.F.R. § 1015.3(b)(2)). Given that Defendants target individuals who may be suffering financial hardship due to delays in payment of their settlement award, representations regarding the timing of procuring settlement award payments would undoubtedly be material to Consumers' engaging Defendants' services.

In sum, the Complaint alleges adequately a claim of deceptive acts or practices under the CFPA for the representations described in Count III regarding the timing of payments.

i. "Substantial Assistance" Claim Against Roni Dersovitz Under Count III

The Government alleges that Roni Dersovitz is individually liable under 12 U.S.C. § 5536(a)(3) for providing "substantial assistance" to the RD Entities in engaging in deceptive acts or practices, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B), by misrepresenting on the RD Entities' website that Defendants could "speed[] up" disbursement of a Consumer's award and "cut through red tape" to get payment from the settlement administrator sooner. (Compl. ¶¶ 79, 84.)

Here, the Court has already determined that the Government alleged adequately that the RD Entities made material misrepresentations to Consumers in violation of 12 U.S.C. § 5536(a)(1)(B). Turning to the “knowing” or “reckless” requirement of 12 U.S.C. § 5536(a)(3), the Court also concludes that, based on the knowledge that Dersovitz had through his authority over the RD Entities and Dersovitz’s approval of the contents of RD’s website shows that he at least “recklessly” made material misrepresentations that were likely to mislead a reasonable consumer. (Compl. ¶ 46.) Futhermore, Dersovitz’s approval of a website intended to draw in business for the RD Entities alleges adequately that he provided “substantial assistance” to the RD Entities’ venture by maximizing their prospects for new business through their websites.

Accordingly, the Complaint alleges adequately facts demonstrating that Dersovitz substantially assisted the RD Entities in engaging in deceptive acts or practices in violation of the CFPA.

c. Count IV

Count IV, which alleges that the RD Entities acted deceptively in violation of the CFPA by making misleading statements as to when RD would pay Consumers, pleads adequately facts demonstrating that the RD Entities engaged in deceptive conduct under the CFPA. (Compl. ¶¶ 86-89.)

“A claim is considered material if it involves information important to consumers and, hence, is likely to affect their choice of, or conduct regarding a product." Med. Billers Network, 543 F. Supp. 2d at 304 (internal quotation marks and citation omitted). One of Consumers' main motivations in entering into contracts with the RD Entities was to get their money sooner than they otherwise would from their third-party obligors. (Compl. ¶¶ 86-88.) Accordingly, the RD Entities' failure to provide money to Consumers on certain dates as agreed is misleading insofar as the RD Entities made statements that turned out to be false, and those statements are also material in that they "would influence the Consumer's decision" as to whether to enter into the Purchase Agreement or not. Med. Billers Network, 543 F. Supp. 2d at 313.

The RD Entities' argument that such grievances amount only to a breach of contract claim is undercut by the fact that the contracts do not speak to the timing of payment. (Def. Br. 36); (Pl. Opp. 27.) Therefore, the Government need not "identify[] which of the 27 contracts the RD Entities allegedly breached by failing to make timely payment." (Def. Br. 36.) As previously noted, Rule 9(b)'s heightened pleading standard does not apply to deceptive conduct claims under the CFPA, and therefore the Government need not aver the "who," "what," "where," and "when" that 9(b) requires at this stage. The Complaint avers adequately that Defendants made misleading statements, outside the four corners of the Purchase Agreements, as to the timing of payments that misled consumers. Accordingly, the Government has alleged plausibly that the RD Entities engaged in deceptive acts or conduct under Count IV.

i. "Substantial Assistance" Claim Against Roni Dersovitz Under Count IV

The Court concludes that the Complaint alleges adequately a claim against Roni Dersovitz for "substantially assisting" the RD Entities in carrying out deceptive acts or practices by making misstatements about when Consumers would receive payments from the RD Entities. 12 U.S.C. §§ 5531(a), 5536(a)(1)(B); (Compl. ¶¶ 51, 90-91.) Having established that the Complaint alleges adequately a claim for the underlying violation, the Court also concludes that the Complaint alleges adequately that Dersovitz at least "recklessly" provided substantial assistance to the RD Entities in misrepresenting to Consumers when their funds would be disbursed. (Compl. ¶ 86.) The Complaint alleges that Dersovitz "has authority and responsibility to . . . determine when funds for [C]onsumers would arrive." (Compl. ¶ 51.) As noted above, the timing of payments was crucial to Consumers, who entered into these transactions for the sole purpose of receiving expedited access to liquidity in the form of a lump sum cash payment. Incorrect statements as to the timing of disbursement of Consumers' payments, if made, would

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constitute an "extreme departure from the standards of ordinary care" given that Dersovitz had some element of authority over when funds would arrive and given the importance of the timing to payments to these particular Consumers. (Compl. ¶ 51.)

Finally, for the reasons stated earlier, including Dersovitz's responsibility for the RD Entities' policies and practices and his role as founder and CEO of the RD Entities, the Complaint alleges adequately that Dersovitz sought ostensibly through these misstatements "to make [the RD Entities] succeed" by drawing in Consumers who were primarily concerned with the timing of their settlement payments. DiMaria, 207 F. Supp. 3d 343, 359 (S.D.N.Y. 2016) (quoting SEC v. DiBella, 587 F.3d 553, 566 (2d Cir. 2009)). Accordingly, the Complaint alleges adequately a claim for "substantial assistance" liability against Dersovitz in his individual capacity.

d. Count V

Under Count V, the Government alleges that the RD Entities engaged in deceptive acts or practices by "collecting on contracts that are void under state laws or, in the alternative, that function as loans with interest rates that exceed usury limits under state laws, and on which no payment is due." (Compl. ¶¶ 93-94.)

For the same reasons that the Court found the Government's factual allegations to plead adequately a claim of deceptive conduct under Count I, so too here. Informing Consumers that they have an obligation to repay under a transaction in which the assignment is void or unenforceable clearly meets the materially misleading threshold under the CFPA. Collecting on loans that are void is materially misleading because it gives Consumers the impression that "borrowers were obligated to repay" the RD Entities when in reality the loan agreements were void and the borrowers were not legally obligated to pay. CFPB v. CashCall, Inc., CV 15-7522-JFW (RAOx), 2016 WL 4820635, at *10 (C.D. Cal. Aug. 31, 2016), appeal filed, No. 18-55479 (9th Cir. Apr. 12, 2018). Accordingly, the Government has alleged plausibly that Defendants engaged in deceptive acts or conduct under Count V.

i. "Substantial Assistance" Claim Against Roni Dersovitz Under Count V

As explained above, the Court concludes that the Complaint alleges adequately that the RD Entities engaged in deceptive acts or practices in violation of the CFPA by indicating to Consumers that they had an obligation to repay the RD Entities when, in fact, the loans were usurious and therefore void under state law. 12 U.S.C. §§ 5531(a), 5536(a)(1)(B). The

Government has also alleged adequately that Dersovitz substantially assisted the RD Entities in carrying out these deceptive acts and practices. 12 U.S.C. § 5536(a)(3). At a minimum, the Complaint and the Purchase Agreements themselves contain facts adequate to allege that Dersovitz acted "recklessly" in providing this assistance. The entire premise of the RD Entities' business model is labeling transactions that look and function like loans as "sales" to circumvent the regulatory restrictions that would otherwise govern these transactions if they were loans.

According to the Complaint, Dersovitz "has authority and responsibility to dictate all the terms of consumer contracts" and "makes decisions on the terms of the offers or extensions of credit." (Compl. ¶ 27.) These allegations, coupled with the fact that the Purchase Agreements reserve the right to file a UCC Financing Statement in the event a court deems the transaction a loan and Dersovitz's position as CEO and founder of the RD Entities, allege facts sufficient to find that Dersovitz exhibited "highly unreasonable" conduct in failing to determine whether the assignments were valid before offering Purchase Agreements to Consumers. The allegations, viewed collectively, indicate that Dersovitz knew that the transactions might not be valid assignments but proceeded with them in any event in an "extreme departure from the standard of ordinary care." Finally, the Complaint alleges that Dersovitz "substantially assisted" the RD Entities in carrying out this deceptive conduct in light of his role as founder and CEO of the RD Entities and his substantial involvement in the business, such as collecting on loans, drafting policies, and having the final word on the terms of the Purchase Agreements. Accordingly, the Complaint pleads facts sufficient to state a claim of individual liability against Dersovitz for substantially assisting a "covered person" under the CFPA.

2. Count II: Abusive Acts or Practices Under the CFPA

The Government alleges that the RD Entities engaged in abusive conduct by undermining Consumers' understanding of the Purchase Agreements through their misrepresentations that the contracts are for valid and enforceable assignments. (Compl. ¶¶ 72-73.) Under the CFPA, conduct is "abusive" where it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service," "takes unreasonable advantage of . . . a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service," "takes unreasonable advantage of . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service," or "takes unreasonable advantage of . . . the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." 12 U.S.C. § 5531(d).

Here, the Government has pleaded sufficient facts to state a claim for abusive acts or practices under the CFPA. Representations that a transaction is a sale when it does not, in fact, transfer validly any rights of ownership from the consumer to the RD Entities are materially misleading because such representations are false. To that end, the Government is correct that these false representations prevent Consumers from evaluating accurately whether this transaction is in their best interest. Defendants' contention that they disclose adequately the risks involved in the Purchase Agreements by labeling them "complex financial transaction[s]" does not neutralize other materially misleading information. The repeated misrepresentations alleged, assuming they were made, would "create[] the 'net impression' that the [Purchase Agreements] were enforceable" even though that impression is "patently false" because the Purchase Agreements "were void." CashCall, 2016 WL 4820635, at *10.

Accordingly, the Government has alleged plausibly that the RD Entities engaged in abusive practices under the CFPA.

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a. "Substantial Assistance" Claim Against Roni Dersovitz Under Count II

The Government alleges plausibly that Dersovitz knowingly or recklessly provided substantial assistance to the RD Entities in carrying out abusive acts or practices in violation of the CFPA. 12 U.S.C. § 5536(a)(3); 12 U.S.C. § 5531(d).

Aside from alleging plausibly that the RD Entities engaged in conduct sufficient to state a claim for abusive acts or practices under 12 U.S.C. § 5531(d), the Government also alleges plausibly that Dersovitz was "reckless" and provided "substantial assistance" to the RD Entities by enabling them to engage in this conduct.

As to the scienter requirement, the Complaint alleges adequately that Dersovitz knew, would have known, or acted recklessly with a high risk that the assignments in the Purchase Agreements were prohibited. Universal Debt & Payment Solutions, 2015 WL 11439178, at *10. At a minimum, a business premised on purchasing rights to structured settlement payments should know whether the future receivables are, in fact, assignable. According to the Complaint, Dersovitz has considerable control over the terms of the consumer contracts, (Compl. ¶ 27), and exercises considerable control over the RD Entities' practices and policies. Given all of this, failure to conduct proper due diligence on whether the assignments in the Purchase Agreements are permissible is "highly unreasonable" and amounts to an "an extreme departure from ordinary standards of care." Id. at *9. For the reasons stated earlier, Dersovitz also substantially assisted the RD Entities through this conduct given his role as CEO and founder of the RD Entities, (Compl. ¶ 18), his involvement in dictating the terms of the Purchase Agreements, (Comnpl. ¶ 27), and determining when to collect from Consumers, (Compl. ¶ 54). Such allegations taken together are adequate to assert that Dersovitz "associate[d] himself with the venture" and "participate[d] in it as something [he] wished to bring about," and "[sought] to make it succeed" by taking unreasonable advantage of the reasonable reliance by Consumers on the RD Entities. Id. at *13.

iv. State Law Claims

Defendants devote significant space in arguing that the Complaint's CFPA claims should be dismissed because the CFPB is unconstitutionally structured and thus lacks authority to bring such claims. (Def. Br. 9-14.) Vexingly, Defendants do not address the NYAG's independent authority to bring claims in federal district court under the CFPA, without regard to the constitutionality of the CFPB's structure. 12 U.S.C. § 5552(a)(1) (authorizing state attorneys general to bring claims under the CFPA); (Pl. Opp. 7.) The Government has alleged adequately claims for deceptive and abusive acts or practices under the CFPA, and therefore federal question subject matter jurisdiction over the CFPA claims exists regardless of the constitutionality of the CFPB’s structure.

A federal district court may exercise “supplemental jurisdiction over all other claims that are so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy . . . .” 28 U.S.C. § 1367(a). “Federal-law and state-law claims form part of the same case or controversy where they ‘derive from a common nucleus of operative fact’ and are ‘such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.’” Nguyen v. Am. Express Co., 282 F. Supp. 3d 677, 683 (S.D.N.Y. 2017) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349 (1988)). Review of the factual allegations in the Complaint makes clear that both the federal- and state-law claims derive from the same underlying conduct and transactions, namely, Defendants’ conduct towards Consumers in offering the Purchase Agreements. These facts establish that the federal- and state-law claims “arise out of the same common nucleus of operative fact” such that the exercise of supplemental jurisdiction over the NYAG’s state-law claims would be appropriate. 28 U.S.C. § 1367(a). Accordingly, the Court will exercise supplemental jurisdiction over the NYAG’s New York state law claims for violations of civil and criminal usury

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laws, New York General Obligations Law, deceptive practices, false advertising, and fraud. 28 U.S.C. § 1367(a).

1. NYAG's Jurisdiction Over the Purchase Agreements

In a single footnote, Defendants argue that the Complaint pleads insufficiently NYAG's jurisdiction over the transactions at issue in this case because "the RD Entities' principal place of business is New Jersey" and "NYAG has not made any allegations regarding the residences of the customers who entered the transactions at issue." (Def. Br. 38 n.14.)

As a preliminary matter, the Court pays minimal credence to an argument raised in a two-sentence footnote of a forty-page motion to dismiss regarding the NYAG's jurisdiction over certain Consumers. See Gramercy Advisors, LLC v. Ripley, 13-cv-9070 (VEC), 2014 WL 5847444, at *3 (S.D.N.Y. Nov. 12, 2014) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (internal quotation marks and citation omitted). To the extent that Defendants challenge NYAG's assertion of jurisdiction over the transactions under New York General Business Law § 349 - the statute at issue in the two cases that they cite in support of this argument - NYAG has alleged adequately that the transactions have a sufficient nexus to New York under New York General Business Law § 349, because the Complaint makes

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reference to "New York consumers," (Compl. ¶¶ 54) and loans made "in New York," (Compl. ¶ 57). In addition, several of the contracts themselves indicate that the Consumer has a New York address, (See, e.g., Dersovitz Aff. Ex. A-2 at 20) (listing consumer as having New York residence), and that certain of the Consumers used a New York agent to seek legal advice regarding the Purchase Agreement before entering into it, (Dersovitz Aff. Ex. A-1 at 18-19) (showing New York attorney sending letters on behalf of Consumer client to RD Legal Funding Partners, LP). For purposes of New York General Business Law § 349, the relevant inquiry is whether there are New York transactions that are deceptive or that occur as a result of out-of-state deceptive conduct. New York v. Feldman, 210 F. Supp. 2d 294, 303 (S.D.N.Y. 2003).

Accordingly, the information in the Purchase Agreements as well as the allegations in the Complaint allege adequately that deceptive transactions took place in New York and, in the alternative, that these transactions took place in New York as a result of out-of-state deceptive conduct.

2. Count VI: Claims Under New York Civil and Criminal Usury Laws

The Complaint alleges adequately that Defendants have charged more than the maximum usury rate under New York Banking Law § 14-a, with respect to New York's civil usury laws, and

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under New York Penal Law §§ 190.40 and 190.42, with respect to New York's criminal usury laws. (Compl. ¶¶ 99-105, 106-110.) Defendants' sole argument in response to the Government's usury claims is that the transactions at issues are sales, not loans, and therefore are not subject to state usury laws. (Def. Br. 37.)

As discussed supra, the Court has concluded that Plaintiffs have alleged adequately that the transactions at issue constitute loans, not sales, and therefore Defendants' argument here is without effect. "In New York, the civil usury statute provides that '[t]he maximum interest rate permissible on a loan is 16% per annum, and any interest rate in excess of that amount is usurious.'" Roopchand v. Mohammed, 62 N.Y.S.3d 514, 516 (N.Y. App. Div. 2017) (internal quotation marks and citation omitted) (citing N.Y. Gen. Oblig. Law § 5-501[a]; N.Y. Banking Law § 14(a)). Under New York's criminal usury law, it is a felony to "knowingly charge or collect interest on a 'loan or forbearance' at a rate above 25% annually." Madden v. Midland Funding, LLC, 237 F. Supp. 3d 130, 141 (S.D.N.Y. 2017) (quoting N.Y. Penal Law § 190.40). Furthermore, it is unlawful to collect interest on loans or forbearances that exceed the maximum allowable interest rate because such loans are void. (Compl. ¶¶ 101-03); N.Y. Gen. Oblig. Law § 5-501; N.Y. Banking Law § 14-a.

Accepting the allegations in the Complaint as true and in the light most favorable to the NYAG at this stage of the proceedings, NYAG alleges facts demonstrating plausibly that at least certain of the Purchase Agreements functioned as loans that charged usurious interest rates in excess of New York's civil and criminal usury caps, respectively. (Compl. ¶¶ 29, 32.) Accordingly, NYAG's state law claims alleging violations of civil and criminal usury laws survive the instant motion.

3. Count VIII: Violation of New York General Obligations Law § 13-101

Defendants argue that the NYAG fails to state a claim under New York General Obligations Law § 13-101, which prohibits the sale or assignment of claims or demands to recover for personal injury, because the transactions transfer the rights to proceeds from claims for personal injury, not the personal injury claims themselves. N.Y. Gen. Oblig. Law § 13-101; (Def. Br. 37-38.)

Under N.Y. Gen. Oblig. Law § 13-101(1), a party may not transfer a "claim or demand" to "recover damages for a personal injury." With respect to the VCF Purchase Agreements, as discussed supra, Section IV(a)(i)(2), those transactions purport to transfer Eligible Claimants' claims for settlement proceeds under the VCF.

As discussed supra, the term "claim" is defined as "[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . [a] demand for money, property, or a legal remedy to which one asserts a right." Claim, Black's Law Dictionary (10th ed. 2014). The plain language of the Purchase Agreements indicates that Defendants sought to obtain ownership of Eligible Claimants' "claims" to damages for injuries that they suffered following the September 11, 2001 terrorist attacks in that they sought to obtain the right to receive payment directly from the VCF. In sum, the Complaint alleges adequately facts demonstrating that the Purchase Agreements transferred a "claim or demand" to "damages for personal injury" in violation of N.Y. GBL § 13-101(1).

Similarly, the NYAG has alleged facts sufficient to state a claim under Section 13-101(1) of N.Y. GBL as to the NFL Purchase Agreements. For the reasons already explained supra, Section IV(a)(i)(1), the NFL Purchase Agreements purport to assign Class Members' full interest in a portion of their settlement proceeds, including the right to demand payment directly from the NFL Settlement Administrator. As such, the Purchase Agreements purport to transfer a "claim or demand" to "recover damages for personal injury." Accordingly, the NYAG has alleged facts sufficient to state a claim under N.Y. GBL § 13-101(a) regarding the NFL Purchase Agreements.

4. Count IX: Violation of New York General Business Law § 349

"To state a claim for deceptive practices under section 349, a plaintiff must show: (1) that the act, practice, or advertisement was consumer-oriented; (2) that the act, practice, or advertisement was misleading in a material respect; and (3) that the plaintiff was injured as a result of the deceptive act, practice, or advertisement." Pelman ex rel. Pelman v. McDonald's Corp., 396 F. Supp. 2d 439, 444 (S.D.N.Y. 2005).

Under the first prong, "consumer oriented" conduct is that which "has a broad impact on consumers at large." Bennett v. State Farm Fire and Casualty Co., -- N.Y.S.3d --, 2018 WL 2225321, at *2 (N.Y. App Div. May 16, 2018) (citing Nafash v. Allstate Ins. Co., 28 N.Y.S.3d 381, 384 (N.Y. App. Div. 2016); JPMorgan Chase Bank, N.A. v. Hall, 996 N.Y.S.2d 309, 315 (N.Y. App. Div. 2014); Vescon Constr., Inc. v. Gerelli Ins. Agency, Inc., 948 N.Y.S.2d 636, 638 (N.Y. App. Div. 2012); Flax v. Lincoln Natl. Life Ins. Co., 864 N.Y.S.2d 559, 561 (N.Y. App. Div. 2008)). A "single shot transaction" that is customized to meet the specific demands of a particular consumer is insufficient to show that the conduct had a "broad impact on consumers." Hall, 996 N.Y.S.2d at 315 (quoting N. State Autobahn, Inc. v. Progressive Ins. Grp. Co., 953 N.Y.S.2d 96, 102 (N.Y. App. Div. 2012)). Rather, the conduct must amount to a "standard practice that was [or is] routinely applied to all [consumers]" who engaged with the defendant. N. State Autobahn, 953 N.Y.S.2d at 102.

Under the second prong, the New York Court of Appeals has defined the term "materially misleading" conduct using an objective standard under which "the alleged act must be 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" Orlander v. Staples Inc., 802 F.3d 289, 300 (2d Cir. 2015) (quoting Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 126 (2d Cir. 2007) (quoting Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 647 N.E. at 745 ("Such a test . . . may be determined as a matter of law or fact (as individual cases require)." Koenig v. Boulder Brands, Inc., 995 F. Supp. 2d 274, 287 (S.D.N.Y. 2014) (quoting Oswego Laborers' Local 214 Pension Fund, 647 N.E.2d at 745).

Applying this framework to the facts of this case, NYAG has alleged facts sufficient to demonstrate that Defendants engaged in deceptive practices in violation of N.Y. GBL § 349. As to the first element, the averments in the Complaint indicate that Defendants' conduct was "consumer-oriented" in that Defendants made similar statements and representations to all of the Consumers targeted. Oswego Laborers' Local 214 Pension Fund, 623 N.Y.S.2d at 745 (holding conduct to be "consumer-oriented" where defendant Bank interacted with plaintiffs’ representative the same as any other customer opening a savings account). According to the Complaint, the RD Entities represent to Consumers that the Purchase Agreements are assignments of Consumers’ interests in their anticipated settlement payments and are not an offer of credit, (Compl. ¶ 38); label all of the Purchase Agreements as “assignment and sale” agreements, (Compl. ¶ 39-40); and do not disclose interest rates for transactions to Consumers, (Compl. ¶ 42). These allegations show that Defendants’ conduct was not limited to any particular single Consumer but rather was how Defendants interacted with all Consumers. Oswego Laborers’ Local 214 Pension Fund, 623 N.Y.S.2d at 745 (citing Genesco Entm’t v. Koch, 593 F. Supp. 743, 752 (S.D.N.Y. 1984) (finding that conduct was “consumer-oriented” because it was “not unique” to the plaintiffs, was not “private in nature” and not a “single shot transaction”). Accordingly, NYAG has pled adequately facts indicating the conduct at issue was “consumer-oriented.”

Turning to the second element of a claim under N.Y. GBL § 349, NYAG has also alleged adequately that the RD Entities made misrepresentations that would be “materially misleading” to a reasonable consumer. All of the Purchase Agreements contain numerous statements that the transaction is a “sale” that transfers all of the rights of ownership in the Property Amount

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to the RD Entities, but in reality, the Consumer is not entitled to assign title and ownership over the Property Amount to another. Furthermore, the Purchase Agreements entail a rate of interest that would violate New York civil and criminal usury laws in some instances, rendering the transactions void under New York law. Such allegations, if true, are likely to mislead a reasonable consumer as to the nature, terms, and obligations of the contractual arrangement in front of him or her. Accordingly, the NYAG has pleaded facts sufficient to state a claim under N.Y. GBL § 349.

5. Count X: Violation of New York General Business Law § 350

"The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to Section 349." Austin v. Albany Law School of Union Univ., 957 N.Y.S.2d 833, 843 (N.Y. Sup. Ct. 2013) (citing Denenberg v. Rosen, 897 N.Y.S.2d 391, 394 (N.Y. App. Div. 2010), lv. dismissed, 930 N.E.2d 762 (N.Y. 2010)). N.Y. GBL § 350 makes unlawful false advertising "in the conduct of any business, trade or commerce or in the furnishing of any service" in New York. N.Y. Gen. Bus. Law § 350. Because of the commonality in the elements of a claim under N.Y. GBL § 349 and § 350, the Court draws on its analysis of NYAG's Section 349 claim in concluding that the NYAG has alleged facts sufficient to state a claim under N.Y. GBL § 350 for false advertising.

In this Complaint, the NYAG alleges that Defendants falsely advertised their agreements as sales rather than loans and falsely advertised that they would be able to expedite Consumers’ payment of their settlement awards. As discussed earlier, such advertising is “consumer-oriented” in that the Complaint alleges that these representations were made to all those who visited Defendants’ website or transacted with Defendants through a Purchase Agreement. (Compl. ¶¶ 125-26.) Such statements are also material because they are likely to mislead a reasonable consumer into believing that the transactions are true sales or that Defendants had the ability to expedite payment from the settlement fund administrators when neither statement is true. Defendants also argue that these alleged statements pertain to the “source” of the payments, which is distinct from the timing of payments and would not be material to consumers. (Def. Br. 34.) The Court disagrees. Consumers are individuals who want their settlement awards quickly because they need access to liquidity. It does not take a grand leap of imagination to envision that Consumers may have strained relations with the claims administrators in seeking access to their settlement awards. Therefore, if Consumers were misled into believing that RD would act as a type of third-party

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facilitator between the Consumer and the claims administrator, this information would be material to the Consumer. Therefore, the Court concludes that Defendants' argument is without merit.

Accordingly, the NYAG alleges adequately facts demonstrating a claim under N.Y. GBL § 350.

6. Count XI: New York Executive Law § 63(12) Fraud

Executive Law § 63(12) empowers the Attorney General to seek injunctive and other relief whenever a person or business engages in "repeated . . . or . . . persistent fraud or illegality." "Fraud" under § 63(12) is not common-law fraud but is statutorily defined broadly as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." Conduct violates Executive Law § 63(12) if it "has the capacity or tendency to deceive" both the average consumer and "the ignorant, the unthinking, and the credulous." Matter of People v. Applied Card Sys., Inc., 805 N.Y.S.2d 175, 176 (N.Y. App. Div. 2005) (internal quotation marks and citation omitted). Several cases have also held that proof of intent to deceive or reliance are not required to state a claim under N.Y. Executive Law § 63(12).

Here, because the elements of a claim under Section 63(12) are entirely encompassed by the elements of deceptive acts or practices under the CFPA or NY GOL § 349 that the Government has already pled adequately, the Complaint contains sufficient allegations to state a claim under N.Y. Executive Law § 63(12) as well.

c. Constitutional Claims

i. History, Liberty, and Presidential Authority

In reaching the question of the constitutionality of Title X of Dodd-Frank, which established the CFPB as an "independent bureau" within the Federal Reserve System, 12 U.S.C. § 5491(a), the Court acknowledges the en banc holding of the Court of Appeals for the District of Columbia Circuit in PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018), upholding the statute. Of course, that decision is not binding on this Court.[7]

[7] Other courts have also addressed this question. CFPB v. TCF Nat'l Bank, No. 17-166 (RHK/DTS), 2017 WL 6211033 (D. Minn. Sept. 8, 2017); CFPB v. Seila Law, LLC, No. 17-CV-01081-JLS-JEM, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017), appeal filed, No. 17-56324 (9th Cir.); CFPB v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017); CFPB v. Future Income Payments, LLC, 252 F. Supp. 3d 961 (C.D. Cal. 2017), appeal filed, No. 17-55721 (9th Cir.); CFPB v. D & D Mktg., Inc., No. CV 15-9692 PSG (EX), 2017 WL 5974248 (C.D. Cal. Mar. 21, 2017), interlocutory appeal granted, No. 17-55709 (9th Cir.); CFPB v. CashCall, Inc., No. CV-15-7522-JFW-RAOx, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016), appeal filed, 18-55479 (9th Cir.); CFPB v. NDG Fin. Corp., No. 15-CV-5211 (CM), 2016 WL 7188792 (S.D.N.Y. Dec. 2, 2016), mot. reconsideration denied, No. 15-CV-5211 (CM), 2016 WL 7742784 (S.D.N.Y. Dec. 19, 2016); CFPB v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878 (S.D. Ind. 2015), appeal dismissed for lack of jurisdiction, 15-1761 (7th Cir. 2016); CFPB v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342 (N.D. Ga. 2015); CFPB v. Morgan Drexen, Inc., 60 F. Supp. 3d 1082 (C.D. Cal. 2014).

Respectfully, the Court disagrees with the holding of the en banc court and instead adopts Sections I-IV of Judge Brett Kavanaugh's dissent (joined in by Senior Circuit Judge A. Raymond Randolph), where, based on considerations of history, liberty, and presidential authority, Judge Kavanaugh concluded that the CFPB "is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director." Id. at 198.

Also most respectfully, the Court disagrees with Section V of Judge Kavanaugh's opinion wherein he determined the remedy to be to "invalidate and sever the for-cause removal provision and hold that the Director of the CFPB may be supervised, directed, and removed at will by the President." Id. at 200. Instead, the Court adopts Section II of Judge Karen LeCraft Henderson's dissent wherein she opined that "the presumption of severability is rebutted here. A severability clause 'does not give the court power to amend' a statute. Nor is it a license to cut out the 'heart' of a statute. Because section 5491(c)(3) is at the heart of Title X [Dodd Frank], I would strike Title X in its entirety." Id. at 163-64 (citations omitted).

ii. CFPB's Notice of Ratification

On May 11, 2018, the CFPB filed a Notice of Ratification ("Ratification") with the Court in response to Defendants' constitutional challenge to the for-cause removal provision of the CFPB's enabling statute. In the Ratification, the CFPB attempts to ratify its decision to file this enforcement decision prior to the appointment of the CFPB's Acting Director, Mick Mulvaney, on November 24, 2017. (Notice of Ratification (hereinafter, Ratification) 1.) Because the President may remove Mr. Mulvaney at will, the CFPB asserts that Defendants may not obtain dismissal on the grounds that the instant action was initially filed by a Director at the CFPB removable only for cause. (Ratification 3.)

As Defendants note, ratification is a principle of agency law. (Defendants' Opp'n to Ratification ("Ratif. Opp'n") 2, ECF No. 79.) Ratification addresses situations in which an agent was without authority at the time he or she acted and the principal later approved of the agent's prior unauthorized acts. See GDG Acquisitions LLC v. Government of Belize, 849 F.3d 1299, 1310 (11th Cir. 2017) (noting that ratification assumes that the agent "did not have actual authority at the time he acted"); Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 371 (D.C. Cir. 2017) (explaining role of principal that ratifies prior unauthorized acts of agent).

The Court agrees with Defendants that the CFPB's Ratification does not address accurately the constitutional issue raised in this case, which concerns the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf. See CFPB v. Gordon, 819 F.3d 1179, 1192 (9th Cir. 2016) (holding, after invalidation of CFPB Director's recess appointment, that the Director's "ratification, done after he was properly appointed as Director, resolves any Appointments Clause deficiencies"); Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 371 (D.C. Cir. 2017) (holding, after invalidation of Board members' recess appointments, that NLRB properly ratified the appointment of its Regional Director who, in turn, ratified his prior unauthorized actions); Advanced Disposal Servs. East, Inc. v. NLRB, 820 F.3d 592, 605-06 (3d Cir. 2016) (same).

Here, the constitutional issues presented by the structure of the CFPB are not cured by the appointment of Mr. Mulvaney. As Defendants point out, the relevant provisions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact. (Ratification 4.) Furthermore, Mr. Mulvaney cannot serve past June 22, 2018 (210 days after the vacancy arose), unless the President nominates a new Director, and then only until the new Director is appointed. Thus, there will likely be a new Director appointed in the coming months who will be subject to the for-cause removal provision. Therefore, the Ratification does not cure the constitutional deficiencies with the CFPB's structure as the CFPB argues. Accordingly, the Court rejects the Notice of Ratification (ECF No. 78) to the extent the CFPB argues that the Ratification renders Defendants' constitutional arguments moot.

Accordingly, the Court finds that the CFPB "lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers," and thus the CFPB's claims are dismissed. Fed. Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821, 822 (D.C. Cir. 1993).

d. Conclusion

For the foregoing reasons, Defendants’ motion (ECF No. 39) is DENIED. Because Plaintiff Consumer Financial Protection Bureau is unconstitutionally structured and lacks authority to bring claims under the CFPA, the Clerk of Court shall terminate Plaintiff Consumer Financial Protection Bureau as a party to this action.

Counsel shall confer and inform the Court by letter no later than July 9 how they propose to proceed.

SO ORDERED.

Dated: New York, New York

June 21, 2018

Loretta A. Preska

LORETTA A. PRESKA
Senior United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMER FINANCIAL, PROTECTION BUREAU, et al., Plaintiffs, v. RD LEGAL FUNDING, LLC, et al., Defendants.	17-CV-890 (LAP) Order

Loretta A. Preska, Senior United States District Judge:

Taking into account the parties' recent correspondence regarding the Court's subject matter jurisdiction over the remaining CFPA claims in this case, the Court hereby amends its ruling in the June 21, 2018 Order, (ECF No. 80), as follows. The conclusions of law in this order supersede and replace any legal conclusions to the contrary in the June 21, 2018 Order:

I. NYAG's CFPA Claims

In light of the Court's decision that the appropriate remedy for Title X's unconstitutional for-cause removal provision is invalidating Title X in its entirety, it follows that there is no statute for the NYAG to proceed under and no grant of authority to proceed. In sum, there is no basis for federal jurisdiction over NYAG's CFPA claims. Accordingly, these claims must be dismissed. Fed. R. Civ. P. 12(h)(3).

Given that there is no basis for federal jurisdiction in NYAG's CFPA causes of action, 28 U.S.C. § 1367(a) no longer serves as an appropriate procedural vehicle for this Court to exercise supplemental jurisdiction over NYAG's state law claims.

II. Federal Jurisdiction and NYAG's State Law Claims

NYAG argues that its state law claims raise issues involving the federal Anti-Assignment Act, thereby giving rise to federal question jurisdiction over these same claims. (See ECF No. 93). The Court concludes that there is no "substantial" federal issue embedded in NYAG's state law claims that would give rise to federal question jurisdiction over those same state law claims, notwithstanding the inapplicability of 28 U.S.C. § 1367(a). Pritika v. Moore, 91 F. Supp. 3d 553, 558 (S.D.N.Y. 2015).

"[C]ourts have typically found a substantial federal issue only in those exceptional cases that go beyond the application of some federal legal standard to private litigants' state law claims, and instead implicate broad consequences to the federal system or the nation as a whole." Pritika, 91 F. Supp. 3d at 558. Here, certain of NYAG's state law claims turn on alleged violations of the federal Anti-Assignment Act. See 31 U.S.C. § 3727; (Compl., Counts VI-XI.) The question of whether victims' purported assignment of their monetary awards from the September 11th Victim Compensation Fund ("VCF") violates the

Anti-Assignment Act does not "implicate broad consequences to the federal system or the nation as a whole." Pritika, 91 F. Supp. 3d at 558 (citing Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 201 (1921)); see also Broder v. Cablevision Sys. Corp., 418 F.3d 187, 195 (2d Cir. 2005) (concluding that a federal issue is substantial if it implicates a "complex federal regulatory scheme"); In re Facebook, Inc., IPO Sec. and Derivative Litig., 922 F. Supp. 2d 475, 482-83 (S.D.N.Y. 2013) (holding that questions of whether NASDAQ, a national securities exchange, complied with its regulatory obligations under federal law and what duties NASDAQ had as a national securities exchange to "members of the investing public" involved a substantial federal interest).

The VCF touches and concerns the nation and federal system to the extent that it is funded through taxpayer dollars at the federal level. However, the question of what parties may do with their award money does not raise "broad consequences to the federal system or the nation." Pritika, 91 F. Supp. 3d at 558. The validity of the assignments of monetary awards from the VCF is a particularized issue that involves a discrete pool of individuals. The question of whether the Anti-Assignment Act prohibits victims from assigning their monetary awards from the VCF does not implicate constitutional issues and does not involve a determination of a federal agency's obligations under federal law. Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 315 (2005). In sum, the question that the Anti-Assignment Act raises in this case does not have the required "significan[ce] . . . to the federal system as a whole," Gunn v. Minton, 568 U.S. 251, 264 (2013). Accordingly, NYAG's state law claims do not present a "substantial" federal issue giving rise to federal jurisdiction.

An upset in the division of federal and state jurisdiction would also ensue if the Court exercised jurisdiction over NYAG's state law claims. Counts VI - XI in the Complaint are premised on New York consumer protection statutes that involve application of New York contract law and New York usury law. Principles of comity dictate that state courts should resolve questions of state law. Chenensky v. New York Life Ins. Co., 942 F. Supp. 2d 388, 395 (S.D.N.Y. 2013). New York courts have also proven that they are more than capable of deciding cases that implicate the Anti-Assignment Act. See, e.g., Leonard v. Whaley, 36 N.Y.S. 147 (Sup. Ct. 1985); Coastal Commercial Corp. v. Central Nat. Bank of Yonkers, 140 N.Y.S.2d 887 (Sup. Ct. 1955).

Accordingly, NYAG's remaining state law claims do not raise a "substantial" issue of federal law that justifies this Court's exercising jurisdiction over those claims. Grable, 545 U.S. at 313-14.

III. Supplemental Jurisdiction and NYAG's State Law Claims

The Court also declines to exercise supplemental jurisdiction over NYAG's state law claims under 28 U.S.C. § 1367(c)(3). In determining whether to exercise supplemental jurisdiction over remaining state law claims after the dismissal of all federal law causes of action, a district court must balance the objectives of "judicial economy, convenience, fairness, and comity." Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988)). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." Id. (quoting Cohill, 484 U.S. at 350 n.7).

In this case, each of these factors weighs in favor of denying supplemental jurisdiction. As discussed above, allowing New York state courts to resolve issues involving only New York law furthers "a proper respect for state functions" as comity requires. Chenensky, 942 F. Supp. 2d at 395 (S.D.N.Y. 2013) (quoting Levin v. Commerce Energy, Inc., 560 U.S. 413, 421 (2010)). The present posture of the case - mainly, the fact that no discovery has been conducted yet - also means that "neither party will be significantly inconvenienced or prejudiced if the plaintiff[] refile[s] in state court." Yong

Kui Chen v. Wai ? Café Inc., 10 Civ. 7254 (JCF), 2017 WL 3311228, at *4 (S.D.N.Y. Aug. 2, 2017). This Court has only decided RD Legal's motion to dismiss thus far, and therefore the state court would not be substantially duplicating extensive efforts that this Court has already undertaken to oversee the case. See Chenensky, 942 F. Supp. 2d at 392.

Accordingly, the Court declines to exercise supplemental jurisdiction over the NYAG's remaining state law claims.

IV. Conclusion

In summary, the Court amends its June 21, 2018 Order, (ECF No. 80), and concludes that:

(1) The proper remedy for the constitutional issue raised by Title X's for-cause removal provision is to invalidate Title X in its entirety;

(2) this remedy invalidates the statutory basis for NYAG's independent litigating authority under the CFPA and its CFPA claims in this case;

(3) for the reasons stated in point (2), the NYAG's CFPA claims must be dismissed for lack of federal jurisdiction, Fed. R. Civ. P. 12(h)(3);

(4) the NYAG's remaining state law claims do not present a "substantial question" of federal law giving rise to federal jurisdiction; and

(5) the Court declines to exercise supplemental jurisdiction over NYAG's remaining state law claims under 28 U.S.C. § 1367(c)(3).

For the foregoing reasons, all of the NYAG's state law claims are dismissed without prejudice to refiling in state court.

The Clerk of Court is directed to enter judgment (1) dismissing the NYAG's CFPA claims against Defendants without prejudice, and (2) dismissing the NYAG's state law claims without prejudice.

The Clerk of Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED.

Dated: New York, New York
September 12, 2018

Loretta A. Preska

LORETTA A. PRESKA
Senior United States District Judge

USDC SDNY
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DATE FILED: 9/12/18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

CONSUMER FINANCIAL PROTECTION BUREAU, et al.,

Plaintiffs,

-v-

RD LEGAL FUNDING, LLC, et al.,

Defendants.

---X

17 **CIVIL 890** (LAP)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated September 12, 2018, in summary, the Court amends its June 21, 2018 Order, and concludes that: (1) The proper remedy for the constitutional issue raised by Title X's for-cause removal provision is to invalidate Title X in its entirety; (2) this remedy invalidates the statutory basis for NYAG's independent litigating authority under the CFPA and its CFPA claims in this case; (3) for the reasons stated in point (2), the NYAG's CFPA claims must be dismissed for lack of federal jurisdiction, Fed. R. Civ. P. 12(h)(3); (4) the NYAG's remaining state law claims do not present a "substantial question" of federal law giving rise to federal jurisdiction; and (5) the Court declines to exercise supplemental jurisdiction over NYAG's remaining state law claims under 28 U.S.C. § 1367(c)(3). For the foregoing reasons, all of the NYAG's state law claims are dismissed without prejudice to refiling in state court. Judgment is entered (1) dismissing the NYAG's CFPA claims against Defendants without prejudice, and (2) dismissing the NYAG's state law claims without prejudice and all pending motions are denied as moot; accordingly, the case is closed.

Dated: New York, New York
September 12, 2018

RUBY J. KRAJICK

Clerk of Court

BY: K Mango

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSUMER FINANCIAL, PROTECTION BUREAU, et al., Plaintiffs, v. RD LEGAL FUNDING, LLC, et al., Defendants.	17-CV-890 (LAP)

Order

Loretta A. Preska, Senior United States District Judge:

In its September 12, 2018 Order, (ECF No. 105), the Court inadvertently dismissed the New York Attorney General's ("NYAG") claims "without" prejudice. Given the Court's conclusion that "there is no statute for NYAG to proceed under," the NYAG's CFPA claims should have been dismissed "with" prejudice.

Based on the foregoing, the Clerk of the Court is directed to enter judgment dismissing the NYAG's CFPA claims against Defendants with prejudice.

The Clerk of the Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED.

Dated: New York, New York
September 18, 2018

Loretta A. Preska

LORETTA A. PRESKA
Senior United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DATE FILED: 9/19/18

---X
CONSUMER FINANCIAL PROTECTION BUREAU, et al.,

Plaintiffs,

-v-

RD LEAGAL FUNDING, LLC, et al.,

Defendants.

---X

17 **CIVIL 890** (LAP)

AMENDED JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated September 12, 2018, and the Order dated September 18, 2018, in summary, the Court amends its June 21, 2018 Order, and concludes that: (1) The proper remedy for the constitutional issue raised by Title X's for-cause removal provision is to invalidate Title X in its entirety; (2) this remedy invalidates the statutory basis for NYAG's independent litigating authority under the CFPA and its CFPA claims in this case; (3) for the reasons stated in point (2), the NYAG's CFPA claims must be dismissed for lack of federal jurisdiction, Fed. R. Civ. P. 12(h)(3); (4) the NYAG's remaining state law claims do not present a "substantial question" of federal law giving rise to federal jurisdiction; and (5) the Court declines to exercise supplemental jurisdiction over NYAG's remaining state law claims under 28 U.S.C. § 1367(c)(3). For the foregoing reasons, all of the NYAG's state law claims are dismissed without prejudice to refiling in state court. Judgment is entered (1) dismissing the NYAG's CFPA claims against Defendants with prejudice, and (2) dismissing the NYAG's state law claims without prejudice and all pending motions are denied as moot; accordingly, the case is closed.

Dated: New York, New York
September 19, 2018

RUBY J. KRAJICK

Clerk of Court

BY: K Mango

Deputy Clerk

1700 G Street NW,
Washington, DC 20552

October 23, 2018

USDC SDNY
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VIA ECF

Hon. Loretta A. Preska
United States District Court Judge
Southern District of New York
United States Courthouse
500 Pearl Street, Room 2220
New York, NY 10007

Re: Consumer Financial Protection Bureau and the People of the State of New York v. RD Legal Funding, LLC; RD Legal Finance, LLC; RD Legal Funding Partners, LP; and Roni Dersovitz

Dear Judge Preska:

Pursuant to Rule 58(d), the Bureau of Consumer Financial Protection (Bureau) respectfully requests that the judgment against it be set out in a separate document.

Rule 58(a) states that "[e]very judgment and amended judgment must be set out in a separate document," and the Second Circuit has explained that "[t]his separate document must be separate from any judicial memorandum or opinion and must be labeled a 'judgment,'" *Arzuaga v. Quiros*, 781 F.3d 29, 33 (2d Cir. 2015) (citation omitted). Here, while the Court granted the Bureau's request for entry of final judgment against it on August 23, 2018 (ECF No. 100), the Clerk's Judgment entered on September 12, 2018 (ECF No. 106) and amended on September 19, 2018 (ECF No. 110) only adjudges the New York Attorney General's claims.

While the Bureau does not believe that the lack of a separate document would affect the validity of its appeal, *see* Fed. R. App. Proc. 4(a)(7)(B) ("failure to set forth a judgment or order on a separate document . . . does not affect the validity of an appeal from that judgment or order"); Fed. R. Civ. Proc. 58(c)(2)(B) (providing alternate method for judgments to be considered entered if not set out in a separate document), it respectfully requests, out of an abundance of caution and as contemplated by Rule 58(d), that the Court direct the Clerk to enter a final judgment against it on a separate document.

SO ORDERED

Loretta A. Preska

LORETTA A. PRESKA
UNITED STATES DISTRICT JUDGE

10/29/18

Very truly yours,

/s/ Hai Binh T. Nguyen

Hai Binh T. Nguyen
Enforcement Attorney
Bureau of Consumer Financial Protection

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Consumer Financial Protection Bureau and the People of the State of New York, by Eric T. Schneiderman, Attorney General for the State of New York, Plaintiffs, v. RD Legal Funding, LLC, RD Legal Finance, LLC, RD Legal Funding Partners, LP, and Roni Dersovitz, Defendants.	Civil Action No. 1:17-cv-00890-LAP [Proposed] Judgment

IT IS ORDERED AND ADJUDGED that for the reasons stated in the Court's June 21, 2018 Order, (ECF No. 92), final judgment is hereby entered dismissing the Consumer Financial Protection Bureau's claims.

The Clerk of Court is directed to enter judgment dismissing the Consumer Financial Protection Bureau's claims against Defendants.

Dated: October 29, 2018

Loretta A. Preska
United States District Court Judge

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DATE FILED: 10-29-18

U.S. Const. art. II, § 3.
[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

12 U.S.C. § 5302. Severability

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

12 U.S.C. § 5491. Establishment of the Bureau of Consumer Financial Protection

(a) Bureau established

There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection", which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of title 5. Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Bureau.

(b) Director and Deputy Director

(1) In general
There is established the position of the Director, who shall serve as the head of the Bureau.

(2) Appointment
Subject to paragraph (3), the Director shall be appointed by the President, by and with the advice and consent of the Senate.

(3) Qualification
The President shall nominate the Director from among individuals who are citizens of the United States.

(4) Compensation
The Director shall be compensated at the rate prescribed for level II of the Executive Schedule under section 5313 of title 5.

(5) Deputy Director
There is established the position of Deputy Director, who shall—
(A) be appointed by the Director; and
(B) serve as acting Director in the absence or unavailability of the Director.

(c) Term

(1) In general
The Director shall serve for a term of 5 years.

(2) Expiration of term

An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.

(3) Removal for cause
The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.

(d) Service restriction
No Director or Deputy Director may hold any office, position, or employment in any Federal reserve bank, Federal home loan bank, covered person, or service provider during the period of service of such person as Director or Deputy Director.

(e) Offices
The principal office of the Bureau shall be in the District of Columbia. The Director may establish regional offices of the Bureau, including in cities in which the Federal reserve banks, or branches of such banks, are located, in order to carry out the responsibilities assigned to the Bureau under the Federal consumer financial laws.

12 U.S.C. § 5511. Purpose, objectives, and functions

(a) Purpose

The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of 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.

(b) Objectives

The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—

(1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

(2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

(3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and

(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

(c) Functions

The primary functions of the Bureau are—

(1) conducting financial education programs;

(2) collecting, investigating, and responding to consumer complaints;

(3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;

(4) subject to sections 5514 through 5516 of this title, supervising covered persons for compliance with Federal consumer financial law, and taking

appropriate enforcement action to address violations of Federal consumer financial law;

(5) issuing rules, orders, and guidance implementing Federal consumer financial law; and

(6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.