18-2743-cv(L),

18-3033-cv(CON), 18-2860-cv(XAP), 18-3156-cv(XAP)

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, RONI DERSOVITZ,

Defendants-Third-Party-Plaintiffs-Third-Party-Defendants-Appellees-Cross-Appellants.

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

BRIEF FOR DEFENDANTS-THIRD-PARTY-PLAINTIFFS-THIRD-PARTY-DEFENDANTS-APPELLEES-CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee and Cross-Appellant RD Legal Finance, LLC, by and through its undersigned counsel, hereby states that it has no corporate parents and no publicly held corporation owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee and Cross-Appellant RD Legal Funding Partners, LP, by and through its undersigned counsel, hereby states that it has no corporate parents and no publicly held corporation owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee and Cross-Appellant RD Legal Funding, LLC, by and through its undersigned counsel, hereby states that it has no corporate parents and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The District Court correctly found that the structure of the Consumer Financial Protection Bureau ("CFPB") is unconstitutional and struck down the Consumer Financial Protection Act ("CFPA") in its entirety. As then-Judge Kavanaugh stated in his dissent in *PHH Corp. v. CFPB*, 881 F.3d 75, 166 (D.C. Cir. 2018), parts I-IV of which the District Court adopted, the "CFPB's concentration of enormous power in a single unaccountable, unchecked Director poses a far greater risk of arbitrary decision making and abuse of power, and a far greater threat to individual liberty, than a multimember independent agency does."

The underlying enforcement action here is a prime example of how the CFPB's unchecked authority leads to administrative overreach, under the guise of "pushing the envelope," that profoundly affects the businesses and individuals the agency targets. RD Legal Funding Partners, LP, RD Legal Finance, LLC and RD Legal Funding, LLC (collectively, the "RD Entities") are affiliated finance companies providing a valuable and lawful service: for customers who need and desire immediate liquidity, the RD Entities pay a lump sum to purchase the customer's interest in future proceeds from a legal settlement or judgment. Here, these transactions include the purchase of a portion of customers' proceeds from two settlement funds: the September 11th Victim Compensation Fund (also known as the Zadroga Fund); and the settlement fund created in connection with *In re:*

National Football League Players' Concussion Injury Litigation, No. 2:12-md-02323-AB, MDL-2323 (E.D. Pa.) (the "*NFL Concussion Litigation*") (the "NFL Settlement Fund"). Far from engaging in the "deceptive and abusive" practices alleged in this lawsuit, the RD Entities provide customers the information necessary to make informed decisions about whether to sell their settlement proceeds.

In their attempt to invalidate these transactions, the CFPB and New York Attorney General ("NYAG") rely on the dubious theory that—despite clear contractual terms and the weight of legal authority to the contrary—these transactions are not true sales and should instead be recharacterized as loans (*i.e.*, "extensions of credit" under the CFPA). And because the RD Entities did not tell the selling plaintiffs that such transactions were loans (rather than sales as the RD Entities believed and continue to believe), the circular argument proceeds, the RD Entities engaged in deceptive practices. The CFPB's overreaching attempt to regulate conduct beyond its statutory authority is a predictable consequence of its unchecked authority, and the dismissal of this action should be affirmed in its entirety, not only because the CFPB is unconstitutionally structured, but also because the CFPB and NYAG have failed to state a claim for relief.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1345. The District Court entered judgment against the CFPB and NYAG on September 12, 2018 (Special Appendix ("SA") 116), and a final amended judgment on September 19, 2018 (SA119). The RD Entities and their principal, Roni Dersovitz (collectively, "RD"), filed timely notices of appeal on September 25, 2018 (Joint Appendix ("JA") JA199), and October 22, 2018 (JA805), within fourteen days of the notices of appeal filed by the CFPB (JA797), and NYAG (JA802), respectively. *See* Fed. R. App. P. 4(a)(3). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW ON APPEAL

1. Whether the District Court correctly concluded that the structure of the CFPB is unconstitutional.

2. Whether the District Court correctly concluded that the proper remedy is to strike the CFPA in its entirety.

3. Whether the District Court correctly concluded, after striking the CFPA in its entirety, that it lacked jurisdiction over the remaining state law claims.

ISSUES PRESENTED FOR REVIEW ON CROSS-APPEAL

4. Whether the District Court erred in concluding the RD Entities are "covered person[s]" under the CFPA.

5. Whether the District Court erred in concluding the Complaint stated claims against RD under provisions of the CFPA that prohibit abusive and deceptive conduct.

6. Whether the District Court erred in concluding the Complaint stated claims against RD under New York usury laws, General Obligations Law § 13-101, General Business Law §§ 349 and 350, and Executive Law § 63(12).

STATEMENT OF THE CASE

I. The CFPB

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank") created the CFPB. The CFPB is "considered an Executive agency," 12 U.S.C. § 5491(a), and is headed by a single Director who serves a five-year term that may extend indefinitely "until a successor has been appointed and qualified." *Id.* § 5491(c)(1)-(2).

Congress transferred to the CFPB the authority to enforce eighteen preexisting consumer-protection laws previously administered by seven different agencies. 12 U.S.C. § 5481(12); 12 U.S.C. § 5581(b). Dodd-Frank also empowered the CFPB to regulate and prosecute acts by "covered person[s]" the CFPB considers "unfair, deceptive, or abusive." *Id.* § 5531(a).

II. The Purchase Agreements

The RD Entities are legal finance companies whose business includes purchasing portions of plaintiffs' proceeds from legal settlements or judgments. The following transactions are at issue: (a) twenty agreements (with twelve sellers) for the purchase/sale of proceeds from the Zadroga Fund (the "Zadroga Agreements");[1] and (b) seven agreements for the purchase/sale of proceeds from the NFL Settlement Fund (the "NFL Agreements") (collectively, the "Purchase Agreements"). (JA28-29, ¶¶ 2-3; JA56-585.)

While there are minor variations among the Purchase Agreements, all are entitled an "Assignment and Sale Agreement," describe the deal in plain language, and reflect the sale of a portion of an award in exchange for an immediate cash payment:

> [Y]ou [the seller] wish to receive an immediate lump sum cash payment in return for selling and assigning a portion of the Award to RD… . You hereby sell and assign to RD your interest in [a portion] … of the Award. … In return for the Property, RD will pay to you [a lump sum payment].

(*See*, *e.g*., JA56.) The agreements provide for the purchase of a set sum for a fixed amount—unlike a loan, there is no rate of interest, periodic payments, or maturity

[1] In 2011, President Obama signed into law the James L. Zadroga 9/11 Health & Compensation Act of 2010, creating the Zadroga Fund to compensate individuals as a result of 9/11-related events. *See* Title XXXIII of the Public Health Service Act, 42 U.S.C. §§ 300mm-300mm-61, 124 Stat. 3623.

date. (*Id.*) Importantly, unlike loans, the agreements make clear that the RD Entities have no recourse against the seller:

> No Recourse. RD is purchasing all of your interest in the Property without recourse against you (other than for Breach). This means that, in the event RD for any reason (other than your Breach of this Agreement) does not receive all of the Property Amount, you will have no obligation to pay RD any portion of the Purchase Price that RD paid to you.

(*See, e.g.*, JA60-61, ¶ 6(h)].) For each transaction, the seller's lawyer acknowledged receipt of a Notice of Assignment of the award, and agreed to hold in escrow for disbursement to the relevant RD Entity any funds that are subject to the agreement. (*See, e.g.*, JA73-74.) Each seller also signed a power of attorney authorizing the RD Entity to endorse and deposit any check issued to the seller for funds sold and assigned under the agreement. (*See, e.g.*, JA67.)

Each agreement notifies the seller, in bold print above the signature line, "**This is a complex transaction**," and encourages the seller to consult with an attorney and other advisors:

> **By signing this Agreement, you are assigning your rights to a portion of the Award that you may receive in regard to the Case. In return for your assignment, you will receive an immediate cash payment that is significantly less than the portion of the Award that you are assigning. You are strongly encouraged before signing this Agreement to consult with an attorney and/or trusted financial advisor of your choice, who can assist you in determining whether this transaction will best fulfill your financial needs and objectives and protect your**

> **interests in the event you choose to proceed with this transaction.**

(*See*, *e.g.*, JA66 (emphasis in original).) Every seller was then provided with rescission rights for five days following receipt of payment from the RD Entities. (*See*, *e.g.*, JA64.)

III. The Underlying Action

In 2016, the CFPB issued a civil investigative demand ("CID") to depose RD Legal Funding, LLC ("RDLF"). The CFPB, however, has authority to regulate only "covered person[s]," 12 U.S.C. §§ 5531(a), 5536(a), which, as is relevant here, includes persons who "extend[] credit and servic[e] loans." *Id.* §§ 5481(6)(A), (15)(A)(i).

Because RDLF's contracts are true sales—and not loans subject to the CFPA—RDLF followed the agency's enabling regulations and submitted a petition to set aside the CID, in part, on the ground the company is not subject to the CFPB's statutory jurisdiction. *See* 12 C.F.R. § 1080.6(e). The CFPB declined to rule on the petition, and instead notified RDLF that it would immediately initiate an enforcement action.

The CFPB and NYAG filed the underlying enforcement action on February 7, 2017, with both bringing claims under the CFPA, and the NYAG under state law. (*See* SA15.) Each claim is premised on the allegation that RD misrepresents the transactions to consumers as "assignments" when, according to the CFPB and

NYAG, they are in fact "extensions of credit" (under the CFPA) and usurious loans (under New York law). (*See* JA29-30, ¶ 6-8.)

The CFPB and NYAG brought four counts for deception under the CFPA, 12 U.S.C. § 5536(a)(1)(B) (Counts I, III-V), and one count for abusive conduct under the CFPA, 12 U.S.C. § 5531(d)(1), 2(B); 12 U.S.C. § 5536(a)(1)(B) (Count II). The NYAG also brought six state law claims based on the same alleged conduct (Counts VI-XI).

RD moved to dismiss the complaint because, as a threshold matter, the transactions are neither "extensions of credit" (under the CFPA) nor loans (under New York law). RD also moved to dismiss the complaint on the independent ground that the CFPB is unconstitutional. (JA51-52; ECF 40.)

The CFPB and NYAG disagreed with the constitutional argument and argued the federal Anti-Assignment Act (as to the Zadroga Agreements) and the contractual anti-assignment clause in the NFL settlement agreement (as to the NFL Agreements) somehow made the Purchase Agreements "functionally" a loan. (ECF 36 at 24.)

IV. The District Court's Referral to the Eastern District of Pennsylvania

On September 15, 2017, at the request of class counsel in the *NFL Concussion Litigation* and over RD's objection, the District Court referred to the Eastern District of Pennsylvania court ("EDPA") presiding over the *NFL*

Concussion Litigation "the question of whether the *NFL Concussion Litigation* settlement agreement forbids assignments of settlement benefits." (JA765-768 (the "Referral Order").) The CFPB, NYAG, and RD appeared in the *NFL Concussion Litigation* and filed briefs with respect to the Referral Order. (JA772.)

A. The EDPA's Decision

On December 8, 2017, the EDPA issued an "Explanation and Order" in response to the Referral Order, and held the NFL settlement agreement prohibits plaintiffs from assigning their interests in future settlement proceeds and that any such assignment—including the NFL Agreements—is "void, invalid and of no force and effect." (SA17; JA770.) The EDPA then directed that any litigation funder that did not accept the court's remedy of rescission (thereby allowing recoupment of the amount already paid to a plaintiff) would suffer full voidance of its agreements. (SA18; JA774.)

B. The Third Circuit's Decision

On appeal, the Third Circuit affirmed the underlying order only to the extent it voided a "true assignment," *i.e.*, terms that permit an assignee "to step into the shoes of the player and seek funds directly from the settlement fund." *In re Nat'l Football League Players' Concussion Injury Litig.*, 923 F.3d 96, 110 (3d Cir. 2019). The Third Circuit held the district court erred, however, by voiding the funding agreements in their entirety. It explained that the anti-assignment clause in the settlement agreement did not affect the rights between the assignors and assignees, and thus "the cash advance agreements," which include the NFL Agreements, "remain enforceable … to the extent the litigation companies retain rights under the agreements after any true assignments are voided." *Id.* at 112.

V. The District Court Concludes The CFPB's Structure Is Unconstitutional And Strikes Down The CFPA

On June 21, 2018, the District Court issued an Opinion and Order with respect to RD's Motion to Dismiss. As to whether the transactions are sales or loans, the District Court accepted that the Purchase Agreements effected assignments, but concluded (a) "the assignments … are void as against the third party-obligors," *i.e.*, the Zadroga Fund Special Master and NFL Settlement Fund claims administrator (SA49); (b) "because the assignments are void, no ownership rights are transferred to the RD Entities under the Purchase Agreements" (SA50); and (c) relying on a seventy-year-old state court case from Missouri that was cited by no party, that the contracts establish "a creditor-debtor relationship" that is "separate and apart from the void assignment" (SA56). The District Court reached this conclusion despite the CFPB and NYAG providing only "sparse" justification for its assignment-into-loan theory, and the "puzzling paucity of case law" addressing the issue. (SA46.) While the District Court noted that "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 after the party has received the funds" (SA37), it stated those cases do not apply and concluded that the Complaint stated claims under the CFPA and New York law, including because the Purchase Agreements should be recharacterized as loans. (SA39-40.)

The District Court nonetheless dismissed the complaint with prejudice on the ground that the CFPB is unconstitutional and struck down Title X of Dodd-Frank in its entirety. The District Court adopted Sections I-IV (but not Section V) of Judge Kavanaugh's dissent from the *en banc* decision in *PHH*, 881 F.3d 75 (D.C. Cir. 2018), in which he 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." (SA104.) The District Court further adopted Section II of Judge Henderson's dissent in *PHH*, which concluded that the severability clause in Dodd-Frank does not provide "a license to cut out the 'heart' of a statute" and, that Title X should be struck down. (*Id.*)

After striking down the CFPA in its entirety, the District Court held "there is no basis for federal jurisdiction over the NYAG's CFPA claims" (SA109) and the NYAG's state law claims did not raise "'substantial' federal issue[s]" that give rise to federal question jurisdiction. (SA110.) Accordingly, the District Court dismissed the NYAG's state law claims without prejudice and entered judgment in favor of RD. (SA116, 119.)

STANDARD OF REVIEW

Whether the District Court correctly (1) held that the CFPB is unconstitutional, (2) struck the CFPA in its entirety, and (3) held that it lacked jurisdiction over the NYAG's remaining state law claims are reviewed *de novo*. *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 137 (2d Cir. 2013).

Whether (4) the RD Entities are "covered person[s]" under the CFPA, and (5) the Complaint states a claim for relief under the CFPA or New York law are also reviewed *de novo*. *Id.*; *Chase Grp. All. LLC v. City of New York Dep't of Fin.*, 620 F.3d 146, 150 (2d Cir. 2010).

SUMMARY OF THE ARGUMENT

Appeal. Title X of Dodd-Frank insulates the CFPB from appropriate checks by the Executive and Legislative branches, in violation of the Constitution's separation of powers. The Director wields vast authority over nearly every person that offers a consumer financial product or service, yet is not subject to the President's oversight. Congress also lacks the power to hold the Director accountable using its power of the purse—as he has sole power to fund his agency from the Federal Reserve System's operating expenses—and the congressional appropriations committees are prohibited from reviewing the Director's budget determinations. Worse, the CFPB Director is more accountable to the Financial Stability Oversight Council ("FSOC")—the ten-member committee vested with veto power over CFPB regulations—than to the President, a feature that further distances the CFPB from presidential oversight. The CFPB's structure cannot be reconciled with the Constitution's design, and it cannot be cured by merely severing the unconstitutional provisions. The Court should affirm the District Court's decision to strike down Title X and dismiss this lawsuit.

Cross-Appeal. In addition to the constitutional problems discussed above, the Court should affirm the dismissal because the CFPB and NYAG's claims are all premised on the erroneous theory that the Purchase Agreements are void as to third-party obligors and that, as a result, they are somehow converted into extensions of credit (for purposes of claims under the CFPA) or loans (for purposes of the New York state law claims). Neither the facts nor the law support this novel theory. Under the relevant law for determining whether a transaction is a true sale, which the District Court declined to apply, the Purchase Agreements are what they claim to be: an assignment *and* sale of a customer's interest in future settlement proceeds. To the extent the assignments are void as to third-party obligors, the assignment and sale provisions remain enforceable between the assignor and assignee. But even if the transactions are unenforceable under some sort of anti-assignment proviso, under no scenario do the Purchase Agreements transform into loans. Thus, they are not subject to the CFPA.

For the same reason, the CFPB and NYAG failed to state a claim for relief: because the transactions were accurately described by RD Legal as assignments and sales, no customers were deceived.

ARGUMENT

I. The District Court Correctly Concluded The CFPB's Structure Is Unconstitutional

The Constitution established three co-equal branches of the federal government, with each branch assigned its own powers. "By diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting); *see also NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (it is a "bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty'") (quoting *Bond v. United States*, 564 U.S. 211, 223 (2011)). "The values of liberty and accountability protected by the separation of powers belong not to any branch of the Government but to the Nation as a whole." *Wellness*, 135 S. Ct. at 1955 (Roberts, C.J., dissenting).

Over more than a century, Congress has created numerous agencies to assist it and the executive branch in carrying out the responsibilities assigned to them by the Constitution. Some of those agencies are generally considered "independent"—that is, designed to afford them some autonomy from the political branches.[2] But all agencies of the federal government must operate within the structure created by the Constitution, and consistent with allocation of powers to and among the three coordinate branches. Federal agencies are not a separate, "fourth branch," of government.[3]

The Supreme Court has zealously guarded against deviations from the Constitution's design—often, but not always, under the rubric of maintaining "separation of powers." "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'" *Noel Canning*, 573 U.S. at 572 (Scalia, J., concurring) (quoting *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring)). Part of that policing function requires ensuring that those entrusted with administering and enforcing the nation's laws remain accountable to the

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[2] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 772, 774 (2013) (observing "there is no single feature … that every agency commonly thought of as independent shares").

[3] *See City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (agency rulemakings "are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive Power'"); *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 773 (2002) ("[A]gencies, even 'independent' agencies, are more appropriately considered to be part of the Executive Branch.") (Breyer, J., dissenting).

political branches, which are themselves ultimately accountable to the public. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 884 (1991) (public must be able to "ensure that those who wield[]" power are "accountable to political force and the will of the people.").

Title X of Dodd-Frank (the CFPA) created the CFPB, a unique entity without a close counterpart in the long history of federal agencies. As described below, (1) the CFPB's single Director removable only for cause, (2) its oversight by the FSOC, and (3) its authority to independently obtain funds from the Federal Reserve outside of congressional oversight and control, each give rise to constitutional problems that warrant finding those provisions of Title X unconstitutional even when considered in isolation from one another. But taken together, these features of Title X render the CFPB *sui generis*—an agency with vast power over vital sectors of our economy (*see* CFPB 6-7, 25 (listing powers)), but too insulated from accountability to the political branches, and through them to the People, to pass constitutional muster. *Cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *see also* Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, 36 Yale J. on Reg. 273, 275, 314 (2019) (compared with other agencies, the CFPB "was structured, by a wide margin, to be the most insulated from congressional control" and "the most independent from political accountability").

This Court should affirm the District Court's judgment that Title X is unconstitutional,[4] and must be invalidated in its entirety.[5]

A. Title X Is Unconstitutional In Numerous Respects

1. Single Director Removable Only for Cause

Unlike almost every other federal agency, the CFPB is headed by a single Director who serves a five-year term, and may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

Article II of the Constitution provides that "[t]he executive Power shall be vested" in the President. U.S. Const., art. II, § 1, cl. 1, 3. "Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary." *Free Enterprise v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

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[4] This Court may affirm a district court's decision for any reason supported by the record, regardless of whether the argument was raised in or ruled upon by the district court. *See, e.g.*, *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014) (affirming on alternative ground raised for the first time on appeal in an *amicus curiae* brief).

[5] Although the district court addressed the CFPB's notice of ratification filed with it (SA104-07), on appeal the CFPB has abandoned its arguments concerning ratification, asking this Court to "address Defendants' constitutional claims ….." (CFPB 14 n.5.)

"Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting The Federalist No. 70 (Alexander Hamilton)).

The Supreme Court has "upheld limited restrictions on the President's removal power." *Free Enter.*, 561 U.S. at 495. But the limited restrictions previously sanctioned by the Court do not justify the CFPB's unconstitutional leadership structure enacted by Title X.

In *Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1935), the Court upheld a provision establishing that Federal Trade Commission (FTC) commissioners could be removed only "for inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620. The Court's conclusion rested upon the particular "character of the office," *id.* at 631: in the Court's view at the time, the FTC "act[ed] in part quasi legislatively and in part quasi judicially," *id.* at 628, was "nonpartisan," comprised of multiple members with staggered terms, and was "called upon to exercise the trained judgment of a body of experts," *id.* at 624. In addition, the Court notably viewed the FTC as "wholly disconnected from the executive department … [and] an agency of the legislative and judicial departments." *Id.* at 630.

While there is reason to doubt the Supreme Court would embrace all aspects of *Humphrey's Executor* were it to reconsider it,[6] even as it stands that decision does not dictate the outcome here, for several reasons.

First, *Humphrey's Executor* is properly understood as addressing only multi-member commissions of a particular nature. Indeed, in the decision itself, the Court specifically observed it had addressed only "an office such as that here involved," leaving in place "a field of doubt" about other circumstances, left for "future consideration and determination as they may arise." 295 U.S. at 632; *see also Wiener v. United States*, 357 U.S. 349, 353 (1958) ("the essence" of *Humphrey's* was to permit limited restrictions on the power to remove "members of a body" exercising judgment).

Second, leaving aside the *Humphrey's Executor* Court's quixotic view of the FTC as "wholly disconnected from the executive department," 295 U.S. at 630, the distinction between a single agency head and a multi-member leadership structure is constitutionally significant. *See PHH*, 881 F.3d at 183-93 (Kavanaugh, J., dissenting). Among other things, a multi-member body with staggered terms typically guarantees a President the opportunity to appoint members, and the bipartisan requirement common for multi-member bodies[7] increases the likelihood

[6] Perhaps the CFPB shares these doubts. It has advised this Court it "does not take a position on whether existing Supreme Court precedent was correctly decided." (CFPB 15 n.7.)

[7] *See, e.g.*, 45 U.S.C. § 154 (National Mediation Board); 39 U.S.C. § 202(a)(1) (United States Postal Service Board of Governors); 42 U.S.C. § 1975(b)

that at least some members share the President's views. In contrast, a single Director can unilaterally impose views and implement policies at odds with the President's preferences. And where, like here, a single Director has a term greater than four years, 12 U.S.C. 5491(c)(1), a President may never have the ability to appoint a CFPB Director.

Third, the CFPB exercises considerably more executive power than did the FTC at the time *Humphrey's Executor* was decided. *See Humphrey's Executor*, 295 U.S. at 624. Title X gives the CFPB Director wide-ranging policymaking, rulemaking and enforcement authority, and there must be limits on the scope of executive power that Congress can vest in an agency insulated from the President.

Fourth, extending the *Humphrey's Executor* exception to the CFPB would upend the general rule against restraining the President's removal power. *See Free Enterp.*, 561 U.S. at 513-14 (the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties"); *Myers* v. *United States,* 272 U.S. 52, 117 (1926) ("as [the President's]

(Commission on Civil Rights); 15 U.S.C. § 2053(c) (Consumer Product Safety Commission); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission); 46 U.S.C. § 301(b)(1) (Federal Maritime Commission); 5 U.S.C. § 7104(a) (Federal Labor Relations Authority); 15 U.S.C. § 41 (FTC); 5 U.S.C. § 1201 (Merit Systems Protection Board); 25 U.S.C. § 2704(b)(3) (National Indian Gaming Commission); 42 U.S.C. § 5841(b)(2) (Nuclear Regulatory Commission); 49 U.S.C. § 1111(b) (National Transportation Safety Board); 39 U.S.C. § 502(a) (Postal Regulatory Commission); 49 U.S.C. § 1301(b)(1) (Surface Transportation Board).

selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible"); *see also Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.").

The CFPB and NYAG also rely on *Morrison v. Olson*, 487 U.S. 654 (1988), but it likewise fails to support their contention that constraining the President's power to remove the CFPB Director is constitutional. In *Morrison*, the Court upheld a statute permitting an independent counsel to be removed by the Attorney General only for "good cause" because the independent counsel was an *inferior* officer with "limited jurisdiction and tenure" and without "policymaking or significant administrative authority." 487 U.S. at 691. None of this is true of the CFPB Director—a *principal* officer of the United States,[8] who serves a five-year term, and wields significant policymaking, rulemaking and enforcement authority.

Faced with the unmistakable factual differences between this case and *Morrison*, the CFPB plucks a line from that decision, claiming the for-cause limitation on the President's power to remove the CFPB Director is constitutional

[8] The CFPB does not dispute its Director is a principal officer, and New York expressly concedes the point. (*See* CFPB 28 n.10; NYAG 3, 28, 35); *see also Free Enter.*, 561 U.S. at 506.

because it "does not 'impede the President's ability to perform his constitutional duty' to take care that the laws are faithfully executed." (CFPB 16 (citing *Morrison*, 487 U.S. at 691).) That claim, however, is both conclusory and counterfactual. The CFPB Director controls an agency with—by its own account—considerable power over large and important sectors of our economy. (*See* CFPB 24-25 (listing its powers, including: rulemaking; administrative proceedings; filing suits in federal court; imposing civil penalties).) Suppose the President disapproves of action taken or authorized by the Director: how can he stop it? He cannot. And that is by design. The President is powerless to control the activities of this agency unless the Director can properly be removed for "inefficiency, neglect of duty, or malfeasance in office." Even major policy disagreements and divergent philosophies clearly do not qualify. The CFPB's assertion that "the President can hold accountable those officials he can remove for cause" (CFPB 18) simply does not withstand scrutiny. Being accountable for malfeasance is not the same as being held *politically* accountable. Indeed, the facts of *Humphrey's Executor*, on which the Appellees so heavily rely, show that for-cause removal does not itself enable a President to bring an official into alignment with the President's approach to the official's work. That case arose precisely because the President was unable to effectuate change at the FTC as he had only for-cause removal at his disposal. *See Humphrey's Executor*, 295 U.S. at

619 (President Roosevelt, writing to commissioner who refused to resign as requested: "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission.").[9]

Moreover, the CFPB's claim that these few words from *Morrison* constitute "the controlling legal test" (CFPB 17, 27; *see also id*. at 19; NYAG 33) ignores the Supreme Court's observation that separation of powers cases should be decided not by "formalistic and unbending rules," but "with an eye to the practical effect" of the practice on "constitutionally assigned" roles. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). The CFPB misses the jurisprudential forest for a tree when it clings to its narrow "test for removal provisions" while castigating the District Court (and then-Judge Kavanaugh, whose analysis the District Court adopted) for taking account of the history and deep-rooted concern for liberty animating the Supreme Court's separation of powers cases. (*See* CFPB 35.)

[9] Further evidencing the CFPB's power to break ranks from the President, the agency is litigating this case, including this appeal, on its own, because the Department of Justice has taken the position for the Executive branch that "the statutory restriction on the President's authority to remove the [CFPB] Director violates the constitutional separation of powers." Brief for Respondent in Opposition at 13, *State National Bank of Big Springs v. Mnuchin*, No. 18-307 (2018).

Appellants' inability to point to any factually analogous Supreme Court case supporting their position is unsurprising[10] given that agencies run by a single person removable only for cause are exceedingly rare.[11] And that rarity is instructive. In the separation-of-powers context, "the lack of historical precedent" for a new structure is "[p]erhaps the most telling indication of [a] severe constitutional problem." *Free Enter.*, 561 U.S. at 505; *see also Noel Canning*, 573 U.S. at 524.

This Court should hold that Title X's provisions creating a single CFPB Director removable only for cause infringe on the President's control of the Executive Branch, impermissibly frustrate the President's "responsibility to take care that the laws be faithfully executed," *Free Enter.*, 561 U.S. at 493, and are unconstitutional.

[10] New York invokes *Mistretta v. United States*, 488 U.S. 361 (1989), in its defense of the for-cause limitation on the President's authority to remove the CFPB Director. (NYAG 32.) However, *Mistretta* involved a multi-member commission established within the Judicial branch, 488 U.S. at 368—and therefore has little relevance to this case, which concerns the President's authority over an Executive branch agency headed by a single person.

[11] The Federal Housing Finance Agency, established in 2008 to oversee quasi-governmental entities, also has a single director removable only for cause. 12 U.S.C. §§ 4511(b), 4512(b)(2). Last year, the Fifth Circuit held this for-cause removal provision is unconstitutional. *Collins v. Mnuchin*, 896 F.3d 640, 676 (5th Cir.) (per curiam), *reh'g en banc granted*, 908 F.3d 151 (5th Cir. 2018).

2. Oversight and Veto Power by the FSOC

Title X authorizes the FSOC to "set aside" any CFPB "regulation or provision" that "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U.S.C. § 5513(a). This FSOC veto power over CFPB regulations is unavailable to the President—either directly or through the power of removal.

The FSOC itself is comprised of ten voting members (including the CFPB Director), each serving a term of six years, as well as five non-voting members. 12 U.S.C. § 5321(b). The President lacks the ability to remove some members of the FSOC at will. *See* 12 U.S.C. § 242 (Chair of Federal Reserve Board of Governors); 12 U.S.C. § 4512(b)(2) (Director of the Federal Housing Finance Agency); *Free Enter.*, 561 U.S. at 487 (Chair of the Securities and Exchange Commission).

As a result, with respect to CFPB regulations, the CFPB Director is more accountable to the FSOC than to the President, and the President's ability to control or influence the FSOC is constrained by an inability to remove some members without cause. Section 5513(a) accordingly creates a framework resembling the double-layer removal problem condemned by the Supreme Court in *Free Enterprise*. While not the precise "dual for-cause limitations" found to violate the separation of powers, *Free Enter.*, 561 U.S. at 492, the veto power over

CFPB regulations vested in the FSOC by Title X further distances the CFPB from presidential oversight, and the resulting "diffusion of power carries with it a diffusion of accountability." *Id*. at 497.

This Court should hold that § 5513(a) is unconstitutional.

3. CFPB Funding

The CFPB's funds come indirectly from the U.S. Treasury, but outside of the congressional appropriations process (and without presentment to the President). Title X requires the Federal Reserve Board of Governors to transfer to the CFPB any amount the Director requests (on an annual or quarterly basis), up to 12% of the Federal Reserve System's own operating expenses. *See* 12 U.S.C. § 5497(a)(2)(A)(iii); *see also* 12 U.S.C. § 289(a)(3)(B) ("[S]urplus funds of the Federal reserve banks … shall be transferred to the Board of Governors of the Federal Reserve System for transfer to the Secretary of the Treasury for deposit in the general fund of the Treasury."). Funds requested by the Director "shall be immediately available" to the CFPB, and remain available to the CFPB until expended. 12 U.S.C. § 5497(c)(1). Title X provides the funds transferred to and available to the CFPB, and any other funds it obtains, "shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 5497(c)(2). The statute further provides that funds the CFPB obtains from the Federal Reserve System "shall not be subject to review by the Committees on Appropriations" in the House or Senate, 12 U.S.C. § 5497(a)(2)(C), and that the CFPB has no "obligation … to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information" and the OMB Director has no "jurisdiction or oversight over the affairs or operations" of the CFPB, 12 U.S.C. § 5497(a)(4)(E).

Title X's CFPB funding provisions are constitutionally suspect in several respects.

First, there is the apparent infidelity to the requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. II, § 9. By its own terms, Title X does not effect "Appropriations made by Law" to the CFPB. Indeed, the statute expressly provides the contrary: the funds transferred to and available to the CFPB "shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 5497(c)(2). But it is nevertheless quite clear that Title X does require the Federal Reserve Board to transfer to the CFPB funds that would otherwise be directed to the Treasury. *See* 12 U.S.C. § 5497(a)(2)(A)(iii); 12 U.S.C. § 289(a)(3)(B). This is a violation of the Appropriations Clause.[12]

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[12] Congress's declaration that the money diverted from the Federal Reserve to the CFPB are not "Government funds or appropriated monies" is not dispositive. *Cf. Department of Transp. v. Association of Am. R.R.s*, 135 S. Ct. 1225, 1233 (2015) ("[F]or purposes of Amtrak's status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over

Second, Title X's funding provisions go too far in insulating the CFPB from accountability to the political branches. Congress's "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58 (James Madison); *see also United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974). That legislative power serves the "fundamental and comprehensive purpose" of "assur[ing] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990); Joseph Story, *Commentaries on the Constitution* § 1342 (1833) ("The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation."). Direct funding of the CFPB entirely outside the congressional

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Congress' disclaimer of Amtrak's governmental status."); *Free Enter.*, 561 U.S. at 485-86 (parties conceding Board members are part of the government for constitutional purposes notwithstanding statutory provision stating they are not government officials). But if the CFPB is actually funded with private rather than government funds—for example, by members of Federal Reserve Banks, who are required to contribute more or receive smaller dividends as a result of being forced to fund the CFPB—then the relevant funding provisions of Title X present additional constitutional concerns, including a potential Fifth Amendment violation.

appropriations process effectively removes the CFPB from oversight by the political branch most directly and immediately accountable to the People. *See* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1384 (1988) ("If Congress creates spending authority which is open-ended with respect to amount and duration … it effectively concedes any role in defining and constraining executive—that is, governmental—action."); Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733, 1736 (2013) ("[S]elf-funding, unlike any other single structural feature of agency independence, effectively severs an agency from an entire branch of government."); *see also* Henry B. Hogue, Marc Labonte & Baird Webel, Congressional Research Serv., *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 25 (2017) ("[T]he annual appropriation processes and periodic reauthorization legislation provide Congress with opportunities to influence the size, scope, priorities, and activities of an agency."); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1466-67 (2015) (oversight and appropriations enable Congress to "assert influence over [agency] discretion").

Third, Title X's authorization of self-funding by the CFPB appears tantamount to congressional delegation of its own appropriations powers to the agency—which would violate Article I. Again, by its own terms, Title X does not appropriate funds to the CFPB. 12 U.S.C. § 5497(c)(2). Instead, the statute empowers the CFPB to request in the future whatever funds it wants from the Federal Reserve (subject only to a cap, calculated based on the Federal Reserve's own budget), and the Federal Reserve is required by law to immediately comply with the CFPB's funding demand, no questions asked. The funds that the Federal Reserve sends to the CFPB would otherwise end up deposited in the Treasury. 12 U.S.C. § 289(a)(3)(B). This arrangement created by Title X bears the hallmarks of an impermissible exercise by the CFPB of the legislative appropriations power. *See Whitman*, 531 U.S. at 472 ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted ... in a Congress of the United States.' This text permits no delegation of those powers."); *Association of Am. R.R.s*, 135 S. Ct. at 1237 ("Congress … cannot delegate its 'exclusively legislative' authority at all.") (Alito, J., concurring).

Fourth, the CFPB's funding provisions further disable the President's control over the agency. While Congress plays the central role in appropriations, the Constitution also assigns the President a role through the Presentment Clause. *See* U.S. Const. art. I, § 7, cl. 2. And, in practice, federal budgets are a collaboration between the political branches. Title X reflects this reality when it attempts to shield the CFPB from the work of the Office of Management and Budget. 12 U.S.C. § 5497(a)(4)(E). As the dissenting Justices in *Free Enterprise* recognized, "the decision as to who controls the agency's budget requests and funding … affect[s] the President's power to get something done." 561 U.S. at 524 (Breyer, J., dissenting).

Appellees' efforts to dismiss the constitutional significance of Title X's funding provisions are unavailing.

Both the CFPB and NYAG point to the existence of other "self-funding" agencies as support for their claim that no problem exists here. (CFPB 34 n.13; NYAG 42-43.) But even assuming the funding of those other agencies is consistent with the Constitution, those agencies bear little resemblance to the CFPB, which has broad policymaking, rulemaking and enforcement authority affecting the public at large, and must be accountable to the political branches through the appropriations process mandated by the Constitution. *See* C. Boyden Gray, *Extra Icing on an Unconstitutional Cake Already Frosted? A Constitutional Recipe for the CFPB*, 24 Geo. Mason L. Rev. 1213, 1227-29 (2017); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy With Removal Protection*, 125 Harv. L. Rev. 1822, 1824 (2012) ("The impact of CFPB's self-funding is important because of the agency's potential power …. [W]hen the traditional independent agency model is combined with self-funding, as was done with the CFPB, control is substantially diminished, especially because of reduced congressional power.").

Moreover, the CFPB's self-funding is different from other agencies: the CFPB operates with funds that would otherwise go directly into the Treasury, while other "self-funding" agencies collect fees and revenue from sources other than the Treasury. (*See* CFPB 6, 34 n.13.)

The CFPB also contends there is no "constitutional concern" because Congress can change the CFPB's funding "at any time by enacting a new law." (CFPB 34 n.13.) Needless to say, the *possibility* of future amendment cannot cure an unconstitutional statute. Moreover, the CFPB is wrong in at least two respects. As with the President, members of Congress cannot "bind [their] successors by diminishing their powers." *Free Enter.*, 561 U.S. at 497. Deviation from constitutional requirements is not permitted even if "the encroached-upon branch approves the encroachment." *New York* v. *United States*, 505 U. S. 144, 182 (1992); *see also Clinton v. City of New York*, 524 U.S. 417, 452 (1998) ("[O]ne Congress cannot yield up its own powers, much less those of other Congresses to follow.") (Kennedy, J., concurring). In addition, the CFPB's claim defies experience. Legislation does not turn readily into law. This is evidenced by numerous unsuccessful efforts since the enactment of Title X to subject the CFPB to the constitutional appropriations process.[13] The theoretical possibility of

[13] *See, e.g.*, S. 453, 116th Cong. (as introduced, Feb. 12, 2019) (subjecting CFPB to the regular appropriations process); H.R. 969, 116th Cong. (as introduced, Feb. 5, 2019) (same); H.R. 3280, 115th Cong., § 926 (as introduced, July 18, 2017)

someday removing the CFPB's authority to self-fund is not a serious check on the separation from the political branches which Title X has conferred on the agency.[14]

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"No one doubts Congress's power to create a vast and varied federal bureaucracy." *Free Enter.*, 561 U.S. at 499. But the CFPB is unlike any other federal agency previously created by Congress—with broad power over vital sectors of our economy but excessively insulated from accountability to the political branches by the CFPB's leadership structure, the FSOC's veto power, and the CFPB's authority to obtain funds from the Federal Reserve outside of congressional oversight and control.

For the reasons explained above, each of these features of Title X give rise to separate constitutional problems. But "a number of statutory provisions" can

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(same); H.R. 2553, 115th Cong. (as introduced, May 19, 2017) (same); S. 387, 115th Cong. (as introduced, Feb. 15, 2017) (same); S. 3318, 114th Cong. (as introduced, Sept. 13, 2016) (same); H.R. 5485, 114th Cong., § 502 (as passed by House, July 7, 2016) (same); S. 1383, 114th Cong. (as introduced, May 19, 2015) (same); H.R. 1486, 114th Cong. (as introduced, Mar. 19, 2015) (same); H.R. 3193, 113th Cong. (as passed by House, Feb. 27, 2014) (same); H.R. 2786, 113th Cong., § 502 (as introduced, July 23, 2013) (same); H.R. 1640, 112th Cong. (as introduced, Apr. 15, 2011) (same); H.R. 1355, 112th Cong. (as introduced, Apr. 4, 2011) (same).

[14] The NYAG appears to concede Title X's funding provisions impair Congress's oversight of the CFPB, noting: "Congress's decision to fund an independent agency outside the annual appropriations process 'primarily affects Congress' itself, 'which has the power of the purse.'" (NYAG 43 (citing *PHH*, 881 F.3d at 96).)

"work[] together [to] produce a constitutional violation," *Free Enter.*, 561 U.S. at 509; *see also Morrison*, 487 U.S. at 693 (considering whether statute "taken as a whole" violated separation of powers). Here, these three aspects of Title X place the CFPB well beyond any agency framework previously approved by the Supreme Court or consistent with the Constitution's design.[15]

This Court should affirm the District Court's judgment that Title X is unconstitutional.

B. The CFPB's Constitutional Defects Cannot Be Cured Through Severing

The District Court correctly determined that the unconstitutional provisions of Title X are not severable from the remainder of the statute, and that Title X should be invalidated in its entirety.[16] (SA104, 109, 114, 119.)

The touchstone of severability is "legislative intent." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006).[17] But Judges are

[15] That Congress has not previously created an agency with this combination of characteristics further supports that Title X is unconstitutional. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995); *Printz v. United States*, 521 U.S. 898, 905 (1997); *see also Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) ("In separation-of-powers cases this Court has often 'put significant weight upon historical practice.'") (quoting *Noel Canning*, 573 U.S. at 524); *Luis v. United States*, 136 S. Ct. 1083, 1099 (2016) (Thomas, J., concurring) ("lack of historical precedent" is indicative of a "constitutional problem").

[16] The District Court adopted as its rationale concerning this issue Section II of Judge Henderson's dissent in *PHH*, 881 F.3d at 137 (SA104), but this Court may affirm for any reason supported by the record. *See, e.g.*, *Lotes*, 753 F.3d at 413.

"expounders of what the law *is*" not "policymakers choosing what the law *should be*." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). "[T]he proper role of the judiciary … [is] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017); *see also Free Enter.*, 561 U.S. at 510 ("[E]ditorial freedom … belongs to the Legislature, not the Judiciary.").

Appellees contend the proper remedy here is to make the CFPB's single director removable at will by the President. (CFPB 43-44; NYAG 44.) That, however, requires rewriting the statute—an act of policymaking rather than statutory interpretation. The original legislation that culminated in Title X called for a Consumer Financial Protection *Agency* to be led by a single director, appointed by the President, selected from a five-member board comprised of the head of "the agency responsible for chartering and regulating national banks" and four presidential appointees, who would be removable "for inefficiency, neglect of duty, or malfeasance in office." H.R. 3126, 111th Cong., § 112 (as introduced, July 8, 2009). The bill was amended twice in committee: first, to replace the agency's name and structure with a five-member Consumer Financial Protection

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[17] While Dodd-Frank includes a severability clause, *see* 12 U.S.C. § 5302, it creates only a "presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). "[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968).

Commission, and second, to delay the creation of the five-member commission for an interim period, during which the agency would be led by a single director. H.R. Rep. No. 111-367, at 101 (2009). The bill that passed the House included this "initial structure" and "subsequent structure." *See* H.R. 4173, 111th Cong., § 4101 (as passed by House, Dec. 11, 2009); *see also* 155 Cong. Rec. H 14418, 14418 (Dec. 9, 2009) (statement of Rep. Waxman) ("Under the agreement we have reached, the agency will start off with a single director who can take early leadership in establishing the agency and getting it off the ground. After a period of 2 years, the agency will continue operations with the leadership from a bipartisan commission."). The director was to have been removable "for cause," and the commissioners "only for inefficiency, neglect of duty, or malfeasance in office." H.R. 4173, 111th Cong., §§ 4102, 4103. The Senate competitor bill called for a single director with no board or commission; the director was to be removable "for inefficiency, neglect of duty, or malfeasance in office." S. 3217, 111th Cong., § 1011(c)(3) (as introduced, April 14, 2010). The Senate took up H.R. 4173 and passed it after substituting the text of its competitor bill. The version of H.R. 4173 that became law created a permanent director position with no provision for a commission, retaining the "for cause" removal standard from the Senate bill. Pub. L. No. 111-203, § 1011(b), 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491(b)).

The statutory history of Title X offers no assurance that Congress would have adopted a leadership structure for the CFPB in a form other than the unconstitutional one actually enacted. And absent clear legislative intent, this Court may not simply convert the CFPB to an agency with a single director removable at will, when there were other paths Congress plausibly might have taken.[18] *Cf. United States v. Booker*, 543 U.S. 220, 249 (2005) ("Congress likely would not have intended the Act as so modified to stand.").

Moreover, unlike in *Free Enterprise* and other cases where an unconstitutional provision can be readily severed with confidence that Congress would have enacted the statute as is except for the provision in question, here there are two other sets of problematic provisions which also would need to be excised from the statute—those dealing with the FSOC veto power over CFPB regulations and the funding provisions of Title X.

While it is hardly self-evident that Congress would have enacted Title X without the FSOC control over CFPB regulations, it is obvious that the statute cannot stand on its own without its funding provisions. Congress specifically sought to finance the operations of the CFPB without authorizing or appropriating funds. There is not a scintilla of support for the notion that Congress would have

[18] Would Congress have adopted instead a multi-member leadership structure, with the members removable only for cause? A single director who could be removed by the President at will? Or perhaps there were insufficient votes in Congress to enact the CFPB in any form other than the one actually voted upon.

enacted Title X without these provisions—which, if severed, would have the effect of rendering the CFPB inoperative because it would have no lawfully allocated money to conduct its affairs.

The unconstitutional portions of Title X "were obviously meant to work together" with the remainder of the statute, *Murphy v. NCAA*, 138 S. Ct. 1461, 1483 (2018), and therefore cannot be severed. *See also Alaska Airlines*, 480 U.S. at 684 (unaffected portions of law are "incapable of functioning independently" and cannot be severed). As when the Supreme Court found a key provision of the Bankruptcy Act of 1978 unconstitutional, "it is for Congress to determine the proper manner of restructuring the [statute] to conform to the requirements of [the Constitution] in the way that will best effectuate the legislative purpose." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 n.40 (1982) (plurality); *id*. at 91-92 (concurring opinion agreeing the statute's unconstitutional assignment of certain powers to bankruptcy judges was not severable).

This Court should affirm the district court's judgment that Title X must be invalidated in its entirety.

II. The District Court Correctly Declined To Exercise Jurisdiction Over The NYAG's Claims

Despite the dismissal of all federal claims, the NYAG asserts the District Court nonetheless should have exercised jurisdiction over its state law claims because they raise "whether the [federal Anti-Assignment Act] voids only the assignment of a *substantive* claim against the United States, or whether it also voids the assignment of the *proceeds* of such a claim in a private contract." (NYAG 66 (emphasis in original).) Federal courts may only exercise jurisdiction over stand-alone state law claims where "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 257-58 (2013) (finding no federal jurisdiction). This is an "extremely rare exception," *id.* at 257, that does not apply here.

First, the law is clear that the Anti-Assignment Act does not *void* an agreement between private parties. (*See* Section III.C.1., *infra*.) Moreover, the NYAG's state law claims primarily rely on state law and do not "necessarily" raise a federal issue. (JA44-48); *see New York ex rel. Jacobson v. Wells Fargo Nat'l Bank, N.A.*, 824 F. 3d 308, 315 (2d Cir. 2016) (claims "necessarily" raise a federal issue if they are "affirmatively 'premised"' on a violation of federal law). The NYAG's reliance on *Rhode Island Fisherman's Alliance, Inc. v. Rhode Island Dept. of Envtl. Mgmt.*, 585 F.3d 42, 50-51 (1st Cir. 2009) (NYAG 68) is misplaced. There, "the federal question [was] inherent in the state-law question itself because the state statute expressly reference[d] federal law." *Id.* at 50. Here, the state law claims are not brought under a statute that expressly references federal law. The NYAG has raised the federal Anti-Assignment Act as an alternative basis to find the Zadroga Agreements void; its claims are neither "affirmatively 'premised'" on nor brought to enforce the Act, and thus do not "necessarily" raise federal questions.

Second, the NYAG's state law claims do not raise a "substantial" federal issue. "[F]ederal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005). As the District Court correctly observed, "[t]he validity of assignments of monetary awards from the Zadroga Fund is a particularized issue that involves a discrete pool of individuals." (SA111.) A federal question is not "substantial" if it merely is "vitally important to the particular parties in [the] case." *Gunn*, 568 U.S. at 263-64. Rather, "something more, demonstrating that the question is significant to the federal system as a whole, is needed." *Id.* at 264.

Third, the exercise of federal jurisdiction here would disrupt the traditional balance between federal and state jurisdiction. The NYAG ignores the factors considered under this inquiry—"principally … the nature of the claim, the traditional forum for such a claim, and the volume of cases that would be affected." *New York ex rel. Jacobson*, 824 F.3d at 316. Instead, the NYAG argues adjudicating its state law claims in federal court "would have no unique consequences" for the federal-state balance because state law almost always provides the underlying cause of action in cases involving an embedded federal question, and federal courts routinely resolve state law claims. (NYAG 67-68.) That federal courts *can* resolve state law claims, however, does not mean they *should*, nor does the mere existence of an embedded federal question mean federal jurisdiction is warranted. *See Liana Carrier Ltd. v. Pure Biofuels Corp.*, 672 F. App'x 85, 92 (2d Cir. 2016) (concluding the state-federal balance weighed against federal jurisdiction in case involving state law breach of contract claims). Applying the relevant considerations, the state-federal balance weighs against federal jurisdiction here: state court is the traditional forum for the NYAG's state law claims, which are based on New York statutes and require the application of New York law. *See* Section III.B., *infra* (discussing state cases conducting true sale analysis).

The Court should affirm the District Court's decision that, following the dismissal of all federal claims, it lacked jurisdiction over the NYAG's state law claims.

III. The RD Entities Are Not "Covered Person[s]" Under The CFPA

Although the District Court correctly concluded the CFPB is unconstitutional, the Court need not reach that issue because the RD Entities are not "covered person[s]" subject to the CFPB's authority. The CFPB's statutory authority extends only to "covered person[s] or service provider[s]." 12 U.S.C. §§ 5531(a), 5536(a). A "covered person" is "any person that engages in offering or providing a consumer financial product or service." *Id*. § 5481(6)(A). The CFPB alleged that the RD Entities are "covered persons" under 12 U.S.C. § 5481(15)(A)(i), which defines "financial product or service" to include "extensions of credit." (JA32, ¶ 19.) The CFPA defines "credit" as the right "to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase." 12 U.S.C. § 5481(7). As set forth below, the Purchase Agreements are not "extensions of credit," under either the defined term "credit" or the well-established analytical framework under New York law distinguishing loans and true sales.

Instead of performing either analysis, the District Court sidestepped the issue. The court declined to apply cases concluding that assignments of future payments do not meet the definition of "extensions of credit" on the ground that "[n]one of those cases … involves an assignment that a court has declared invalid as a matter of law." (SA47.) Similarly, despite acknowledging the factors used to determine whether a transaction is a true sale or loan, the District Court stated that its conclusion the assignments were void as to third-party obligors "constitutes the beginning and end of the story." (SA53.)

Application of the proper analytical framework demonstrates that, because

(a) the transactions cannot be recharacterized as either extensions of credit or loans, and (b) invalidating an assignment does not convert a sale into a loan, the RD Entities are not "covered persons." *See* 12 U.S.C. §§ 5531(a), 5536(a).

A. Contracts for the Purchase of Settlement Proceeds Are Not Extensions of "Credit" Under the CFPA

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). The Purchase Agreements implicate none of these rights. The consumer does not incur a debt, and has not been granted a right to defer payment of a debt by the RD Entities. Moreover, because the consumer is the *seller* of the asset, the consumer does not "purchase property or services."

In an attempt to shoehorn the transactions into the definition of "credit," the Complaint mischaracterizes the transactions as involving "repayment." (JA33, ¶ 24 (alleging the RD Entities' "consumers agree to ***repay*** a far larger amount than the amount advanced.") (emphasis added).) In the Purchase Agreements, however, the customer *sells* a portion of a legal receivable and incurs *no repayment* obligation whatsoever. The sellers' only obligations are to facilitate the direct distributions of the proceeds from the holder of the funds to the RD Entities or, if the seller receives the distribution, to turn it over to the RD Entities. (*See, e.g.*, JA58-59, ¶ 5(c)(d).) The contracts expressly confirm that if the RD Entities are unable to collect the settlement proceeds—if, for example, the Zadroga Fund lacks sufficient resources or the proceeds are not distributed by the third-party obligor—the seller "will have no obligation to pay RD any portion of the Purchase Price that RD paid to [the seller]." (JA60-61, ¶ 6(h).) There is no debt. There is no repayment obligation. Thus, there is no "credit."

Cases interpreting analogous federal statutory definitions of "credit" confirm that the "hallmark of 'credit' … is the right of one party to make deferred payment."[19] *Reithman v. Berry*, 287 F.3d 274, 277-79 (3d Cir. 2002). "Absent a right to defer payment for monetary debt, property or services," there is no "credit" transaction. *Shaumyan v. Sidetex Co., Inc.*, 900 F.2d 16, 18 (2d Cir. 1990) (holding ECOA inapplicable for this reason); *see also Reithman*, 287 F.3d at 277 ("The key element … is whether, under the agreement between the debtor and the creditor, the debtor has a right to defer payment of existing debt or to incur future debt and defer payment at its sole discretion.") (quotation omitted). Thus, where, as here, there is no repayment obligation, the contract is not an extension of

[19] The definition of "credit" in the CFPA is substantially the same as the definitions in the Truth in Lending Act ("TILA"), *see* 15 U.S.C. § 1602(f) ("[T]he right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."), and the Equal Credit Opportunity ACT ("ECOA"), *see* 15 U.S.C. § 1691a(d) ("[T]he right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor."). Cases analyzing whether a transaction is a loan or a sale under those statutes are accordingly instructive here.

"credit." *See, e.g.*, *Capela v. J.G. Wentworth, LLC*, No. CV09-882, 2009 WL 3128003 (E.D.N.Y. Sept. 24, 2009) (holding purchase of future settlement proceeds "cannot be considered a loan [under TILA] because [the consumer] has no obligation at all to pay the settlement installments if [the third-party obligor] fails to do so").

Because the seller has no obligation to repay any debt to the RD Entities, let alone the right to defer payment of a debt to the RD Entities, the transactions are not within the CFPA's definition of an extension of "credit" and the CFPA claims should have been dismissed.

B. The CFPB and NYAG Cannot Recharacterize the Purchase of Settlement Proceeds as a Loan Rather Than a True Sale

The entire Complaint—both the basis for the jurisdiction under the CFPA and the causes of action themselves—is premised on the conclusory allegation that the transactions at issue are loans, not sales as they have always been described in the Purchase Agreements. This core allegation is contrary to New York law.

1. Courts Analyze the Allocation of Risk Between Parties to Determine Whether a Transaction is a True Sale or a Loan

To constitute a loan, an agreement must "provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard." *Rubenstein v. Small*, 273 A.D. 102, 104 (N.Y. App. Div. 1st Dep't 1947). Thus, when courts analyze whether a transaction is a "true sale" or a loan, "several attributes must be examined, primarily the allocation of risk.'" *In re Dryden Advisory Grp., LLC*, 534 B.R. 612, 620 (Bankr. M.D. Pa. 2015) ("*Dryden*") (applying New York law). The critical inquiry is not *how much* risk exists, but *which party holds whatever risk does exist*. *See Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc.*, 67 F.3d 1063, 1069 (2d Cir. 1995) ("The root of all of these factors is the transfer of risk."). Where the seller retains the risk about whether and when the proceeds will be received, the transaction is a loan; where the agreement transfers that risk from the seller to the buyer, the transaction is a sale.

Several courts have recently surveyed relevant case law and articulated the factors used to assess how risk is allocated between parties to determine whether a transaction is a true sale or a loan. *See Rapid Capital Fin., LLC v. Natures Mkt. Corp.*, 57 Misc.3d 979, 982-85 (N.Y. Sup. Ct. 2017) (collecting cases and discussing factors). These factors consider the allocation between the parties of the "if" (collection risk) and "when" (duration risk) of the receipt of proceeds from a transaction as follows:

- **Whether the buyer has a right to recourse against the seller for non-payment**. *See Dryden*, 534 B.R at 623 ("[T]he most important single factor when determining whether a transaction is a true sale is the buyer's right to recourse against the seller," which indicates the transaction is a loan.).
- **Whether the agreement has a finite term**. *See Rapid Capital Fin.*, 57 Misc.3d at 984 ("[A] loan has a finite term, … whereas the period over which

repayment will be made for a receivables purchase agreement is indeterminate.”).

- **Whether payment obligations are contingent on the seller’s receipt of receivables**. *See K9 Bytes, Inc. v. Arch Capital Funding, LLC*, 56 Misc.3d 807, 816-17 (N.Y. Sup. Ct. 2017) (considering whether the seller is required “to make a minimum … payment *irrespective* of the account receivable,” which indicates the transaction is a loan) (citation and internal quotation marks omitted).

These factors recognize that loans have common characteristics: an absolute obligation to make payments, over a fixed term, with regular payments due.

2. Litigation Financing Contracts are Sales, Not Loans, Based on the Allocation of Risk to the Funder

In the context of litigation finance agreements similar to the ones here, courts have concluded the transactions are not loans because the repayment of principal is contingent on the successful collection of money in the underlying lawsuit. *See, e.g.*, *Cash4Cases, Inc. v. Brunetti*, 167 A.D.3d 448, 449 (N.Y. App. Div. 1st Dep’t 2018); *see also Singer Asset Fin. Co., L.L.C. v. Bachus*, 294 A.D.2d 818, 820 (N.Y. App. Div. 2d Dep’t 2002) (purchase of a structured settlement payment “is not a loan but an absolute assignment”).

These decisions analyze the allocation of risk between the parties, and, where the litigation funding company holds the entire risk of non-payment from the third-party obligor, courts easily determined the assignments were sales and not loans. *See also Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 35 Misc.3d 1205[A], 2012 WL 1087341, *5-6 (N.Y. Sup. Ct. 2012) (“The concept of usury applies to loans, which are typically paid at a fixed or variable [interest] rate over a term. The instant transaction, by contrast, is an ownership interest in proceeds for a claim, contingent on the actual existence of any proceeds.”).

3. The Purchase Agreements Are True Sales Because They Allocate Risk to RD

Application of these factors demonstrates that the Purchase Agreements transfer the risk of non-payment to RD, and thus they are “true sales,” not loans. Indeed, in analyzing three of the Zadroga Agreements under similar New Jersey law, the court in *RD Legal Funding Partners, LP v. Acosta, et al.*, N.J. Sup. Ct. No. BER-L-7533-16 (“*Acosta*”), recently found that “[t]here was necessarily risk borne by [RD] in purchasing a portion of the award” and concluded that the agreements were sales, not loans. *See Acosta* Order Granting Partial Summary Judgment (“*Acosta* Order”) at 8; *see also Peterson v. Islamic Republic of Iran*, S.D.N.Y. No. 10-cv-4518 (KBF), ECF 872 at 49-50 (finding RD funding agreements “should not be viewed as loans”). This Court should reach the same conclusion.

(i) The Transactions Are Non-Recourse and Thus Have Collection Risk

“Courts have held that the most important single factor when determining whether a transaction is a true sale is the buyer’s right to recourse against the seller.” *See Dryden*, 534 B.R. at 623. The concept of recourse concerns the ability of the buyer of receivables to seek repayment from the seller if the seller is unable to tender the receivables as provided for in the contract. *Id.* ("An agreement 'without recourse' means that the purchaser/factor agreed to assume the full risk of collecting the money owed to the seller, whereas an agreement 'with recourse' means that the seller retains the risk of collection.").

When the buyer of receivables has no recourse against the seller, the transaction is a true sale rather than a loan. *See Matter of Lynx Strategies, LLC v. Ferreira*, 28 Misc.3d 1205(A), 2010 WL 2674144, at *1-2 (N.Y. Sup. Ct. 2010) ("non-recourse advance" to fund legal action in exchange for ownership interest in proceeds of a claim where there was no absolute right to repayment was not a loan). In contrast, where the seller "backed up the risk with [a] personal guarantee and a security interest in [seller's] property" and "any default of the Agreements … would trigger payment," the transaction is considered a loan. *Clever Ideas v. 999 Restaurant Corp.*, 2007 N.Y. Slip Op. 33496(U), 2007 WL 3234747 (N.Y. Sup. Ct. 2007) (transactions were "payable absolutely, and thus loans").

When discussing recourse against the seller, some courts refer to recourse as whether the buyer can demand repayment from the seller if the third-party obligor defaults. *See, e.g.*, *Capela*, 2009 WL 3128003, at *10-11 (structured settlement receivable "cannot be considered a loan because [the consumer] has no obligation at all to pay the settlement installments if [the third-party obligor] fails to do so"). Others refer to whether the buyer or seller bears the risk of collection. *See, e.g.*, *Platinum Rapid Funding Grp. Ltd. v. VIP Limousine Servs., Inc.*, 2016 N.Y. Slip Op. 31591(U), 2016 WL 4478807, at *3 (N.Y. Sup. Ct. 2016) (agreement to purchase future receivables was sale rather than loan because buyer "took the risk that there could be no daily receipts").

Regardless of the terminology, courts ask the same essential question: Does the buyer bear the risk (however large or small) that the purchased asset cannot be collected, or does the buyer have a right to demand repayment from the seller in the event of non-collection? Where there is no absolute right to repayment from the seller, the transaction is not a loan. *See, e.g.*, *NY Capital Asset Corp. v. F &B Fuel Oil Co., Inc.*, 58 Misc.3d 1229[A], 2018 WL 1310218, at *7 (N.Y. Sup. Ct. 2018) ("When payment or enforcement rests on a contingency, the agreement is valid though it provides for a return in excess of the legal rate of interest.").

Here, the sellers bore no risk of repayment, as the Purchase Agreements expressly state that RD has ***no recourse*** against the seller in the event the receivables do not materialize. (*See, e.g.*, JA60-61, ¶ 6(h).) This non-recourse provision establishes that RD can only collect the purchased receivables if and when the proceeds are distributed—*i.e.*, after the funds are paid by the Zadroga Fund or the NFL Settlement Fund—and RD therefore bears the entire risk of non-collection.[20] RD's lack of recourse under the transactions—and there were no other fees or guaranties by the seller that could be disguised as a form of recourse—demonstrates that repayment is *entirely contingent* upon the disbursement of the respective awards, which was uncertain at the time of each Purchase Agreement.

(ii) The Transactions Are Not Subject to a Finite Term and thus Have Duration Risk

"Another consideration in distinguishing between loans and purchases of receivables is that a loan has a finite term, with a definite point at which repayment is required, whereas the period over which repayment will be made for a receivables purchase agreement is indeterminate." *Rapid Capital Fin.*, 57 Misc.3d at 984. "The existence of this uncertainty in the length of the Agreement is an express recognition by the parties of the wholly contingent nature of this Agreement." *K9 Bytes*, 56 Misc. at 817-18 (quotation omitted).

This makes sense, as a loan agreement generally has a maturity date by which repayment of the principal and interest must be received, whereas a sale of

[20] The Purchase Agreements provide that RD has no recourse in the event the proceeds are not collected, and it therefore bears the risk of non-payment unless the claimant wrongfully withholds money belonging to RD Legal. (*See, e.g.*, JA60-61, ¶ 6(h).) This contractual right to seek relief in response to a breach *does not* constitute recourse for purposes of determining whether the transaction is a loan. *See Transmedia Rest. Co., Inc. v. 33 E. 61st St. Rest. Corp.*, 184 Misc.2d 706, 711 (N.Y. Sup. Ct. 2000) (agreement does not constitute a loan where, "*[e]xcept in the case of a default or breach of the April Agreement*, [the buyer] bears the risk of not being repaid the advanced funds") (emphasis added)).

receivables does not and thus has *duration risk* that does not exist in loans. *See, e.g.*, *IBIS Capital Group*, 2017 WL 1065071, at *5 ("[T]he Agreement's lack of a specified ending date is consistent with the contingent nature of each and every collection of future sales proceeds under the contract.").

The agreements here do not provide a specific date by which RD must be paid. There are no periodic payments due, and no maturity dates for full payment. From the face of the agreements, it is plain that the period over which payment will be made is indeterminate, and the time span for RD's collection of the proceeds is contingent upon any number of unpredictable factors that might delay or prevent their receipt and thus affect the value of the proceeds because of the time value of money. "As such, the agreement[s] ha[ve] an indefinite term, evidencing the contingent nature of the repayment plan." *NY Capital Asset Corp.*, 2018 WL 1310218, at *8; *see also IBIS Capital Group*, 2017 WL 1065071, at *4 (transaction was a sale "[b]ecause it was impossible for the parties to know when, if ever, [buyer] might collect the full purchased amount").

(iii) Payment Obligations Are Contingent on the Receipt of the Receivables and thus have Duration and Collection Risk

In determining whether a transaction is a true sale or a loan, courts also look to whether the seller is required "to make a minimum … payment *irrespective* of the accounts receivable," which indicates that the transaction is a loan. *K9 Bytes*, 56 Misc.3d at 817 (citation and internal quotation marks omitted) (discussing that a reconciliation clause adjusting the amount due based on receivables indicates a sale). Regular periodic payments are a hallmark of a loan, as they show there is an absolute requirement to make timely payments and eliminate collection and duration risk.

Here, the Purchase Agreements provide there is never any payment due from the seller to RD—just an obligation to turn over proceeds to RD when and if the fund proceeds are collected. Indeed, as in many true sale agreements, the contingent nature of the obligation to make payments is confirmed through a reconciliation provision, which obligates RD to reconcile any payment received and return the excess amount to the seller:

> Excess Payment to RD. If RD receives payment with respect to the Case in an amount that exceeds the Property Amount, RD will promptly pay the excess amount to you.

(*See*, *e.g.*, JA60-61, ¶ 6(a).) Such a reconciliation provision ensures that the amount of the receivables ultimately collected by the buyer does not exceed the amount it purchased. *See, e,g.*, *IBIS Capital Group*, 2017 WL 1065071, at *3 (noting that "reconciliation mechanism" in agreement "ensure[s] that IBIS will not inadvertently receive any money other than the purchased future sales proceeds"). Thus, the obligation is always contingent upon the actual receipt of proceeds, and RD never retains more than it purchased.

Notably, the collection risk in both the Zadroga and NFL transactions is borne by the RD Entities. *See Acosta* Order at 8 ("[W]hen defendant received his proceeds from RD, RD Legal Funding was not guaranteed full payment by way of VCF."); *NFL Concussion Litigation*, No. 2:12-md-o2323-AB, ECF 10652 at 10 (23% of 2,787 timely NFL claims have been denied).

(iv) The Plain Language of the Purchase Agreements Demonstrates the Parties' Intent to Enter into True Sales

Finally, while calling a transaction a sale is not dispositive, it also should not be ignored where, as here, the contractual language is consistent with the substance of the transactions. *See, e.g.*, *NY Capital Asset Corp.*, 2018 WL 1310218, at *6; *K9 Bytes*, 56 Misc.3d at 812-13 ("[P]laintiffs had the means to understand that the agreements set forth that they were not loans" on account of the plain language in the contracts "clearly stat[ing] that they involve purchases or sales … [and] that they are not loans").

The Purchase Agreements all expressly confirm they were intended by the parties to be true sales. Each contract is entitled "Assignment and Sale Agreement" and has express language confirming the nature of the Transactions:

- "[Y]ou [the customer] wish to receive an immediate lump sum cash payment in return for <u>selling and assigning</u> a portion of the Award to RD."
- "You hereby <u>sell and assign</u> to RD your interest …" in a portion of the Award.

- "This transaction is a true sale and assignment of the Property to RD and provides RD with the full risks and benefits of ownership of the Property."
- "[Y]ou and we intend that this agreement is a true sale …"
- "No Recourse. RD is purchasing all of your interest in the Property without recourse against you."

(*See*, *e.g.*, JA56-57, 60 (emphases added).) Because this clear language is consistent with the substance of the Purchase Agreements, this Court should respect the parties' characterization of these transactions as true sales. *See Platinum Rapid*, 2016 WL 4478807, at *3 (rejecting "request for the Court to convert the Agreement to a loan" where it "would contradict the explicit terms of the sale of future receivables in accordance with the [] Agreement").

C. There Is No Basis for Converting the Assignments Into Loans

The District Court sidestepped the analysis above. Instead, the court accepted that the transactions at issue are assignments (rather than loans), but held that "the assignments in the [Purchase Agreements] are void as against the third-party obligors." (SA49.) According to the District Court, this somehow "establishes a creditor-debtor relationship" between RD and the assignors that converts the agreements into loans. (SA56.)

There is no legal basis for this flawed conclusion, which the District Court reached despite the "sparse" explanation provided by the CFPB and NYAG for their assignment-into-loan theory and the "paucity of case law" in support.

(SA46.) Even accepting that the Purchase Agreements are unenforceable against the third-party obligors, the agreements remain enforceable as between the parties to the assignment. Under no circumstances are the transactions converted into loans.

1. The Purchase Agreements Remain Enforceable Against the Assignor

(i) The Anti-Assignment Act Does Not Void the Assignments as Between the Assignor and Assignee

The Anti-Assignment Act (31 U.S.C. § 3727) "generally prohibits the 'voluntary assignment of demands against the government,'" *Saint John Marine Co. v. United States*, 92 F.3d 39, 48 (2d Cir. 1996) (internal citations and quotation omitted), and sets forth requirements that must be met to assign a claim against the United States. The Act does not automatically void an agreement to which it applies; rather, its "core purpose [is] as a *defense* that the Government may assert to claims against the United States" or even waive. *United States v. Kim*, 806 F.3d 1161, 1177 (9th Cir. 2015) (emphasis added) (internal citation omitted).[21]

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[21] The pre-1982 version of the Anti-Assignment Act provided that an assignment not complying with its provisions was automatically "null and void." *Delmarva Power & Light Co. v. United States*, 542 F.3d 889, 894 (Fed. Cir. 2008). Even under the pre-1982 version—which did not require that the federal government invoke the statute to render an assignment void—courts recognized that the assignment remained enforceable between the parties. *Martin v. National Sur. Co.*, 300 U.S. 588, 596 (1397); *In re Ideal Mercantile Corp*., 244 F.2d 828, 831-32 (2d Cir. 1957).

Thus, the law uniformly provides that the effect of the Anti-Assignment Act is to "void[] the assignment as against the United States," but "the assignment remains enforceable as between the parties to the assignment," *i.e.*, between RD and the Zadroga Agreement assignors. *Saint John Marine*, 92 F.3d at 45; *accord Segal v. Rochelle*, 382 U.S. 375, 384-85 (1996) (although "one holding a claim invalidly assigned under [the Act] may not sue the Government upon it," a state "court of equity could and would compel the assignment of any refund received [from the Government]"); *In re Ideal Mercantile Corp.*, 244 F.2d at 832 ("[A]n assignment of a claim against the United States is enforceable in many cases as between the parties to that assignment, or their successors in interest, after the Government has paid the claim.").

Thus, in *United Pac. Ins. Co. v. United States*, 358 F.2d 966 (Ct. Cl. 1996), the court addressed an assignment of funds being administered by the United States and held "[t]here is no need to discuss whether the assignment in question complies with all the provisions of the Assignment of Claims Act, for whether or not the transaction is valid as against the United States, it is in any event effective and binding on the parties" to the assignment. *Id.* at 969.

The same is true here: regardless of the whether the Purchase Agreements are enforceable against the Zadroga Fund, as a matter of law, they remain binding on RD and the assignors.

(ii) The NFL Settlement Agreement Does Not Void the Assignments as Between the Assignor and Assignee

The anti-assignment provision in the NFL Settlement Agreement likewise applies only to the right to demand payment from the third-party obligor, *i.e.*, the NFL claims administrator. Under the Third Circuit's decision, 923 F.3d 96, 110 (3d Cir. 2019), it is now settled[22] that, under the anti-assignment provision in the NFL Settlement Agreement, any contractual provision that permits an assignee "to step into the shoes of the player and seek funds directly from the settlement fund"—what the Third Circuit refers to as "true assignments"—is "void *ab initio*."[23] "The cash advance agreements," which include the NFL Agreements, "remain enforceable … to the extent the litigation companies retain right under the agreements after any true assignments are voided." *Id.* at 112.

The NFL Agreements include a severability clause that expressly contemplates this scenario: "If any portion of this Agreement is determined by a court of competent jurisdiction to be unenforceable, the remainder of the

[22] The Third Circuit decision is *res judicata* that is binding on the CFPB and the NYAG: the effect of the anti-assignment provision in the NFL Settlement Agreement was adjudicated on the merits; the CFPB and NYAG appeared and filed briefs in the trial court; and any argument could have been raised in that proceeding. *See, e.g.*, *Soules v. Connecticut Dep't of Emergency Servs. & Pub. Prot.*, 882 F.3d 52, 55 (2d Cir. 2018).

[23] This ruling is consistent with the District Court's conclusion that the NFL Agreements "are void as against the third-party obligors." (SA46.)

Agreement will continue in full force and effect unless a failure of consideration would result."[24] (JA447, ¶ 5(i).) *See Christian v. Christian*, 42 N.Y.2d 63, 73 (1977) (severing unenforceable term and finding other terms enforceable where contract included severability clause).

2. The Assignments Are Not Converted Into "Extensions of Credit"

The District Court recognized the Purchase Agreements contain assignment provisions—a necessary predicate to conclude they are subject to the Anti-Assignment Act and anti-assignment provision in the NFL Settlement Agreement—yet disregarded the principles above, holding that because the assignments "are void as against third-party obligors," the Purchase Agreements "give rise" to a creditor-debtor relationship between the RD Legal and assignors, (SA46), that makes the agreements "extensions of credit" (SA56), or "loans" (SA94). This conclusion both is contrary to law and defies logic: a transaction cannot be both an assignment *and* a loan.

The District Court relied upon a single case for its novel and incorrect conclusion: *Missouri ex rel Taylor. v. Salary Purchasing Co.*, 358 Mo. 1022 (1949), which was not cited by any party, has never been cited as a statement of

[24] Notably, the same result is dictated by the Uniform Commercial Code, which invalidates most anti-assignment agreements as to the assignee and assignor. *See* N.Y. U.C.C. § 9-408(c)(2) (stating that if anti-assignment clause is rendered unenforceable by Article 9, the assignment still "does not impose a duty or obligation" on the account obligor).

New York law, and did not even involve otherwise valid assignments unenforceable as to third-party obligors. Rather, *Taylor* involved a payday lender's purported purchase of consumers' unearned wages, which the Missouri Supreme Court concluded amounted to usurious loans because the parties "intended to create the relation of debtor and creditor" and the agreements "transferred no right or title in the unearned wages which they purported to assign." *Id.* at 1026. *Taylor* did not conclude that an assignment that is void as to a third-party obligor becomes a loan between the assignee and assignor; it concluded that the transaction at issue *was a loan* based on a true sale analysis under Missouri law.

Here, based on a true sale analysis under New York law, *see* Section III.B.—an analysis the District Court did not apply—the Purchase Agreements cannot be recharacterized as loans.

The District Court reasoned that RD retained "at most, an equitable lien on Consumers' future settlement award proceeds that establishes a creditor-debtor relationship." (SA56.) While an assignment of future proceeds *does* give an assignor an equitable lien on the assets being assigned, it does not thereby transform the assignment into a loan; rather, it merely provides the assignee "a lien on the asset through which it may satisfy" a monetary obligation, *In re Flanagan*, 503 F.3d 171, 183 (2d Cir. 2007), that attaches at the time the proceeds are recovered by the assignor. *See In re Mucelli*, 21 B.R. 601, 604 (1982) ("An assignment of proceeds in a personal injury action attaches to the judgment recovered, once recovered."). Thus, the holder of an equitable lien is *not*, as the District Court posits, a secured creditor that has recourse against the assignor, (SA50, 56). *See In re Andrade*, No. 07-46595, 2010 WL 5347535, at *2-3 (Bankr. E.D.N.Y. 2010) (equitable liens created by purchase of proceeds of personal injury claim were "unsecured claims" to be considered "as part of the usual claims administration process"); *Matter of Cordaro v. Cordaro*, 235 N.Y.S.2d 289, 290 (N.Y. App. Div. 4th Dep't 1962) ("[A]s between a judgment creditor's lien and the equitable lien of an assignee of property subsequently to be acquired, the latter, while his rights will be enforced in equity as against his assignor, has no right at all as against the former.") (citation omitted).

The CFPB's and NYAG's claims hinge on the premise that assignments unenforceable against third-party obligors are transformed into loans between the assignor and assignee. This novel premise is legally unfounded and must be rejected.

IV. The Complaint Fails to State a Claim for Relief

The District Court also erred by concluding that the Complaint states a claim for relief.

A. *Counts I, III-V, IX-XI: The Complaint Does Not Allege Deceptive Conduct*

The CFPA claims for deception (Counts I, III-V) and state law claims for deceptive practices (Count IX), false advertising (Count X), and fraud (Count XI), all include false or deceptive conduct as an element of the claim. (SA13.a) To establish that a practice is deceptive, the Complaint must allege "(1) a representation, omission or practice that, (2) was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice was material." *CFPB v. IrvineWebWorks, Inc.*, No. SACV 14-1967, 2016 WL 1056662, at *12 (C.D. Cal. Feb. 5, 2016) (applying standard to deceptive conduct claim under the CFPA); *Kurtz v. Kimberly-Clark Corp.*, No. 14-CV-1142, 2017 WL 1155398, at *31 (E.D.N.Y. Mar. 27, 2017) (same requirements under N.Y. Gen. Bus. Law §§ 349, 350).

The Complaint claims that the RD Entities deceived consumers by misrepresenting (1) that the transactions were sales, not loans (JA28-50, ¶¶ 63-67, 121, 125, 129); (2) that consumers can assign their awards (*id.*, ¶¶ 34-37, 121, 125, 129); (3) that RD could "cut through the red tape" and expedite the payment of an award (*id.*, ¶¶ 79-82, 121, 125, 129); and (4) the date on which consumers would receive payment from RD (*id.*, ¶¶ 86-89, 121, 125, 129). None of these alleged deceptive representations provides a basis for relief.

1. The transactions are not loans

The entire Complaint is premised on the conclusory allegation that the transactions are loans, not sales. As discussed in Section III, *supra*, this core allegation is contrary to law. Because these transactions are sales, RD cannot be held liable for representing them as such to customers who knowingly and willingly sold their entitlement to future settlement proceeds to the RD Entities in exchange for an immediate lump sum payment.

2. Even under the District Court's reasoning, the assignments are not "void" between RD and the assignors

The Complaint alleges that RD misleads consumers by failing to inform them the Purchase Agreements are not valid and enforceable, but this circular argument is based on recharacterizing as loans agreements that RD always intended to be sales. (*See* JA28-50, ¶¶ 7, 34-43, 93, 112-18.) In any event, as a matter of law, and as discussed above, even if the assignment provisions in the Purchase Agreements are unenforceable as to third-party obligors, *see* Section III.C., *supra*, they remain valid between the parties to the contract. Thus, the RD Entities could not have deceived sellers by informing them the assignments were enforceable—they were in fact enforceable at the time they were entered and remain enforceable now.

3. "Cut through red tape" is neither misleading nor material

The RD Entities' alleged representations that they could expedite consumers' receipt of funds and "cut through red tape" (*see* JA37, 42 , ¶¶ 45, 78-84) in order to provide funds to a customer more quickly could not reasonably be misleading. A specific representation must be read in the context of the entire advertisement, transaction, or course of dealing, to determine whether "the overall net impression" is misleading or deceptive. *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 631 (6th Cir. 2014). The idiom "cut through the red tape" clearly means that the RD Entities will provide an immediate source of funding. The contracts between the RD Entities and sellers make clear that the RD Entities—not the administrators of the Zadroga Fund or the NFL Concussion Fund—will pay the individual seller, (*see* JA56, ¶ 1(b) ("RD will pay to you")), and "a signatory to a contract is presumed to have read, understood and agreed to be bound by all terms … in the documents he or she signed." *Sun Forest Corp. v. Shvili*, 152 F. Supp. 2d 367, 382 (S.D.N.Y. 2001) (citation omitted).

The statement "cuts through red tape" also is not material. "A 'material' misrepresentation or practice is one that is likely to affect a consumer's choice of or conduct regarding a product." *F.T.C. v. BlueHippo Funding, LLC*, No. 08 Civ. 1819, 2015 WL 6830161, at *3 (S.D.N.Y. Nov. 6, 2015) (quotation omitted). The Complaint makes a single allegation of materiality: that claims regarding accelerating disbursement "are material to consumers, especially, for example, consumers who are severely disabled and may have large medical costs." (JA42, ¶ 81.) This alleges why the *timing* of the payment is material to sellers, but not why the *source* of the payment (*i.e.*, from the RD Entities rather than directly from the fund) would possibly be material to sellers.

4. The alleged failure to make timely payment cannot provide the basis for a deceptive practice claim

The RD Entities' alleged failure to timely make payments pursuant to the Purchase Agreements (JA43, ¶¶ 86-88) may give rise to a breach of contract claim, but to state a claim "under a consumer protection law, a party must allege unfair or deceptive conduct that is distinct from a simple breach of contract." *Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 913 (N.D. Ill. 2013). "Were it otherwise, a plaintiff could convert any suit for breach of contract into a consumer fraud action, as all breach of contract actions involve a promise and a subsequent failure to perform." *Id.* The RD Entities' alleged failure to make timely payments is a textbook claim for breach of contract and does not provide a basis for a consumer fraud claim.

B. Count II: The Complaint Fails to Allege "Abusive" Conduct

The Complaint alleges that the RD Entities engaged in "abusive" conduct under the CFPA by "misrepresent[ing] that its contracts are for valid and enforceable assignments" (JA41, ¶ 72), the RD Entities (a) "undermine[]

consumers' understanding of the offer of credit, and in particular prevents consumer from understanding the terms, costs, and conditions" of the transaction, and (b) "prevent[] consumers from meaningfully evaluating the cost of" the transaction and comparing it "to other alternatives that may be available to the consumers." (*Id.*, ¶ 73.) "Abusive" conduct is defined under the CFPA as conduct that "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or "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." 12 U.S.C. § 5531(d)(1), (d)(2)(B).

The claim fails for the same reason the other claims fail: the Purchase Agreements are true sales—not loans—thus the RD Entities' representations were truthful. In addition, far from "undermin[ing] consumers' understanding" or "prevent[ing] consumers from meaningfully evaluating" the transactions, the contracts state in bold print, "**[t]his is a complex financial transaction"** and advise consumers to consult with an attorney or financial advisor for assistance in evaluating the transaction. (*See, e.g.*, JA64, 66.)

The sellers had an independent "'obligation to exercise ordinary diligence to inquire and, if necessary, to seek proper assistance … to ascertain and understand the [contractual] terms.'" *Dollar Phone Corp. v. Dun & Bradstreet Corp.*, 936 F.

Supp. 2d 209, 214 (E.D.N.Y. 2013) (quoting *Hotel 71 Mezz Lender LLC v. Falor*, 882 N.Y.S.2d 414, 415 (N.Y. App. Div. 2009)). The RD Entities encouraged consumers to seek professional advice and disclosed to consumers the precise issue that the RD Entities allegedly "concealed" in order to "mislead" consumers. The allegations of abusive conduct must be rejected in light of the plain contractual terms.

C. Counts VI and VII: State Usury Laws Do Not Apply

Because the transactions at issue are sales, not loans, the NYAG's claims for violation of state civil and criminal usury laws (JA44-46)—N.Y. General Obligations Law § 5-501; N.Y. Banking Law § 14-a; N.Y. Penal Law §§ 190.40, 190.42—must also be dismissed.

D. Count VIII: N.Y. General Obligations Law § 13-101 Does Not Prohibit the Sales at Issue

Count VIII is premised on the NYAG's misapprehension about *what* is being assigned: the Purchase Agreements involve the assignment and sale of future proceeds, *not*, as the NYAG alleges, the "individual claims to recover for personal injuries" (JA46, ¶ 115.) Section 13-101 forbids only the assignment of a substantive personal injury claim. *See* N.Y. Gen. Oblig. Law § 13-101(1) (prohibiting the transfer of a "claim … to recover damages for a personal injury").

"Under [] section 13-101 an assignment or transfer of a personal injury is prohibited … [but] [u]nder New York State law the proceeds of a personal injury claim are assignable and transferable." *In re Mucelli*, 21 B.R. at 603; *accord In re Minor*, 482 B.R. 80, 84 (Bankr. W.D.N.Y. 2012) (assignment of litigation proceeds does not violate section 13-101); *Grossman v. Schlosser*, 244 N.Y.S.2d 749, 750-51 (N.Y. App. Div. 1963) (recognizing validity of assignment of personal injury proceeds); *Saca v. Canas*, 903 N.Y.S.2d 861, 868 (N.Y. Sup. Ct. 2010) ("[A]n agreement to share proceeds, wherein neither the demand nor the claim is transferred does not run afoul of General Obligations Law § 13–101 [1].").

The Purchase Agreements in no way assign the underlying personal injury claim to the RD Entities, *i.e.*, they do not purport to grant the RD Entities the right to file a claim to seek redress for any injury suffered by a seller. Rather, the sellers assigned their interest in future *proceeds* to which they are entitled, which New York courts have permitted for more than 125 years. *See Williams v. Ingersoll*, 89 N.Y. 508, 518-20 (N.Y. 1882); *Stathos v. Murphy*, 26 A.D.2d 500, 504 ((N.Y. App. Div. 1st Dep't 1966) ("The *Williams* case has been followed with respect to assignments of personal injury claims … through the years.").

CONCLUSION

For the foregoing reasons, the Court should affirm the dismissal of the Complaint in its entirety.

DATED: June 13, 2019

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

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CERTIFICATE OF COMPLIANCE

I, Michael D. Roth, counsel for Defendants-Appellees-Cross-Appellants RD Legal Funding Partners, LP, RD Legal Finance, LLC, RD Legal Funding, LLC, and Roni Dersovitz, hereby certify that the foregoing brief complies with the type-volume limitations set forth in Second Circuit Local Rule 28.1.1(b) because it contains 16,432 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

DATED: June 13, 2019

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JOHN D. O'DWYER, J.S.C.

RD LEGAL FUNDING PARTNERS, LP, Plaintiff, vs. COLIN M. ACOSTA, III and STEPHANIE ACOSTA, Defendants.	SUPERIOR COURT OF NEW JERSEY BERGEN COUNTY LAW DIVISION Docket No. BER-L-7533-16 **ORDER GRANTING PARTIAL SUMMARY JUDGMENT**
COLIN M. ACOSTA, III and STEPHANIE ACOSTA, Third-Party Plaintiff, vs. RONI DERSOVITZ (improperly pled as "Roni Dorvitz"), Third-Party Defendant.	

THIS MATTER having been brought before the Court by way of Plaintiff RD Legal Funding Partners, LP ("RDLF") and Third-Party Defendant Roni Dersovitz's ("Dersovitz, together with RDLF, "RD Legal") Motion for Summary Judgment against Defendants Colin M. Acosta, III, and Stephanie Acosta

("Defendants"); and the Court having considered all papers submitted in connection with this motion; and oral argument having been heard; and good cause having been shown,

IT IS on this 12th day of April 2019,

ORDERED:

1. RD Legal's motion for summary judgment against Defendant Colin Acosta is **HEREBY GRANTED**.

2. The request for summary judgment as to Stephanie Acosta is **DENIED WITHOUT PREJUDICE.**

3. RD Legal is **HEREBY AWARDED** monetary relief under the First and Second Counts of the Complaint in the amount of $539,432.24.

4. RD Legal's application for counsel fees and costs is **DENIED WITHOUT PREJUDICE**.

5. Defendants' counterclaims against RDLF are **HEREBY DISMISSED WITH PREJUDICE**.

6. Defendants' third-party claims against Dersovitz are **HEREBY DISMISSED WITH PREJUDICE**.

7. A copy of this Order shall be served on all counsel of record within seven (7) days of receipt thereof.

SEE RIDER ATTACHED

Hon. John D. O'Dwyer, J.S.C.

RD LEGAL FUDNING V. ACOSTA,

Docket No. BER-L-7533-16

Rider to the Order Dated April 12, 2019

THIS MATTER comes before the Court by way of motion for summary judgment filed on behalf of the plaintiff, RD Legal Funding Partners, LP, and a cross – motion for summary judgment filed on behalf of defendant, Colin M. Acosta and his wife Stephanie Acosta. The factual matters are not in dispute and this matter is ripe for resolution by way of these competing motions.

This litigation has its genesis arising out of the tragic 9/11 bombings. The defendant, Colin Acosta, was a first responder who spent months at the site of the tragedy digging through the rubble in 12 hour shifts. Mr. Acosta developed psychological difficulties as a result of the toll of performing his duties at the site. He was unable to continue employment and suffered financial difficulties. Like other first responders, Mr. Acosta was eligible for and received an award for his disabilities under the Zadroga Act. In October, 2013 Mr. Acosta was awarded the sum of $665,954.61. At that time Mr. Acosta received 10% of the award. The Special Master advised that there was an expectation of future payments but that the amount of the additional payments could not be determined at that time.

Given his inability to work and financial difficulties, Mr. Acosta and his wife, Stephanie, learned of the plaintiff, RD Legal Funding which offered to provide monies to persons situated such as Mr. Acosta in return for their assignment and sale of portions of their awards from the Victim's Compensation Fund. The Acosta's entered into three agreements with RD Legal Funding to sell portions of Mr. Acosta's Victims Compensation Fund award. These agreements were entered into in January, 2014; August, 2014; and May, 2015. As a result of these three agreements

Mr. Acosta agreed to sell and assign portions of his award totaling $539,432.24 in exchange for immediate lump-sum payments totaling $215, 769.29.

As part of the exchange and payment Mr. Acosta relinquished all rights to the purchased portions of his award and agreed to immediately notify RD Legal of receipt of any portion of his award. The documents underlying these transactions indicated that if Mr. Acosta failed to pay or turn over any received portions of the award this would constitute a breach of the agreements and entitle RD Legal to various relief including specific performance; reimbursement of counsel fees; and costs incurred in an enforcement action. Ultimately, Mr. Acosta received funds from the Victim's Compensation Fund but did not reimburse RD Legal in accord with the previously executed agreements. These competing motions for summary judgment are the result of the above – stated facts which are undisputed.

The parties characterize these transactions in starkly different terms. Plaintiff, RD Legal Funding advocates that these transactions are true sales and cannot be characterized as loans. The defendants assert that they are loans subject to usury laws and hence not enforceable. Plaintiff's assert that the transactions were not loans because RD Legal had no right of recourse against Mr. Acosta in the event that the purchased portions of the compensation award did not materialize and, therefore, there was no absolute right of repayment. Furthermore, plaintiffs assert that RD Legal bore all of the risk associated with both the collection of the purchased portions of Mr. Acosta's award and the timing of their distribution. Plaintiffs point out that these risks were significant given the comments by the Special Master of the Victims Compensation Fund. Special Master Birnbaum both before and after RD Legal entered into the funding agreements indicated that claimant's may not ultimately see the full amount of their awards and that there was no guarantee as to when the remaining portions would be paid in whole or in part. On April 8, 2015, Special Master Birnbaum stated the following:

> Once you receive your initial 10 percent payment, please remember that, while the VCF anticipates making a second payment on your claim, *we do not know at this time how much the VCF will be able to pay in the second payment. The VCF has a limited amount of funding. If the total loss calculations for all claims exceeds the VCF's funding limit, the final payments on all claims will be further pro-rated and the amount of your combined payments will be less than the full amount of your loss calculation.*

Plaintiffs further submit that the agreements do not contain elements essential to a loan such as a due date for payment of interest and the plain language of the transaction documents indicate that they are sales rather than loans.

Defendants take issue with the characterization by plaintiffs as to uncertainty of the ultimate funding of the award by the Victims Compensation Fund. Defendants stress that "a fair analysis of the circumstances behind the Victims Compensation Fund shows that the awards funding was a certainty." From the defendant's standpoint, the question was not if Mr. Acosta was going to receive the funds but only when. This alleged certainty, according to the defendants, is what makes these transactions loans rather than sales. In May 2016, Mr. Acosta's award was fully funded. Defendants assert that under the usury laws, all three agreements entered into by Mr. Acosta were unlawful because the interest due was over 30%. As such, the agreements are unenforceable and must be set aside. Defendants assert an entitlement to summary judgment based upon same.

The thrust of plaintiff's argument is that the transactions were clearly and unequivocally sales rather than loans. That is, there was no borrowing of funds with an obligation of repayment.

Plaintiff points to the specific provisions of the contracts between the parties. In pertinent part they provided as follows:

1. Assignments and Consideration

(a) You hereby sell and assign to RD your interest in $500,000.00 (Five Hundred Thousand Dollars and No Cents) of the Award and any future payments made in satisfaction of the Award (the "Property" or "Property Amount") free and clear of any interests in the Award held or obtained by third parties ("Adverse Interests").
(b) In return for the Property, RD Legal will pay you the sum of $200,000 (Two Hundred Thousand Dollars and No Cents) (the "Purchase Price").
(c) **This transaction is a true sale and assignment of the Property to RD Legal and provides RD with the full risks and benefits of ownership of the Property.** However, you retain all obligations, liabilities and expenses under or in respect of the Award. (emphasis in original)

Plaintiff further emphasizes that the Assignment Agreements make clear that no interest, fees, or other costs were charged to Mr. Acosta. It is undisputed that Mr. Acosta executed the agreements and received the funds per the agreement. The agreements made clear that Mr. Acosta had a unequivocal obligation to transfer any funds he received from the Victim's Compensation Fund to RD Legal. According to plaintiffs, the statements by Special Master Birnbaum that there was uncertainty as to how much the Victim's Compensation fund would be able to pay in later payments and that there was a potential for exhaustion of the fund provided sufficient risk to RD Legal to classify these transactions as sales.

Not only does RD Legal seek summary judgment on its breach of contract claim it further seek summary judgment on its conversion claim. A claim for conversion exists when the "owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it." Bondi v Citigroup, Inc., 423 NJ Super 377, 435 (App. Div. 2011).

In support of its allegation that the transactions were sales rather than loans the plaintiff points a number of cases which set forth the elements of loans. To constitute a loan, an agreement must "provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard." Rubenstein v Small, 75 NYS 2d 483, 484 (1st Dep't 1947). The primary issue for courts to look at in determining whether a transaction is a sale or a loan is the allocation of risk. According to plaintiffs the critical inquiry is not how much risk exists, but rather which party holds whatever risk does exist. Endico Potatoes, Inc. v CIT Grp./Factoring, Inc. 67 F.3d 1063, 1069 (2d Cir. 1995). Plaintiff points to a New Jersey District Court decision, Dopp v Yari, 927 F. Supp. 814, 824 (D.N.J. 1996), in support of its position. In Dopp, the Court held that advancement of plaintiffs litigation expenses in exchange for assignment of a share of any recovery was not a loan because it did not call for the unconditional return of the principal.

Plaintiffs submit that courts have routinely held that litigation finance assignment agreements similar to those at issue herein are not loans because the repayment of principal is contingent upon the successful collection of money in the underlying lawsuits. Plaintiffs further point out that RD Legal had no recourse against Mr. Acosta in the event the money was not forthcoming from the Victim's Compensation Fund.

Plaintiff's position boiled down to essence is as follows: Does the buyer bear the risk (however large or small) that the purchase asset cannot be collected, or does the buyer have a right to demand repayment from the seller in the event of non-collection? Where there is no such absolute rights repayment from the seller, the transaction is not a loan.

Defendants oppose plaintiff's motion for summary judgment and support their cross-motion for summary judgment based on the claim that the transactions were loans not sales. Given that they were loans they violated state usury laws and are therefore unenforceable. The basis of defendant's position is that there was no risk borne by plaintiff's with regard to the transactions. There was certainty of payment. The only uncertainty concerned when the payment(s) would be made.

It is undisputed that ultimately all first responders whose claims were appraised before December 17, 2015 (Mr. Acosta included) were funded at 100%. While this is now the reality plaintiff asserts it was not absolutely certain at the time the transactions were entered into – pointing to the statements of the Special Master. Furthermore, plaintiff points to the uncertainty of the timing of the payment.

Defendants, at length in their brief, set forth what they contend are the distinguishing factors in this matter from Dopp v. Yari, 927 F. Supp. 814, 815 (D N.J. 1996). Dopp involved the "question of the enforceability of a contract for the financing of litigation in exchange for a division of the final proceeds." The agreement in Dopp was created after a finding of liability was affirmed by the First Circuit and the case was remanded for a new trial on the issues of remedies and damages." On remand an award of $9,989,606.94 was entered in favor of the plaintiff.

Yari who provided financing during the pendency of the litigation sought payment from Dopp pursuant to the litigation agreement. Dopp refused to pay, arguing, like plaintiff herein, that the agreement violated N.J.'s usury laws. The District Court, interpreting what it believed would be the decision by the New Jersey Supreme Court, upheld the agreement finding that the "agreement can clearly be construed as a joint undertaking of the parties disclosing an intent to distribute proceeds of the case, if any." Id. at 823.

Despite the holding in Dopp above, defendants submit that a proper analysis of Dopp results in viewing the transactions at issue herein as loans. Defendants emphasize that the ultimate finding by the VCF was a certainty. Defendant in their brief in trying to distinguish Dopp state, "(M)eanwhile Acosta was not part of any civil litigation. The question was "when" and not "if" he would receive his award. Whereas in Dopp, the party awarding the monies to Dopp would only have recourse if Dopp prevailed at trial."

This Court finds that Dopp supports plaintiff's position and is detrimental to defendant's position. The Court in Dopp, supra at 820 noted the elements necessary to establish usury consisting of (1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the exaction of a greater compensation than that allowed by law for the use of the money. The Court further noted there must be an absolute obligation to repay. In this matter, as in Dopp, there was at least one contingency, the potential that the Victim Compensation Fund would be unable to fully fund the awards. District Judge Clarkson Fisher noted in Dopp at pg. 822:

> The rule adopted by the majority of jurisdictions, including New York and California, permits collection of interest rates in excess of the legal rate when the collection of the entire interest is at risk and depends upon a contingency and provided that the parties contracted in good faith without the intent to evade the usury laws. *Arneill Ranch v. Petit, 64 Cal. App. 3d 277, 134 Cal. Rptr. 456, 461-464 (Cal. Ct. App. 1977); Fried v. Bolanos, 217 A.D.2d 823, 629 N.Y.S.2d 538, 539-540 (N.Y. App. Div. 1995).*

While this Court is sympathetic to the plight of first responders, defendant's position that these transactions were loans is not supported by the law. The transactions herein are akin to that determined to be a sale in Dopp. In Dopp, a litigation agreement was entered into after the First Circuit affirmed liability and remanded for a trial as to remedies and damages. Furthermore, in this matter contrary to the position of the defendants there was not absolute certainty of payment. While from a retrospective analysis that may be the case, the Statement of Special Master Birnbaum supra, and an absence of any proofs establishing certainty, this Court does not find defendants conclusory statement reliable. The undisputed proofs demonstrate that plaintiffs bore risk without recourse against Mr. Acosta.

The undisputed facts demonstrate that Mr. Acosta executed agreements which consisted of sales not loans. There was necessarily risk borne by the RD Legal Funding in purchasing a portion of the award. Despite defendant's claims to the contrary, the undisputed facts indicate that the receipt of the totality of the award was not a certainty before May, 2015, and, therefore, when defendant received his proceeds from RD, RD Legal Funding was not guaranteed full payment by way of VCF. The statement of April 8, 2015, by Special Master Birnbaum is clear as to the potential for less than full payment. Additionally, the documents themselves evince a sale rather than a loan. Putting aside the words themselves there is no interest rate nor payment date.

The Court having determined that the transactions at issue were sales and not loans negates any claims by the defendants for that of usury. Summary Judgement dismissing Counts I-III of the Counterclaim are dismissed. Furthermore, this determination results in plaintiff's entitlement to summary judgment on the breach of contract claim.

Defendants seek summary judgment on the additional Counts of their Counterclaim sounding in violation of state and federal RICO; violation of New Jersey Consumer Fraud Act; and common law fraud.

With regard to the RICO claims (Counts IV and V of the Counterclaim), defendants assert that RD Legal Funding and its principle, Ronald Dersovitz, committed predicate acts of racketeering, "specifically by using the mails to send three fraudulent and usurious contracts and their using the wires to send monies to Acosta to further the unlawful transactions contained in the contracts." Given this Court's determination that the transactions were not usurious they were not the predicate acts necessary to permit such claims to proceed. Summary Judgment is granted dismissing Counts IV and Count V of defendant's Counterclaim.

The claims for violation of New Jersey Consumer Fraud Act and claim of common law fraud both also fail as a matter of law. Again, defendants rely upon a determination that the transaction at issue were loans. They were not. Defendants also assert that the defendants were falsely advised there were "no monthly interest payments." Defendants advocate that if the agreements are set aside and determined to be loans there were provisions mandating monthly interest. Additionally, defendants assert that there were "hidden expenses" which were fees to a law firm for reviewing the agreement. Neither of these assertions are valid. Given the Courts determination that the transactions were sales no interest applies. Furthermore, the fees to the law firm were for the Acosta's to have legal counsel review the transaction, such expenses were not hidden but clearly delineated.

Based on the forgoing, this Court finds that plaintiff, RD Legal, is entitled to summary judgment against Colin Acosta and awarded the sum of $539,432.44. Defendant's counterclaims are dismissed with prejudice as against RD Legal and Ronald Dersovitz. There are factual issues precluding entry of summary judgment against Stephanie Acosta.

The Court does not determine the issue of legal fees and costs. The plaintiff is free to seek relief with regard to same by way of further motion practice.

SO ORDERED this 12th day of **April, 2019.**

HON. JOHN D. O'DWYER