18-2743(L)

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

RESPONSE AND REPLY BRIEF FOR THE STATE OF NEW YORK

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
CAROLINE A. OLSEN
Assistant Solicitor General of Counsel

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, New York 10005
(212) 416-6184

Dated: August 12, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

ARGUMENT 4

APPEAL 4

POINT I

THE STRUCTURE OF THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB) IS CONSTITUTIONAL 4

A. The For-Cause Removal Restriction Falls Squarely Within Congress's Power. 5

B. The CFPB's Other Structural Features Comport with the Constitutional Separation of Powers. 7

1. RD Legal's challenge to the Financial Stability Oversight Council's veto power over CFPB rules is unpreserved and meritless. 8

2. The CFPB's funding mechanism does not impermissibly burden executive or congressional power. 10

POINT II

IN ANY EVENT, TITLE X OF THE DODD-FRANK ACT CAN SURVIVE WITHOUT THE PROVISIONS THAT GUARANTEE THE CFPB'S INDEPENDENCE 13

A. Congress Intended for the Remainder of Title X to Survive If Any Portion Were Invalidated. 13

Page

B. At Minimum, Title X's Prohibition on Abusive Conduct and Expansion of State Enforcement Powers Should Survive. 15

POINT III

THE DISTRICT COURT HAD JURISDICTION OVER THE NEW YORK ATTORNEY GENERAL'S STATE-LAW CLAIMS 17

CROSS-APPEAL 20

POINT IV

THIS COURT SHOULD DECLINE TO REVIEW RD LEGAL'S CROSS-APPEAL ARGUMENTS 20

POINT V

RD LEGAL'S LENDING SCHEME IS SUBJECT TO TITLE X'S PROHIBITION ON DECEPTIVE, UNFAIR, AND ABUSIVE CONDUCT 22

A. RD Legal Extended Credit by Offering Consumers the Right to Incur a Debt and Defer Its Repayment. 23

B. RD Legal's Contrary Arguments Are Meritless. 25

1. The agreements imposed repayment obligations on consumers. 26

2. The agreements charged a fee for a cash advance rather than effecting a "true sale" of consumers' ownership interests in fund distributions 32

3. The agreements' characterization of the underlying transactions is immaterial. 43

Page

POINT VI

THE COMPLAINT ADEQUATELY ALLEGES THAT RD LEGAL VIOLATED TITLE X AND STATE LAW 45

A. The Complaint States a Claim for Deceptive Practices Under Title X, and Accordingly States a Claim Under New York's Consumer Protection Laws (Counts I, III-V, IX, and XI). 45

1. RD Legal's representations that the contracts were valid assignments were misleading and material. 48

2. RD Legal's promise to "cut through the red tape" and expedite consumers' receipt of their awards was also material and misleading. 49

3. RD Legal deceived customers about when they would receive payments. 52

B. The Complaint States a Claim for Abusive Conduct Under Title X (Count II). 53

C. The Complaint States a Claim for Violations of New York Usury Laws (Counts VI and VII). 55

D. The Complaint States a Claim for Violations of New York General Obligations Law (Count VIII). 56

CONCLUSION 59

TABLE OF AUTHORITIES

Cases **Page(s)**

Abir v. Malky, Inc.,
59 A.D.3d 646 (2d Dep't 2009) 44

Alvarez v. Simmons Mkt. Research Bureau, Inc.,
839 F.2d 930 (2d Cir. 1988) 21

American Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. Federal Labor Relations Auth.,
388 F.3d 405 (3d Cir. 2004) 11

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 15

Board of Comm'rs of Se. La. Flood Prot. Auth.-E. v. Tennessee Gas Pipeline Co., L.L.C.,
850 F.3d 714 (5th Cir. 2017) 17, 18

Caldwell v. Ogden Sea Transp., Inc.,
618 F.2d 1037 (4th Cir. 1980) 56

Cash4Cases, Inc. v. Brunetti,
167 A.D.3d 448 (1st Dep't 2018) 40

CBF Industria de Gusa S/A v. AMCI Holdings, Inc.,
850 F.3d 58 (2d Cir. 2017) 21

CES Publ'g Corp. v. St. Regis Publ'ns, Inc.,
531 F.2d 11 (2d Cir. 1975) 21

CFPB v. D&D Marketing,
No. 15-cv-9692, 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016) 11

CFPB v. Gordon,
819 F.3d 1179 (9th Cir. 2016) 46, 50

CFPB v. ITT Educ. Servs., Inc.,
219 F. Supp. 3d 878 (S.D. Ind. 2015) 51

Cases **Page(s)**

CFPB v. Morgan Drexen, Inc.,
60 F. Supp. 3d 1082 (C.D. Cal. 2014) 11

CFPB v. Navient Corp.,
17-cv-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017).......... 46

CFPB v. NDG Fin. Corp.,
No. 15-cv-5211, 2016 WL 7188792 (S.D.N.Y. Dec. 2, 2016).......... 48, 54

CFPB v. Seila Law LLC,
923 F.3d 680 (9th Cir. 2019).......... 1, 5

CFPB v. Seila Law, LLC,
No. 17-cv-1081, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017).......... 11

CFPB v. Siringoringo,
No. 14-cv-1155, 2016 WL 102435 (C.D. Cal. Jan. 7, 2016) 53

CFPB v. Think Finance, LLC,
No. 17-cv-127, 2018 WL 3707911 (D. Mont. Aug. 3, 2018) 54

Cincinnati Soap Co. v. United States,
301 U.S. 308 (1937).......... 11

Commissioner of Internal Revenue v. Tufts,
461 U.S. 300 (1983).......... 30

Comptel Corp. v. Commissioner of Internal Revenue,
376 F.2d 791 (2d Cir. 1967) 36, 37

Concerned Citizens of Cohocton Valley, Inc. v. New York State Dep't of Envtl. Conservation,
127 F.3d 201 (2d Cir. 1997) 20

Don King Prods., Inc. v. Thomas,
945 F.2d 529 (2d Cir. 1991) 33

Cases **Page(s)**

Echeverria v. Estate of Lindner,
2005 N.Y. Slip Op. 50675(U), 2005 WL 1083704 (Sup. Ct. Nassau County 2005) 39

Equity Serv. Corp. v. Agull,
250 A.D. 96 (1st Dep't 1937) 38

Free Enterprise Fund v. Public Company Accounting Oversight Board,
561 U.S. 477 (2010) 10, 15

FTC v. Medical Billers Network, Inc.,
543 F. Supp. 2d 283 (S.D.N.Y. 2008) 48

FTC v. Quincy Bioscience Holding Co.,
753 F. App'x 87 (2d Cir. 2019) 46

FTC v. Verity Int'l, Ltd.,
443 F.3d 48 (2d Cir. 2006) 52

Goodwin v. Massachusetts Mut. Life Ins. Co.,
73 N.Y. 480 (1878) 23

Granite Partners, L.P. v. Bear, Stearns & Co.,
17 F. Supp. 2d 275 (S.D.N.Y. 1998) 43

Grossman v. Schlosser,
19 A.D.2d 893 (2d Dep't 1963) 58

Gutierrez v. State of New York,
58 A.D.3d 805 (2d Dep't 2009) 57

Humphrey's Executor v. United States,
295 U.S. 602 (1935) 4

In re Dunlap,
458 B.R. 301 (Bankr. E.D. Va. 2011) 35

Cases **Page(s)**

In re Edelman,
295 F.3d 171 (2d Cir. 2002) 23

In re Price,
313 B.R. 805 (Bankr. E.D. Ark. 2004) 35

In re Prince,
89 F.2d 681 (2d Cir. 1937) 24

In re Renshaw,
222 F.3d 82 (2d Cir. 2000) 23, 24

Intercollegiate Broad. Sys. v. Copyright Royalty Bd.,
684 F.3d 1332 (D.C. Cir. 2012) 15

Katel Ltd. Liab. Co. v. AT&T Corp.,
607 F.3d 60 (2d Cir. 2010) 8

Kraft, Inc. v. FTC,
970 F.2d 311 (7th Cir. 1992) 52

Leavitt v. Jane L.,
518 U.S. 137 (1996) 15

Mapco Inc. v. United States,
556 F.2d 1107 (Ct. Cl. 1977) 31

Martin v. National Sur. Co.,
300 U.S. 588 (1937) 34

Matter of People v. Applied Card Sys., Inc.,
27 A.D.3d 104 (3d Dep't 2005) 47

Matter of People v. JAG NY, LLC,
18 A.D.3d 950 (3d Dep't 2005) 44

Missouri ex rel. Taylor v. Salary Purchasing Co.,
358 Mo. 1022 (1949) 34, 35

Cases **Page(s)**

Morrison v. Olson,
487 U.S. 654 (1988) 5, 7

N.C. Freed Co. v. Board of Governors of Fed. Reserve Sys.,
473 F.2d 1210 (2d Cir. 1973) 25

NASDAQ OMX Grp., Inc. v. UBS Secs., LLC,
770 F.3d 1010 (2d Cir. 2014) 19

Nassau Trust Co. v. Midland Manor Home for Adults,
57 A.D.2d 609 (2d Dep't 1977) 37

National Equip. Rental, Ltd. v. Stanley,
283 F.2d 600 (2d Cir. 1960) 24

National Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 14

New York ex rel. Jacobson v. Wells Fargo Nat'l Bank, N.A.,
824 F.3d 308 (2d Cir. 2016) 19

NFL Players' Concussion Injury Litigation,
923 F.3d 96 (3d Cir. 2019) 35, 36, 47

O'Hare v. Commissioner of Internal Revenue,
641 F.2d 83 (2d Cir. 1981) 31, 37

Oasis Legal Fin. Grp., LLC v. Coffman,
2015 CO 63 (2015) 24, 27, 29, 37

Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank,
85 N.Y.2d 20 (1995) 46

PHH Corp. v. CFPB,
881 F.3d 75 (D.C. Cir. 2018) .... passim

Cases **Page(s)**

Policemen's Annuity & Benefit Fund of City of Chi. v. Bank of Am., N.A.,
907 F. Supp. 2d 536 (S.D.N.Y. 2012) 29

Rehab. Med. Care of N.Y. v. Travelers Ins. Co.,
188 Misc. 2d 176 (2d Dep't App. Term 2001) 57

Removatron Int'l Corp. v. FTC,
884 F.2d 1489 (1st Cir. 1989) 55

Renfrew Ctr. v. Blue Cross & Blue Shield of Cent. N.Y., Inc.,
No. 94-cv-1527, 1997 WL 204309 (N.D.N.Y. Apr. 10, 1997) 57

Rosner v. Metropolitan Prop. & Liab. Ins. Co.,
96 N.Y.2d 475 (2001) 57

Rubenstein v. Small,
273 A.D. 102 (1st Dep't 1947) 31

Saint John Marine Co. v. United States,
92 F.3d 39 (2d Cir. 1996) 34

Seidel v. 18 E. 17th St. Owners, Inc.,
79 N.Y.2d 735 (1992) 44

Singer Asset Fin. Co. v. Bachus,
294 A.D.2d 818 (4th Dep't 2002) 43

Smith v. Johnson & Johnson,
593 F.3d 280 (3d Cir. 2010) 21

Soules v. Connecticut Dep't of Emergency Servs. & Pub. Prot.,
882 F.3d 52 (2d Cir. 2018) 36

Stathos v. Murphy,
26 A.D.2d 500 (1st Dep't 1966) 33

Cases **Page(s)**

Stevens v. Equidyne Extractive Indus. 1980, Petro/Coal Program 1,
694 F. Supp. 1057 (S.D.N.Y. 1988) 55

TIFD III-E, Inc. v. United States,
459 F.3d 220 (2d Cir. 2006) 38, 44

United States Dep't of Health & Human Servs. v. Smith,
807 F.2d 122 (8th Cir. 1986) 29, 31

United States v. Booker,
543 U.S. 220 (2005) 13, 16

Western Air Lines, Inc. v. Board of Equalization of State of S.D.,
480 U.S. 123 (1987) 25

Wetzlar v. Wood,
143 A.D. 311 (1st Dep't 1911) 39

Whitford Land Transfer Co. v. Seneca Ins. Co.,
No. 08-cv-71, 2008 WL 4792386 (E.D. Pa. Oct. 31, 2008) 57

Wilmarth v. Heine,
137 A.D.3d 526 (3d Dep't 1910) 24

Laws

Federal

U.S. Const. art. I, § 9, cl. 7 .... 11, 12

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 2

Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victim Compensation Fund Act, Pub. L. No. 116-34, 133 Stat. 1040 (2019) 42

Laws **Page(s)**

Federal

12 U.S.C.
§ 5321 9
§ 5481 .... 3, 22, 23, 24
§ 5496 13
§ 5496a 13
§ 5497 .... 10, 12
§ 5513 .... 8, 9
§ 5531 .... 14, 54
§ 5536 45
§ 5551 16
§ 5552 16

15 U.S.C. § 45 45

31 U.S.C. § 3727 .... 17, 32

37 U.S.C. § 701 18

38 U.S.C. § 5301 18

State

C.P.L.R. 5201 30

Executive Law § 63 46

General Business Law
§ 349 46
§ 350 46

General Obligations Law
§ 5-501 55
§ 13-101 56

Legislative Materials **Page(s)**

H.R. 1327, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1327/actions 42

S. Rep. 111-176 (2010) 16

Miscellaneous Authorities

9 *Williston on Contracts* § 20:8 (4th ed. 2019) (Westlaw) 37

Black's Law Dictionary (11th ed. 2019) (Westlaw) 23, 33, 49, 57

Merriam Webster's New Collegiate Dictionary (10th ed. 1994) 26

Rupa Bhattacharyya, *Fifth Annual Status Report and Annual Reassessment of Policies and Procedures: September 11th Victim Compensation Fund* (Mar. 2017), https://www.vcf.gov/pdf/VCFStatusReportMar2017.pdf 41

Rupa Bhattacharyya, *Sixth Annual Status Report and Second Annual Reassessment of Policies and Procedures: September 11th Victim Compensation Fund* (Feb. 2018), https://www.vcf.gov/pdf/VCFStatusReportFeb2018.pdf 41

N.Y. State Dep't of State, *New York State Uniform Commercial Code*, https://appext20.dos.ny.gov/pls/ucc_public/web_search.secpty_search 44

PRELIMINARY STATEMENT

This enforcement action seeks to hold RD Legal Funding LLC and its affiliates (collectively, "RD Legal") accountable for extending predatory loans to the beneficiaries of the September 11 Victim Compensation Fund (VCF) and the NFL Settlement Fund for injured former players, many of whom are suffering from severe physical and mental illnesses and injuries. The United States District Court for the Southern District of New York (Preska, J.) held that the New York Attorney General (NYAG) and Consumer Financial Protection Bureau (CFPB) had properly stated claims under both federal and state law. But the court ultimately dismissed the complaints on the ground that the for-cause removal provision that protects the CFPB Director's independence was unconstitutional.

Since the opening briefs, the Ninth Circuit has joined the en banc D.C. Circuit in rejecting essentially identical challenges to the structure of the CFPB and upholding the for-cause removal provision at issue here. *See CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir.), *cert. pending*, 2019 WL 2763117 (June 28, 2019); *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). RD Legal fails to raise any argument that these courts have not already considered and rejected. This Court should join its sister

circuits to conclude that the CFPB's structure is constitutional—or, at minimum, that any unconstitutional provision may be severed without invalidating the rest of title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat. 1376 (2010) ("Title X").

RD Legal similarly misses the mark in its purported cross-appeal, which challenges the district court's rejection of RD Legal's statutory bases for avoiding liability. As a threshold matter, this Court should decline to exercise its discretion to consider RD Legal's cross-appeal arguments, because RD Legal lacks standing to appeal the judgment below, and this Court would ordinarily not have jurisdiction to reverse the district court's denial of a motion to dismiss. But even if this Court were to reach the merits of RD Legal's cross-appeal, it should reject them. RD Legal's principal contention is that its agreements with the vulnerable beneficiaries of the VCF and NFL Settlement Fund (hereinafter "consumers") do not constitute loans at all and are thus not subject to Title X. But the district court correctly found that the agreements did make loans: RD Legal advanced consumers money (at exorbitant interest rates), and in exchange, consumers agreed to repay a

much larger amount later. This financing arrangement easily falls within Title X's jurisdiction over any "financial product or service" that involves a consumer "incur[ring] debt and defer[ring] its payment." 12 U.S.C. § 5481(7), 15(A)(i). RD Legal's additional arguments that the complaints fail to state a claim under federal or state law should be rejected as contrary to case law and common sense.

ARGUMENT

APPEAL

POINT I

THE STRUCTURE OF THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB) IS CONSTITUTIONAL

As both the NYAG and CFPB explained in their opening briefs, Supreme Court precedent dating back to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), recognizes Congress's authority to create independent agencies, like the CFPB, that are led by a principal officer who is removable by the President only for cause. (*See* Br. for the State of New York ("NYAG Br.") at 29-43; Opening Br. of the CFPB ("CFPB Br.") at 19-43.[1]) The D.C. Circuit sitting en banc has squarely upheld the constitutionality of the CFPB's for-cause removal provision against the same article II arguments raised by RD Legal here. *See PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2017) (en banc). And since the opening briefs were filed in this case, the Ninth Circuit has reached the same conclusion in *CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir. 2019). RD

[1] *See also* Br. of Current & Former Members of Congress as *Amici Curiae* in Support of Pls.–Appellants ("Congressional Amicus Br.") at 18-27; Br. of Amici Curiae Public Citizen et al. at 8-22.

Legal's attempts to rebut this authority are meritless, as are its attempts to identify additional defects in the CFPB's design.

A. The For-Cause Removal Restriction Falls Squarely Within Congress's Power.

RD Legal contends (Br. for Defs.–Cross-Appellants ("RD Br.") at 19-20) that *Humphrey's Executor* is not controlling because that decision was limited to the distinct powers and structure of the Federal Trade Commission (FTC). But while the FTC at the time of *Humphrey's Executor* might have been distinguishable from the current CFPB on this basis, the Ninth Circuit recently explained that "Congress has since conferred executive functions of similar scope upon the FTC, and the Court in *Morrison* [*v. Olson*, 487 U.S. 654 (1988)] suggested that this change in the mix of agency powers has not undermined the constitutionality of the FTC." *Seila Law*, 923 F.3d at 683; *see also Morrison*, 487 U.S. at 686, 689 n.28.

Moreover, both the Ninth and D.C. Circuits have rejected attempts like RD Legal's (RD Br. at 19-20) to distinguish the FTC based on its multi-member structure—and with good reason. *See PHH*, 881 F.3d at 80, 93, 97-98 (en banc); *Seila Law*, 923 F.3d at 684. The FTC's multi-member structure did not factor into the Court's constitutional analysis

in *Humphrey's Executor*, and the Court's subsequent decision in *Morrison* upheld a for-cause removal provision that applied to an executive entity led by a single head. (*See* NYAG Br. at 38-41.) RD Legal's attempt to distinguish *Morrison* (RD Br. at 21) based on the independent counsel's status as an inferior officer is, "at best, strained." *PHH*, 881 F.3d at 113 (Tatel, J., concurring). In *Morrison*, the Supreme Court "approved a powerful independent entity headed by a single official and along the way expressly compared that office's 'prosecutorial powers' to the 'civil enforcement powers' long wielded by the FTC and other independent agencies." *Id.* (quoting *Morrison*, 487 U.S. at 692 n.31).

RD Legal objects (RD Br. at 19-20) that a single-term President may never get to appoint a CFPB Director given the Director's five-year term, whereas he will almost always be able to appoint at least some members of multi-member commission. But that distinction is immaterial. "None of the leaders of independent financial-regulatory agencies serves a term that perfectly coincides with that of the President, and many have longer terms than the CFPB Director." *PHH*, 881 F.3d at 99 (en banc). Nonetheless, "[t]he Constitution has never been read to guarantee that

every President will be able to appoint all, or even a majority of, the leaders of every independent agency, or to name its chair." *Id.* at 100.

RD Legal also errs when it asserts (RD Br. at 21-23) that the for-cause removal provision is impermissible because the President lacks the power to terminate a CFPB Director with whom he disagrees as a matter of policy. The same is true of *all* for-cause removal restrictions, yet the Supreme Court has repeatedly upheld such restrictions. Under governing precedent, the President's ability to terminate the officer for inefficiency, neglect, and malfeasance ensures that the President retains "ample authority to assure" that the laws are faithfully executed. *See Morrison*, 487 U.S. at 692.

B. The CFPB's Other Structural Features Comport with the Constitutional Separation of Powers.

On appeal, RD Legal advances two additional grounds to invalidate the CFPB's structure. Not a single judge to consider this issue—even those in dissent—has endorsed these arguments. This Court should reject them as well.

1. RD Legal's challenge to the Financial Stability Oversight Council's veto power over CFPB rules is unpreserved and meritless.

RD Legal challenges 12 U.S.C. § 5513, which authorizes the Federal Stability Oversight Commission (FSOC) to veto CFPB rules 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." There are two threshold barriers to this argument. As an initial matter, the FSOC veto authority has no bearing on this case because it applies only to the CFPB's rulemaking, not to enforcement proceedings. Separately, RD Legal forfeited the argument by failing to raise it below.[2] *See, e.g.*, *Katel Ltd. Liab. Co. v. AT&T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010).

In any event, RD Legal's new argument is meritless, because in at least two ways, FSOC oversight "makes the CFPB Director more accountable to the President, not less." *PHH*, 881 F.3d at 121 (Wilkins, J., concurring). First, § 5513(c) gives the Treasury Secretary—who serves as the chairperson of the FSOC—the unilateral power to stay the

[2] RD Legal did not even mention the FSOC in its papers below. (*See* Mem. of Law in Supp. of Defs.' Mot. to Dismiss (ECF No. 30); Reply in Supp. of Defs.' Mot. to Dismiss (ECF No. 37).)

effectiveness of a CFPB rule for ninety days upon the filing of a written petition from an agency with a member on the FSOC. *See* 12 U.S.C. §§ 5321(b)(1)(A), 5513(b), (c)(1). Under this provision, an executive officer who is appointed by the President and removable by him at will has substantial control over whether and when a CFPB rule takes effect.[3]

Second, the membership structure of the FSOC means that the sitting President will often have the ability to appoint the two-thirds majority required to veto a CFPB rule. At least six of the ten voting members of the FSOC are designated by the sitting President and, because of the staggered terms of the other four members, he will often have the ability to appoint at least one additional member. *See PHH*, 881 F.3d at 120 & n.3 (Wilkins, J., concurring). Thus, the President will have substantial influence over the FSOC's members.

RD Legal misses the mark (RD Br. at 25-26) when it attempts to analogize FSOC oversight to the double-removal restriction invalidated

---

[3] Although no adverse inference may be drawn regarding the enforceability of a CFPB rule based on the entry of a stay, *see* 12 U.S.C. § 5513(c)(2), a ninety-day delay could affect the ultimate fate of a rule by, among other things, allowing opponents to gather evidence and support against the rule, or by undercutting the rule's rationale if it was justified by transient circumstances.

in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). As the Supreme Court made plain in that case, the structure of the Public Company Accounting Oversight Board was unconstitutional because the board's members were *not* subject to for-cause removal by the President, but only by the Commissioners of the Securities and Exchange Commission, who themselves were protected from at-will removal. *See Free Enter. Fund*, 561 U.S. at 496. This case is fundamentally different because the CFPB Director is subject to direct removal by the President—not by the FSOC.

2. The CFPB's funding mechanism does not impermissibly burden executive or congressional power.

RD Legal also challenges 12 U.S.C. § 5497, which allows the CFPB to determine its own budget up to a statutory cap, and to withdraw the necessary funds from the Federal Reserve's aggregate earnings. (*See* RD Br. at 30-31.) If the CFPB requires funds beyond this allotment, it must obtain a congressional appropriation. 12 U.S.C. § 5497(e). As explained in the NYAG's opening brief, this funding structure is similar to that of other independent financial regulators, and does not transgress on the President's ability to exercise his article II powers, as the en banc D.C.

Circuit has already held. (See NYAG Br. at 42-43 (discussing *Free Enter. Fund*, 561 U.S. at 499-500).) *See also PHH*, 881 F.3d at 95-96 (rejecting argument that the CFPB's budgetary independence encroached on Executive power).

Contrary to RD Legal's contention (RD Br. at 29-30), the CFPB's funding structure is also consistent with article I's prohibition on money being drawn from the Treasury without a congressional appropriation.[4] *See* U.S. Const. art. I, § 9, cl. 7. The Supreme Court has made clear that the Appropriations Clause restricts only the Executive. *See Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). "Congress itself may choose, however, to loosen its own reins on public expenditure," and it may thus "decide not to finance a federal entity with appropriations" but rather from other sources, including the entity's "'own activities, services, and product sales.'" *American Fed'n of Gov't Emps., AFL-CIO, Local 1647*

---

[4] Several district courts have rejected argument's like RD Legal's. *See, e.g.*, *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014) (rejecting argument that CFPB funding structure violates the Appropriations Clause); *CFPB v. Seila Law, LLC*, No. 17-cv-1081, 2017 WL 6536586, at *2 (C.D. Cal. Aug. 25, 2017) (same), *aff'd*, 923 F.3d at 680; *CFPB v. D&D Marketing*, No. 15-cv-9692, 2016 WL 8849698, at *5 (C.D. Cal. Nov. 17, 2016) (same).

v. Federal Labor Relations Auth., 388 F.3d 405, 409 (3d Cir. 2004) (quoting *Cosme Nieves v. Deshler*, 786 F.2d 445, 446 (1st Cir. 1986)).

It is immaterial that the Federal Reserve funding drawn by the CFPB would otherwise go to the Treasury (RD Br. at 27). The Appropriations Clause restricts only what money can be drawn "drawn *from* the Treasury." U.S. Const. art. I § 9, cl. 7 (emphasis added). Moreover, Congress has specifically provided that "[f]unds obtained by or transferred to the Bureau Fund *shall not be construed* to be Government funds or appropriated monies," thus foreclosing any Appropriations Clause objection. 12 U.S.C. § 5497(c)(2) (emphasis added).

Finally, RD Legal is wrong when it contends (RD Br. at 28-29) that the CFPB's funding mechanism impermissibly insulates the agency from congressional oversight. As the *PHH* majority recognized, the CFPB's financial independence "fits comfortably within precedent and tradition supporting the independence of the financial regulators that safeguard the economy," including the Federal Reserve, the FTC, and the Office of the Comptroller of Currency. *See* 881 F.3d at 96. Such independence is critical to "shield[ing] the nation's economy from manipulation or self-dealing by political incumbents." *Id.* at 78. In any event, Title X provides

multiple mechanisms to ensure meaningful congressional oversight of the CFPB, including annual audits, 12 U.S.C. § 5496a(a)-(b), and the requirement that the Director provide regular reports to Congress, *id.* § 5496(c)(2)-(3).

POINT II

IN ANY EVENT, TITLE X OF THE DODD-FRANK ACT CAN SURVIVE WITHOUT THE PROVISIONS THAT GUARANTEE THE CFPB'S INDEPENDENCE

Even if this Court were to conclude that the provisions guaranteeing the CFPB's independence should be invalidated, the proper remedy would be to strike only those provisions while preserving the remainder of the statute. (*See* NYAG Br. at 44-63; CFPB Br. at 43-54.)

A. Congress Intended for the Remainder of Title X to Survive If Any Portion Were Invalidated.

As explained in the NYAG's opening brief (NYAG Br. at 52-56), RD Legal's total-invalidation argument disregards both the plain text of Title X and applicable precedents. Because total invalidation frustrates the intent of the people's elected representatives, courts must preserve any provision that is capable of "functioning independently" and "consistent with Congress' basic objectives in enacting the statute." *United States v.*

Booker, 543 U.S. 220, 258-59 (2005) (quotation marks omitted). Given Congress's overriding goal of enhancing consumer protection, there is no reason to believe that Congress would have abandoned Title X altogether absent the provisions guaranteeing the agency's independence.

RD Legal is simply wrong to claim that there is "no assurance" that Congress would have supported Title X if the CFPB Director were removable at will and the agency were funded through annual appropriations. (*See* RD Br. at 37.) Congress expressed its intent plainly through an express severability clause. *See National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 586 (2012). And Congress made clear that its overriding objective in enacting Title X was to enhance consumer protection—a goal that it sought to accomplish in myriad and distinct ways that do not turn on the CFPB Director's status or the agency's funding, including by creating a separate federal agency that centralized previously dispersed enforcement activities; expanding the scope of prohibited conduct to include "abusive" acts or practices, 12 U.S.C. § 5531(a); and augmenting the States' role in consumer protection enforcement. (*See* NYAG Br. at 54-55; CFPB Br. at 46-47; Congressional Amicus Br. at 11-15.)

RD Legal also errs when it contends (RD Br. at 35) that excising the for-cause removal provision would impermissibly rewrite Title X. Severing an unconstitutional provision invariably entails modification of a congressional enactment. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 143 (1996). But severing only the improper provisions while preserving the rest advances rather than undermines congressional intent. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). The Supreme Court recognized as much in *Free Enterprise Fund* when it held that the proper remedy for an invalid for-cause removal provision was to invalidate only that provision and leave the remainder of the statute intact. *See* 561 U.S. at 509; *see also Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340-41 (D.C. Cir. 2012).

B. At Minimum, Title X's Prohibition on Abusive Conduct and Expansion of State Enforcement Powers Should Survive.

Even if this Court were to conclude that the CFPB as an agency cannot survive the invalidation of the specific provisions challenged by RD Legal, there is no reason to believe that Congress would have wanted Title X's additional consumer-protection provisions to fall. As explained in the NYAG's opening brief (at 13-14, 60), Title X enacted a new

substantive protection on "abusive" acts and practices to combat the proliferation of credit practices that were a major cause of the financial crisis. *See also* S. Rep. 111-176, at 11-12, 17-23, 172 (2010). Title X also augmented the States' role in consumer protection enforcement, by making clear that States can provide more stringent consumer protections under State law, and by authorizing States to bring their own civil actions to enforce federal law. *See* 12 U.S.C. §§ 5551(a), 5552(a)(1).

RD Legal does not contest that these provisions can continue to operate without the CFPB. Nor does it dispute that these provisions would meaningfully advance Congress's goals in enacting Title X. Although the CFPB may have been Congress's primary innovation in enacting Title X, Congress's ultimate purpose was to strengthen substantive federal protections for consumers. *See* S. Rep. 111-176, at 10-12, 39. (*See also* Congressional Amicus Br. at 1-2.) Allowing those substantive protections to survive without the CFPB would thus "continue to move" consumer protection "in Congress' preferred direction." *Booker*, 543 U.S. at 264.

POINT III

THE DISTRICT COURT HAD JURISDICTION OVER THE NEW YORK ATTORNEY GENERAL'S STATE-LAW CLAIMS

As explained in the State's opening brief, the district court erred below in dismissing the NYAG's state-law claims. Those claims contain an embedded federal issue regarding the effect of the federal Anti-Assignment Act (AAA), 31 U.S.C. § 3727, on RD Legal's contracts with consumers. (*See* NYAG Br. at 63-69.) RD Legal's attempts to defend the district court's erroneous reasoning are unavailing.

First, RD Legal misapprehends the relevant legal standard when it contends (RD Br. at 40) that the federal question in this case is not substantial. "The Supreme Court has suggested that an issue can be important for many reasons," including where, as here, it "presents 'a nearly pure issue of law' that would have applications to other federal cases." *Board of Comm'rs of Se. La. Flood Prot. Auth.-E. v. Tennessee Gas Pipeline Co., L.L.C.*, 850 F.3d 714, 724 (5th Cir. 2017) (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006)). RD Legal does not dispute that the AAA question is purely legal. And its claim that the issue implicates only a "discrete pool of individuals" (RD Br. at 40 (quotation marks omitted)) is groundless. A diverse array of

parties are entitled to monetary payments that are potentially subject to the AAA's bar, including the beneficiaries of other compensation funds, as well as of any monetary settlement agreement with the federal government. (*See* NYAG Br. at 66-67.) The Court's interpretation of the AAA could also have ramifications for how courts construe other federal statutes barring the assignment of federal payments. *See, e.g.*, 37 U.S.C. § 701(e) (prohibiting assignment of certain kinds of military pay); 38 U.S.C. § 5301 (non-assignability of certain veterans' benefits).

Second, RD Legal overemphasizes (RD Br. at 41) the fact that New York state courts are the traditional forum for state-law usury and consumer-protection claims. The relevant comparator here is the number of state-law claims involving an AAA dispute, which is relatively low.[5] Recognizing jurisdiction over that subset of claims would neither burden the federal docket nor unduly interfere with state-court adjudication of state-law issues. *See Board of Comm'rs of Se. La. Flood Prot. Auth.*, 850 F.3d at 725.

---

[5] There are fewer than one hundred reported cases involving an AAA issue under 31 U.S.C. § 3727 across all fifty states.

Finally, RD Legal errs when it contends (RD Br. at 39-40) that the complaint does not necessarily raise the AAA issue. Although a complaint must be "affirmatively premised" on a federal issue to trigger federal jurisdiction, *New York ex rel. Jacobson v. Wells Fargo Nat'l Bank, N.A.*, 824 F.3d 308, 315 (2d Cir. 2016) (quotation marks omitted), a state-law claim can satisfy that requirement even if the complaint does not expressly mention a specific federal statute, so long as federal law actually underlies the relevant claim, *see, e.g.*, *NASDAQ OMX Grp., Inc. v. UBS Secs., LLC*, 770 F.3d 1010, 1020-23 (2d Cir. 2014). Here, the complaint satisfies this jurisdictional test because it *does* expressly base its state-law claim in part on a violation of federal law (as well as a violation of the VCF's policies and procedures, which incorporate federal law by reference). (Joint Appendix (J.A.) 35-36.) The fact that the complaint also alleges that the purported assignments were invalid under state law is not dispositive, particularly when the district court's decision below turned on its interpretation of the federal AAA.

CROSS-APPEAL

POINT IV

THIS COURT SHOULD DECLINE TO REVIEW RD LEGAL'S CROSS-APPEAL ARGUMENTS

As a threshold matter, this Court should decline to exercise its discretion to consider the arguments made in RD Legal's purported cross-appeal.

The cross-appeal is procedurally improper. "One of the prerequisites to appellate jurisdiction, pursuant to [28 U.S.C. § 1291], is that the appellant has standing to pursue the appeal." *Concerned Citizens of Cohocton Valley, Inc. v. New York State Dep't of Envtl. Conservation*, 127 F.3d 201, 204 (2d Cir. 1997). "Because standing to appeal is conferred only on parties 'aggrieved' by the judgment, a party generally does not have standing to appeal when the judgment terminates the case in his favor." *Id.* Here, RD Legal was not aggrieved by the district court's judgment, which dismissed the NYAG and CFPB's claims. Although the district court rejected RD Legal's statutory grounds for avoiding liability and dismissed only on constitutional grounds, the rejection of a legal theory is not appealable when brought by a party who prevails on other grounds. Moreover, even if RD Legal had not prevailed on either theory,

the denial of a motion to dismiss is not generally an appealable final judgment over which this Court has jurisdiction. *See, e.g.*, *Alvarez v. Simmons Mkt. Research Bureau, Inc.*, 839 F.2d 930, 931 (2d Cir. 1988); *CES Publ'g Corp. v. St. Regis Publ'ns, Inc.*, 531 F.2d 11, 15 (2d Cir. 1975) (Friendly, J).

Although the Court may consider RD Legal's arguments as an alternative basis for affirming the judgment granting RD Legal's motion to dismiss, it should exercise its discretion not to do so here because the issues raised by RD Legal's cross-appeal are entirely distinct from the constitutional issues raised by the NYAG's and CFPB's appeals. *See, e.g.*, *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 78-79 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017). At a minimum, this Court should disregard any further briefs submitted by RD Legal in support of its purported cross-appeal, because a party "should not enjoy the benefit of having an opportunity for extra briefing due to its own procedural error." *Smith v. Johnson & Johnson*, 593 F.3d 280, 283 n.2 (3d Cir. 2010).

POINT V

RD LEGAL'S LENDING SCHEME IS SUBJECT TO TITLE X'S PROHIBITION ON DECEPTIVE, UNFAIR, AND ABUSIVE CONDUCT

To the extent the Court addresses the substance of RD Legal's cross-appeal, it should reject the claims as meritless. The deceptive and abusive scheme at issue in this enforcement proceeding is one where RD Legal provided cash advances to consumers who had already received award decisions but not their full award payments from the September 11th Victim Compensation Fund (VCF) and NFL Settlement Fund. In exchange for those advances, the individuals agreed to pay RD Legal a much larger sum of money when the award ultimately issued. As with payday loans and similarly abusive debt arrangements, consumers were often required to pay more than double what RD Legal advanced. (*See* NYAG Br. at 17-18; *see also, e.g.*, J.A. 56, 229, 530-531 (sample contracts).) The district court correctly held that this financing scheme fell within Title X's broad definition of "a consumer financial product or service," 12 U.S.C. § 5481(6)(A), and that by offering such a product, RD Legal was subject to Title X's prohibition on deceptive, unfair, and abusive practices.

A. RD Legal Extended Credit by Offering Consumers the Right to Incur a Debt and Defer Its Repayment.

Under Title X, a "financial product or service" includes, among other things, "extensions of credit"; in turn, "credit" is defined as "the right granted by a person to a consumer to . . . incur debt and defer its payment." 12 U.S.C. § 5481(7), (15)(A)(i). Because Title X does not define "debt," the term takes on its "ordinary, contemporary, common meaning." *In re Edelman*, 295 F.3d 171, 177 (2d Cir. 2002) (quotation marks omitted). In common understanding, "debt" has a broad meaning, encompassing, *inter alia*, any "specific sum of money due by agreement or otherwise." *Black's Law Dictionary* (11th ed. 2019) (Westlaw); *see also, e.g.*, *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N.Y. 480, 486 (1878) ("A debt means an obligation to pay a sum of money which is due or to become due by contract."). Similarly, courts deem a financial transaction to constitute a loan (a species of debt) when there is "(i) a contract, whereby (ii) one party transfers a defined quantity of money, goods, or services to another, and (iii) the other party agrees to pay for the sum or items at a later date." *In re Renshaw*, 222 F.3d 82, 88 (2d Cir. 2000).

RD Legal's contracts easily satisfy these definitions. Under the contracts, RD Legal provided a "defined quantity of money" to consumers,

Renshaw, 222 F.3d at 88—i.e., a small fraction of their determined (but not yet issued) awards from the VCF and NFL Settlement Fund. In exchange, the consumers agreed to pay RD Legal a larger and fixed sum at a deferred date—i.e., when the awards issued. (J.A. 32-35; *see also, e.g.*, J.A. 175, 399, 485.) The individuals thus "incur[red] debt"—namely, an obligation to RD Legal that did not exist prior to the contracts—and "defer[red] its payment" until some later point in time. 12 U.S.C. § 5481(7). In a variety of contexts, courts have held that similar financial arrangements have constituted debts or loans and rejected characterizations of these arrangements that were intended to evade state or federal regulation.[6] The district court correctly reached the same conclusion here.

[6] *See, e.g.*, *National Equip. Rental, Ltd. v. Stanley*, 283 F.2d 600, 603 (2d Cir. 1960) (equipment-lease agreement was really usurious loan); *In re Prince*, 89 F.2d 681, 682-83 (2d Cir. 1937) (transfer of accounts receivable was a loan for purposes of usury law); *Oasis Legal Fin. Grp., LLC v. Coffman*, 2015 CO 63, ¶ 59 (2015) (litigation financing agreement was loan); *Wilmarth v. Heine*, 137 A.D.3d 526 (3d Dep't 1910) (purported assignment of salary payments was really a loan).

B. RD Legal's Contrary Arguments Are Meritless.

RD Legal's contention that its contracts do not satisfy Title X's broad definition of an extension of credit—either as a loan or a more general debt (*e.g.*, RD Br. at 7, 45)—does not withstand scrutiny. RD Legal draws support from cases interpreting "credit" and "debt" under New York law in specific contexts, but none of its cases involve an interpretation of Title X. RD Legal has provided no support for its implicit assumption that these out-of-context precedents constrain the broad language of Title X. *See, e.g.*, *Western Air Lines, Inc. v. Board of Equalization of State of S.D.*, 480 U.S. 123, 129 (1987). Rather, because Title X is "remedial in nature," the terms "extension of credit" and "debt" "must be construed in a liberal fashion" to "effectuate[]" Congress' goal of protecting consumers. *N.C. Freed Co. v. Board of Governors of Fed. Reserve Sys.*, 473 F.2d 1210, 1214 (2d Cir. 1973). Thus, if there were any ambiguity in the characterization of the agreements at issue—and there is not—this Court should adopt the interpretation that would favor consumers by finding that the underlying transactions are loans subject to Title X, regardless of how courts may have interpreted "credit" or "debt" in other circumstances.

In any event, the district court determined that the agreements would fall within Title X's coverage so long as they satisfy the meaning of a loan or debt under New York law (Special Appendix (S.A.) 49-50), and RD Legal does not dispute that conclusion on appeal. As explained below, RD Legal's attempt to portray these agreements as anything but a debt or loan under New York law should be rejected.

1. The agreements imposed repayment obligations on consumers.

RD Legal's principal argument is that the individuals who signed their contracts did not take out loans because they "incur[red] *no repayment* obligation whatsoever." RD Br. at 43. But RD Legal's characterization of the contracts is simply wrong—and, at a minimum, insufficient to warrant dismissal of the NYAG's claims at this early stage.

As the district court correctly recognized (S.A. 51), consumers *did* have a repayment obligation under their contracts. To "repay" means "to pay back" or "to make a return payment." *Merriam Webster's New Collegiate Dictionary* (10th ed. 1994). Under the agreements, consumers promised to pay RD Legal a sum certain out of the proceeds of their awards in exchange for an immediate cash advance. (J.A. 32-33.) This promise

constituted "an obligation to repay," because consumers "receive[d] a payment of money and, in exchange, they commit[ted] to fully compensate" RD Legal at a later time. *Oasis Legal Fin. Grp., LLC v. Coffman*, 2015 CO 63, ¶ 45. Indeed, the contracts themselves expressly characterized consumers' financial obligation as the "amount to be *repaid* by the consumer." (*E.g.*, J.A. 175, 399, 485, 508 (emphasis added).)

RD Legal's arguments on appeal confirm that consumers incurred a repayment obligation. Immediately after asserting that consumers "incur[red] *no repayment* obligation whatsoever" (RD Br. at 43 (emphasis in original)), RD Legal adds a qualifier that undercuts that statement: it admits that consumers remained obligated "to facilitate the direct distributions of the proceeds from the [various funds] to [RD Legal] or, if the [consumer] receive[d] the distribution, to turn it over to [RD Legal]" (*id.*). This euphemistic language about consumers' obligation to "turn . . . over" money—or "facilitate" its "distribution"—to RD Legal—is simply another way to say that consumers are obligated to make repayment.

It is also impossible to square RD Legal's vigorous enforcement of its contractual right to payment with its insistence that consumers "incur[red] *no repayment* obligation whatsoever." (*Id.*) RD Legal expressly

argues (*id.* at 56) that, while the assignments in its agreements are legally void as to the third-party administrators of the various funds at issue here, "the agreements remain enforceable as between the parties to the assignment"—i.e., between RD Legal and consumers (*id.*). But after the cash advance has been paid, the only obligation in the agreements that could conceivably "remain enforceable" is the consumers' promise to pay RD Legal a contractually defined sum of money at some later point in time—a deferred repayment obligation under any definition of that phrase. Indeed, RD Legal insists that it has a "contractual right to seek relief" against consumers (*id.* at 51 n.20)—i.e., to seek the award amounts that consumers receive. And it has in fact brought a number of such actions to compel consumers to hand over the contractually defined sums they had agreed to pay in exchange for the cash advances. *See, e.g.*, Complaint, *RD Legal Funding Partners, LP v. Barasch & McGarry, P.C.*, Index No. 651831/2016 (Sup. Ct. N.Y. County Apr. 6, 2016), NYSCEF Doc. No. 2 (enforcement action against 9/11 first responder).

RD Legal asserts that consumers were under no repayment obligation because repayment was "*entirely contingent* upon the disbursement of the respective awards." (RD Br. at 51.) But the "weight of authority"

recognizes that "a loan is no less a loan because its repayment is made contingent." *United States Dep't of Health & Human Servs. v. Smith*, 807 F.2d 122, 125 (8th Cir. 1986) (brackets omitted) (collecting cases). Moreover, as the district court correctly recognized, "[t]he idea that the Consumer's repayment obligation is legally 'triggered' only upon receipt of settlement funds . . . is illusory. The repayment obligation is always with the Consumer from the moment [RD Legal] disburse[s] the lump sum cash payment." (S.A. 51 (citation omitted).) RD Legal simply waived the right to require satisfaction of that obligation if consumers themselves were not paid.[7]

RD Legal points to a number of different contractual provisions that it asserts (RD Br. at 48-54) are inconsistent with characterizing the agreements as loans or debts because the provisions allocate risk under the contracts to RD Legal. But all of these arguments are really just an

---

[7] *See also, e.g.*, *Policemen's Annuity & Benefit Fund of City of Chi. v. Bank of Am., N.A.*, 907 F. Supp. 2d 536, 557 (S.D.N.Y. 2012) (recognizing that "the obligation to pay the certificate-holders [of mortgage-backed securities] *always exists*; that obligation, however, cannot be *met* if individual mortgagors default on their principal and interest payments"); *Oasis Legal Fin. Grp.*, 2015 CO 63, ¶ 47 (consumers' obligation to repay litigation financer "is unaffected by the finance companies' subsequent reduction or cancellation of certain plaintiffs' obligations").

attempt to sow confusion about the nature of consumers' repayment obligation. For example, RD Legal argues that consumers "bore no risk of repayment" because RD Legal "has *no recourse* against" them. (*Id.* at 50.) But that argument is simply another way of saying that, under the agreements, RD Legal will not enforce the contractual repayment obligation if consumers do not in fact receive their determined awards. (*See id.* at 50-51.) But RD Legal cannot deny that if an award is disbursed—as occurs in the overwhelming majority of cases (see *infra* at 39-42), then consumers *do* have an obligation to repay that RD Legal will vigorously enforce. As the district court correctly recognized, in those circumstances, RD Legal does "retain recourse against the Consumer in the event of nonpayment." (S.A. 53.) Among other things, RD Legal can seek to obtain and enforce a judgment against the consumer's personal assets. *See, e.g.*, C.P.L.R. 5201.

In any event, RD Legal's arguments about its purported lack of recourse are immaterial because courts have long recognized that loans can be made on nonrecourse terms, *see, e.g.*, *Commissioner of Internal Revenue v. Tufts*, 461 U.S. 300, 311-12 (1983), and will recognize the true character of a loan (or more generally a debt) when, as here, there is an

obligation to repay, *e.g.*, *O'Hare v. Commissioner of Internal Revenue*, 641 F.2d 83, 87 (2d Cir. 1981); *Mapco Inc. v. United States*, 556 F.2d 1107, 1110 (Ct. Cl. 1977).

RD Legal's reliance (RD Br. at 52-54) on the indefinite length of consumers' repayment obligations and on its obligation to return any excess funds is again just a restatement of some of the contingencies concerning the actual disbursement of awards to consumers. As with the points above, RD Legal's argument on this front relies on its incorrect assumption that a financing arrangement cannot be a debt or loan "[w]here there is no absolute right to repayment" from the consumer. (*Id.* at 50.) But, as explained, courts do not require such an "absolute right" before finding that an agreement contains a repayment obligation that renders it a debt or loan. *See, e.g.*, *Smith*, 807 F.2d at 125.[8]

---

[8] *Rubenstein v. Small*, 273 A.D. 102 (1st Dep't 1947), the case on which RD Legal relies for its definition of a loan (RD Br. at 46) confirms that an unconditional obligation is not required, recognizing that an advance of money will be a loan if it "provide[s] for repayment absolutely and at all events *or* that the principal *in some way* be secured as distinguished from being put in hazard." *Rubenstein*, 273 A.D.2d at 104 (emphasis added).

2. The agreements charged a fee for a cash advance rather than effecting a "true sale" of consumers' ownership interests in fund distributions.

RD Legal separately asserts that its contracts here did not involve debts or loans because they instead effected a "true sale" of consumers' "interest in future settlement proceeds." (RD Br. at 13.) This argument also fails to rebut the characterization of RD Legal's financing arrangements as debts or loans.

As the district court correctly held, the agreements here could not have effected a "true sale" of consumers' rights to receive disbursements from the VCF and NFL Settlement Fund because assignments of those rights are prohibited. (S.A. 50.) The Anti-Assignment Act (AAA), which applies to the VCF, prohibits the "transfer or assignment of any part of a claim against the United States Government or of an interest in the claim," or any "authorization to receive payment for any part of the claim," absent exceptions not applicable here. 31 U.S.C. § 3727(a), (b). The anti-assignment provision in the NFL Settlement Agreement likewise prohibits the assignment of "any rights or claims relating to the subject matter of the Class Action Complaint," and provides that "[a]ny such

assignment . . . will be void, invalid, and of no force and effect and the Claims Administrator shall not recognize any such action." (J.A. 680.)

RD Legal concedes (RD Br. at 56-58) that these anti-assignment provisions barred it from acquiring the right to receive payment from the VCF or NFL Settlement Fund. That concession is fatal, because it confirms that at the time the agreements were executed and consumers received an advance, RD Legal received no *immediate* interest in the yet-to-be-issued awards. Because RD Legal admittedly could not acquire the right to collect consumers' awards directly from the fund administrators, the only other interest it could potentially acquire was in the future proceeds of the awards themselves. But "[t]here is no doubt that the assignment of a truly future claim or interest does not work a *present* transfer of property." *Stathos v. Murphy*, 26 A.D.2d 500, 503 (1st Dep't 1966), *aff'd*, 19 N.Y.2d 883 (1967); *see also Don King Prods., Inc. v. Thomas*, 945 F.2d 529, 534 (2d Cir. 1991) (same). And a "transfer of property" is the quintessential characteristic of a "sale." *Black's Law Dictionary* (11th ed. 2019) (Westlaw). Thus, no "true sale" of the award proceeds took place upon the execution of these contracts. Instead, consumers retained the right to receive distributions from the funds,

while RD Legal at best secured a promise by the consumers to repay the cash advance (and a substantial additional amount defined in the contract) at a later time—the quintessential structure of a debt. "In sum, because the assignments in the Purchase Agreements are void, [RD Legal] obtain[s], at most, an equitable lien on Consumers' future settlement award proceeds that establishes a creditor-debtor relationship."[9] (S.A. 56.)

As the district court correctly noted (S.A. 54-55), similar factual circumstances led the Supreme Court of Missouri to hold that an unlawful "assignment" of workers' future wages to a salary advance company was in fact a loan by that company subject to Missouri's usury laws. *See Missouri ex rel. Taylor v. Salary Purchasing Co.*, 358 Mo. 1022, 1024-26 (1949). The void assignments "could be nothing but loans"

[9] As the district court recognized (S.A. 38), RD Legal misplaces its reliance on cases like *Saint John Marine Co. v. United States*, 92 F.3d 39 (2d Cir. 1996), which recognize only that RD Legal may have an enforceable financial obligation against a consumer even if an attempted assignment is invalid. *See also, e.g.*, *Martin v. National Sur. Co.*, 300 U.S. 588, 595 (1937) ("After payments have been collected and are in the hands of the contractor or subsequent payees with notice, assignments may be heeded, *at all events in equity*" (emphasis added).)

because they "transferred no right or title in the unearned wages which they purported to assign." *Id.* at 1026. Multiple courts have applied this same reasoning.[10]

The Third Circuit's decision in *NFL Players' Concussion Injury Litigation* (*NFL*), 923 F.3d 96 (3d Cir. 2019), draws a similar distinction. In that case, which involved the same NFL Settlement Agreement at issue here, the district court had invalidated in toto certain agreements by various "predatory funding companies," including RD Legal, on the ground that they included assignments that violated the Agreement's anti-assignment provision. *NFL*, 923 F.3d at 100. The Third Circuit agreed that the Agreement rendered "void and unenforceable" any "true assignments"—i.e., agreements that allow a company like RD Legal "to step into the shoes of a class member and pursue the class member's rights through the claims process." *Id.* at 111-12. But the court further recognized that "a loan transaction between a class member and a third

---

[10] *See e.g.*, *In re Dunlap*, 458 B.R. 301 (Bankr. E.D. Va. 2011) (purported sale of military serviceman's future pension payments was an unsecured debt where federal law barred assignment); *In re Price*, 313 B.R. 805, 811 & n.2 (Bankr. E.D. Ark. 2004) (purported sale of military serviceman's future pension payments was a loan where federal law, including the AAA, barred assignment).

party is not prohibited under the terms of the settlement," and remanded for the district court to determine whether the agreements might contain such "enforceable rights . . . after any true assignment is voided." *Id.* As the Third Circuit thus recognized, a "true assignment" or "true sale" of a consumer's right to receive distributions under the NFL Settlement Fund would be flatly prohibited; to the extent that the agreements here have any continuing legal effect, they must involve a different, non-assignment obligation such as a loan.[11]

RD Legal's contention that its agreements effected a "true sale" is further undercut by the fact that it effectively charged consumers for taking the cash advance by demanding a sum certain, "fixed in advance" for repayment, in an amount greater than what it advanced—a classic hallmark of a loan. *Comptel Corp. v. Commissioner of Internal Revenue*, 376 F.2d 791, 796 (2d Cir. 1967). In a more traditional sale transaction, the

---

[11] In a footnote, RD Legal contends (RD Br. at 58 n.22) that the Third Circuit's decision is res judicata as to the NYAG, but that contention is wrong because, among other things, the NYAG was not a party to or in privity with any party to that action. *See Soules v. Connecticut Dep't of Emergency Servs. & Pub. Prot.*, 882 F.3d 52, 55 (2d Cir. 2018).

purchaser (i.e., RD Legal) would seek to make a payment commensurate to the value of the thing being purchased.[12] But there is no indication that RD Legal viewed its agreements in this light. Instead, the agreements on their face simply extended a cash advance to consumers in return for their later repayment of a larger sum certain. This type of predetermined charge for the advancement of money fits squarely within the definition of a debt or loan. *See id.*; *see also, e.g.*, *Oasis Legal Fin. Grp.*, 2015 CO 63, ¶ 42-45.

The fact that some consumers' repayment obligations increased based on the amount of time it took for awards to issue is further evidence that the advances were actually debts or loans. (*See* J.A. 34-35.) As this Court has explained, it is unlikely that a "true owner" would "agree to an arrangement whereby his profit depended upon the timing of the sale." *O'Hare*, 641 F.2d at 86. The increasing payment obligations in RD Legal's contracts "clearly suggest[] a fee for the use of credit rather than a gain from the sale of property." *Id.*; *see also Oasis Legal Fin. Grp.*, 2015 CO

---

[12] *See, e.g.*, *Nassau Trust Co. v. Midland Manor Home for Adults*, 57 A.D.2d 609, 610 (2d Dep't 1977) (disparity between true value of equipment and advance suggested lease was a loan); *cf.* 9 *Williston on Contracts* § 20:8 (4th ed. 2019) (Westlaw) ("The excess in the price of what is sold is in substance additional compensation for lending the money.").

63, ¶¶ 55-56 (litigation finance advance was a loan, not a sale, where repayment amount increased over time).

Finally, the fact that RD Legal took on very limited risk as a practical matter is further evidence that the agreements were loans and not "true sales." Under established law, an advance of money is a loan where it is provided for the fundamental purpose and expectation of obtaining repayment (along with a fee for the use of that money) rather than to share in the risks and rewards of some underlying venture. *See TIFD III-E, Inc. v. United States*, 459 F.3d 220, 233 (2d Cir. 2006). This principle does not limit loans to situations where repayment is *guaranteed*—as discussed earlier (see *supra* at 28-31), a transaction can be a loan even if repayment is contingent on some uncertain factor. But this principle does preclude a party from characterizing a loan as a sale (or assignment) when the goal of the transaction is not to take on "a meaningful and unlimited share of the upside potential" of a venture, but instead to obtain "a sum certain," *TIFD III-E, Inc.*, 459 F.3d at 233, 236, for which there is no "real" or "substantial" risk of nonpayment, *Equity Serv. Corp. v. Agull*, 250 A.D. 96, 98 (1st Dep't 1937).

New York courts have long applied this principle. For example, in *Wetzlar v. Wood*, 143 A.D. 311 (1st Dep't 1911), the court concluded that a purported assignment of an inheritance was a loan rather than a true sale because there was no meaningful risk that the lender would not be repaid. Although the inheritance was contingent on the beneficiary reaching the age of twenty-five, the beneficiary was required to obtain and assign to the lender a life insurance policy, which eliminated as a practical matter any risk of nonpayment. *See Wetzlar*, 143 A.D. at 315-16. More recently, the same principle has been applied in the context of certain litigation finance agreements. For example, in *Echeverria v. Estate of Lindner*, 2005 N.Y. Slip Op. 50675(U), 2005 WL 1083704 (Sup. Ct. Nassau County 2005), a New York court held that a lump sum advance to fund a plaintiff's personal injury litigation was a loan because the plaintiff's underlying claim sounded in strict liability and he was therefore "almost guaranteed to recover." *Echeverria*, 2005 N.Y. Slip Op. 50675(U) at *9.

Here, RD Legal assumed little to no practical risk under the agreements because there was almost no prospect that consumers would not receive their awards. As an initial matter, RD Legal entered into contracts only with consumers who had already received an award

decision entitling them to specific amounts from an established fund. (J.A. 29.) This fact differentiates RD Legal's transactions from the kinds of litigation finance arrangements that have been recognized as true sales, as amicus American Legal Finance Association explained below. In the typical litigation finance transaction, the lender makes the advance while litigation is pending and before the plaintiff's recovery is certain. *See* Mem. of Law of *Amicus Curiae* American Legal Finance Association in Supp. of Pl. CFPB at 2-3, 5-6, *CPFB v. RD Legal*, 332 F. Supp. 3d 729 (S.DN.Y. Aug. 15, 2017) (No. 17-cv-890), ECF No. 56; *see also, e.g.*, *Cash4Cases, Inc. v. Brunetti*, 167 A.D.3d 448, 448-49 (1st Dep't 2018) (advance made while litigation was "pending" and recovery was "contingent on defendant's 'successful recovery of proceeds' from the action"). Here, by contrast, consumers know what award they will receive and are merely awaiting disbursement of that award.

As the complaint alleges, the possibility that consumers would not receive payment from either fund was remote.[13] (J.A. 38-39.) The NFL

---

[13] The unpublished decisions on which RD Legal relies to the contrary (RD Br. at 48) are neither binding nor persuasive, and contain almost no analysis of the practical risk underlying RD Legal's transactions.

settlement obligates the claims administrator to pay all awards to any qualifying class member; the fund is uncapped; and the NFL has agreed to provide funds sufficient to satisfy all "anticipated payment obligations" and remains liable in the event the fund defaults.[14] (J.A. 605, 676-677.) In approving the settlement, the United States District Court for the Eastern District of Pennsylvania specifically found that these provisions ensured that there would be adequate funds to fully cover all of the class members' claims.[15] Likewise, the VCF fully funded all claims approved before December 2015, giving rise to an expectation of future repayment. (*See, e.g.*, Addendum to RD Br. at 8.) Between 2016 and 2018, the VCF administrator publicly stated that the fund had sufficient moneys to cover all awards.[16] And Congress recently voted by overwhelming

---

Peterson v. Islamic Republic of Iran, No. 10-cv-4518 (S.D.N.Y. Dec. 7, 2017), ECF No. 872, did not even involve the NFL settlement or the VCF.

[14] *See* Order Approving Settlement at 14, *In re NFL Players' Concussion Injury Litig.*, No. 12-md-2323 (E.D. Pa. Apr. 22, 2015), ECF No. 6509 ("The Monetary Award Fund is an uncapped, inflation-adjusted fund.").

[15] *See* Order Approving Settlement, *supra*, at 125-26.

[16] *See* Rupa Bhattacharyya, *Sixth Annual Status Report and Second Annual Reassessment of Policies and Procedures: September 11th Victim Compensation Fund* 37 (Feb. 2018) (internet); Rupa Bhattacharyya, *Fifth*

majorities to appropriate "such sums as may be necessary" to fully fund the VCF through 2092.[17]

In sum, the agreements at issue here did not transfer any ownership interest in the distribution of fund proceeds from consumers to RD Legal; effectively operated to charge consumers a defined amount as a fee for a cash advance; and involved little to no risk that RD Legal would fail to be repaid. Taken together, these circumstances foreclose RD Legal's contention that consumers effected a "true sale" of any ownership interest rather than incurring a debt to RD Legal.

Annual Status Report and Annual Reassessment of Policies and Procedures: September 11th Victim Compensation Fund 34 (Mar. 2017) (internet).

[17] *See* Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victim Compensation Fund Act, Pub. L. No. 116-34, 133 Stat. 1040 (2019); *see also* H.R. 1327, 116th Cong. (2019) ("Actions Overview") (internet).

3. The agreements' characterization of the underlying transactions is immaterial.

Finally, RD Legal's reliance on the fact that the agreements label the transactions as sales and assignments is meritless. (*See* RD Br. at 54-55.) As an initial matter, RD Legal's argument ignores several provisions of the agreements that confirm that they are loans. For example, many of the agreements expressly describe the consumer's financial obligation as the "amount to be repaid" to RD Legal. (*E.g.*, J.A. 116.) Additionally, the agreements required consumers to grant "RD a security interest" in the future award "within the meaning of Article 9" of the Uniform Commercial Code (UCC). (*E.g.*, J.A. 57, 76, 96.) But article 9 generally governs secured transactions, such as loans, not most sales or assignments. *See Singer Asset Fin. Co. v. Bachus*, 294 A.D.2d 818, 820 (4th Dep't 2002).[18] And here, the agreements granted RD Legal the right to file a UCC financing statement to secure its interest in the event a court determined that the contracts were actually loans (*e.g.*, J.A. 57), and RD Legal routinely filed

---

[18] *See also, e .g.*, *Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp. 2d 275, 298 (S.D.N.Y. 1998) ("Article 9 is only applicable to secured transactions," and UCC is therefore "inapplicable" if agreements that were "purchase and sales agreements" rather than loans).

such statements with New York's Department of State in an attempt to perfect its security interests in consumers' awards.[19]

In any event, when determining whether a contract reflects a loan or a sale, courts examine all of the surrounding facts and circumstances, and the agreement must be "judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it." *Abir v. Malky, Inc.*, 59 A.D.3d 646, 649 (2d Dep't 2009) (quotation marks omitted). Focusing on the true character and purpose of an agreement is especially important when a contract is potentially usurious, because "it is common practice for those engaged in usury to disguise the true nature of their transactions." *Matter of People v. JAG NY, LLC*, 18 A.D.3d 950, 952 (3d Dep't 2005); *see also Seidel v. 18 E. 17th St. Owners, Inc.*, 79 N.Y.2d 735, 744 (1992). Here, RD Legal's reliance on the agreements' characterizations improperly "depend[s] on the fictions projected by the [contractual] agreement, rather than on assessment of the practical realities." *TIFD III-E, Inc.*, 459 F.3d at 234. As the district court correctly understood, the basic features of these agreements render them debts

---

[19] *See* N.Y. State Dep't of State, *New York State Uniform Commercial Code* (internet) ("Secured Party Search" for RD Legal Finance, LLC).

rather than sales. The agreements' attempts to assert otherwise should thus be disregarded.

POINT VI

THE COMPLAINT ADEQUATELY ALLEGES THAT RD LEGAL VIOLATED TITLE X AND STATE LAW

As a final attempt to avoid liability under Title X, RD Legal contends that the complaints fail to state a claim under federal or state law. Here again, the district court correctly rejected RD Legal's arguments as meritless. (*See* S.A. 60-103.)

A. The Complaint States a Claim for Deceptive Practices Under Title X, and Accordingly States a Claim Under New York's Consumer Protection Laws (Counts I, III-V, IX, and XI).

Title X prohibits any "covered" person from engaging in any "deceptive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). Although the statute does not define what constitutes a "deceptive" practice, courts have uniformly adopted the meaning of "deceptive" practices from case law under the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a). Under that statute, conduct is deceptive when "(1) there is a representation, omission, or practice that, (2) is likely to mislead

consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material." *CFPB v. Gordon*, 819 F.3d 1179, 1192 & n.7 (9th Cir. 2016) (quotation marks omitted), *cert. denied*, 137 S. Ct. 2291 (2017); *see also CFPB v. Navient Corp.*, 17-cv-101, 2017 WL 3380530, at *23 (M.D. Pa. Aug. 4, 2017) (collecting cases).

New York General Business Law (GBL) §§ 349 and 350 authorize judicial relief for all acts or practices that are "likely to mislead a reasonable consumer acting reasonably under the circumstances."[20] *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995). New York Executive Law § 63(12) also gives the Attorney General a cause of action to remedy "persistent fraud or illegality in the carrying on, conduct or transaction of business." Conduct that is deceptive within the meaning of the FTC Act—and by extension Title X—also constitutes deceptive conduct for purposes of New York's consumer protection laws. *See, e.g.*, *FTC v. Quincy Bioscience Holding*

---

[20] GBL § 349(a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state," while GBL § 350 prohibits "false advertising in the conduct of any business, trade or commerce or in the furnishing of any service."

Co., 753 F. App'x 87, 89 (2d Cir. 2019); *Matter of People v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 107-08 (3d Dep't 2005).

The district court correctly concluded that the complaint adequately states a claim for violations of both Title X and New York's consumer protection laws. RD Legal's basic business practice was to extend predatory loans to the beneficiaries of the NFL Settlement Fund and VCF, many of whom are cash-strapped and suffer from physical illnesses and injuries and from mental conditions that impair cognitive function. (J.A. 32-33.) *See also NFL*, 923 F.3d at 112. After consumers received final confirmation of their awards, RD Legal offered to make an immediate lump sum advance, representing only a fraction of the award. In return, consumers were required to repay RD Legal a much higher portion of their awards when the payments issued. (J.A. 32-33; *see also* NYAG Br. at 15-22.)

As explained below, RD Legal misled consumers into entering into these transactions by representing that the agreements constituted valid and enforceable assignments when they were actually usurious loans, by promising to "cut through the red tape" and expedite consumers' receipt

of their awards, and by promising that consumers would receive funds by a specific date. (*See* J.A. 35-37.)

1. RD Legal's representations that the contracts were valid assignments were misleading and material.

RD Legal does not dispute (RD Br. at 63) that misrepresenting the nature and enforceability of a contract is a material misrepresentation, because it is likely to influence consumer decision-making, including the decision about whether to enter into the contract.[21] (J.A. 40-41.) Here, RD Legal falsely told consumers that the contracts were true and enforceable assignments of the consumers' interest in their awards when the agreements were really loans at usurious rates (or a similarly unlawful deferred debt obligation). Because the advances were not lawful assignments, RD Legal's statements about the nature of the transactions were objectively false and material.

---

[21] *See also, e.g.*, *CFPB v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 WL 7188792, at *14 (S.D.N.Y. Dec. 2, 2016) ("misrepresenting the applicability of state or federal law to the loans—laws that would, if applicable, make the loans void—is just as likely to affect consumer decisionmaking and is therefore a material misrepresentation"); *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 304 (S.D.N.Y. 2008) ("Express representations that are shown to be false are presumed material.").

2. RD Legal's promise to "cut through the red tape" and expedite consumers' receipt of their awards was also material and misleading.

The district court also correctly concluded that the complaint adequately alleges that RD Legal materially misled consumers by promising that it could "cut through the red tape" of the funds' administrative processes. Reasonable consumers would have understood this representation as a promise that RD Legal would work with the relevant fund administrators to expedite payment of consumers' awards from the funds. (S.A. 79-81; J.A. 36-37.) But as RD Legal concedes, it had no ability to affect the timing of payment.

It is implausible to contend (RD Br. at 64) that consumers would have understood the phrase "cut through the red tape" to mean only that RD Legal was promising to expedite *its own processes* to advance cash to consumers. The idiom "cut through the red tape" is commonly understood to mean the elimination of the "time-consuming rules and regulations of an excessive bureaucracy." *Black's Law Dictionary* (11th ed. 2019) (Westlaw) (see "red tape"). By invoking the concept of bureaucracy, RD Legal led consumers to believe that it was working with the fund administrators to expedite payment of consumers' awards. RD Legal

reinforced this misapprehension by promising to "assist[]" consumers to "obtain[] accelerated access to their" payments, and to "provide you with immediate access to your funds." (J.A. 37.) And the contracts compounded the confusion by purporting to authorize RD Legal to collect funds directly from the fund administrators, suggesting that RD Legal could and would work directly with the fund administrators. (*See, e.g.*, J.A. 71, 92.) Any reasonable consumer "navigating a complex settlement landscape" was likely to be confused by these representations. (S.A. 79.) And the beneficiaries of the VCF and NFL settlement were particularly vulnerable given their many physical and mental health problems.

RD Legal argues (RD Br. at 64) that a single line in the contracts would have clarified everything, pointing to the fact that the contracts said that "[i]n return for the Property, RD will *pay to you* the sum of $267,122.59." (*E.g.*, J.A. 56 (emphasis added).) But that single statement was far too cryptic to dispel the "net impression" created by RD Legal's other statements, all of which tended to suggest that RD Legal would work directly with fund administrators to expedite payment of the awards. *See Gordon*, 819 F.3d at 1193. Moreover, because the contracts purport to give RD Legal the right to collect money from the funds

directly, consumers were likely to understand that statement to mean only that RD Legal would collect the awards from the fund administrators and then pay consumers. Contrary to RD Legal's contention (RD Br. at 64), there is no basis to presume that consumers understood all of the terms of the agreements, much less RD Legal's characterization of them. Because this is an action for deceptive practices, "formal contract principles are . . . not conclusive." *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 914-15 (S.D. Ind. 2015).

RD Legal misses the mark when it contends (RD Br. at 64-65) that its "red tape" promise was not material because it relates only to the source of the funds, not its timing. By emphasizing its ability to provide "immediate" access to funds and reduce bureaucratic minutiae, RD Legal created the misimpression that it would help consumers receive payments *faster*. (J.A. 36-37.) RD Legal does not dispute (*see* RD Br. at 64-65) that a representation as to timing would have been material.

But even if the "red tape" promise went only to the *source* of the funds, it would still be material. RD Legal created the false impression it would provide assistance to consumers by working directly with the fund administrators to expedite payment. That statement "involves information

that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product." *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) (quotation marks omitted); *see also FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 64 (2d Cir. 2006) (statement was material where it could affect consumers' decision making). Among other things, the promise to assist consumers to work through bureaucratic minutiae would have undermined consumers' understanding of the costs and benefits of entering the transaction.

3. RD Legal deceived customers about when they would receive payments.

The district court was also correct when it concluded that the complaint states a claim for deceptive practices based on RD Legal's misrepresentations regarding when consumers would receive their advances. (*See* S.A. 81-84.) RD Legal often told consumers that they would receive funds within a matter of days, but failed to wire funds for months. In other cases, it promised to wire funds by a specific date and failed to do so. (J.A. 37-38.)

RD Legal does not dispute that it misrepresented the dates on which it would provide advances, or that representations regarding

timing are material contract terms. Rather, it argues (RD Br. at 65) that its failure to timely pay consumers supports only a breach of contract claim, not a claim for deceptive conduct. But RD Legal misunderstands the nature of the NYAG's allegations. The complaint does not seek to enforce a contractual deadline, but rather alleges that RD Legal engaged in a deceptive practice by repeatedly inducing a class of "financially distressed consumers" to enter into contracts based on false promises about the time when they would receive funds. *CFPB v. Siringoringo*, No. 14-cv-1155, 2016 WL 102435, at *5 (C.D. Cal. Jan. 7, 2016). These allegations are sufficient to allege a claim for deceptive practices under Title X and New York law. *See id.*

B. The Complaint States a Claim for Abusive Conduct Under Title X (Count II).

Under Title X, conduct is "abusive" where it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service," or "takes unreasonable advantage of" (i) "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service," (ii) "the inability of the consumer to protect the interests of the consumer in selecting or

using a consumer financial product or service," or (iii) "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." 12 U.S.C. § 5531(d).

As the complaint alleges, RD Legal engaged in abusive conduct by telling consumers that the agreements were valid sale agreements as opposed to usurious loans. These misrepresentations prevented consumers from understanding the costs of entering into the agreements with RD Legal, the law applicable to the agreements, and how those laws affected the consumer's repayment obligations.[22] (J.A. 41; *see also* S.A. 87-88.)

RD Legal is wrong when it argues (RD Br. at 66-67) that it cured any deficiency by advising consumers that the transactions were "'complex'" and that they could benefit from consulting with an attorney. To be curative, a disclaimer must be prominent and sufficiently "unambiguous

---

[22] *See, e.g.*, *CFPB v. Think Finance, LLC*, No. 17-cv-127, 2018 WL 3707911, at *8 (D. Mont. Aug. 3, 2018) (complaint stated claim for abusive conduct when it alleged that "borrowers lacked an understanding of the law applicable to Defendants' loans and how those laws affected repayment obligations"); *CFPB v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 WL 7188792, at *3-4 (S.D.N.Y. Dec. 2, 2016) (complaint adequately alleged claim for abusive conduct where, among other things, defendant falsely represented that agreements were valid and state usury laws did not apply).

to change the apparent meaning of the claims and to leave an accurate impression." *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989). Here, the disclaimer did nothing to correct the misimpression that the contracts were valid assignments or that state usury laws did not apply. Moreover, the advice was largely empty, because RD Legal knew that most consumers had an immediate need for the funds.[23]

C. The Complaint States a Claim for Violations of New York Usury Laws (Counts VI and VII).

RD Legal's only defense to the NYAG's claims of civil and criminal usury is that the transactions were true assignments. RD Legal does not dispute that, if the agreements were actually loans or another type of "forbearance," the effective interest rates exceeded the legal maximum—and sometimes reached as high as 250 percent.[24] (J.A. 39.) Because the

---

[23] *See also Stevens v. Equidyne Extractive Indus. 1980, Petro/Coal Program 1*, 694 F. Supp. 1057, 1064 (S.D.N.Y. 1988) (opinion letter was potentially misleading for securities-law purposes notwithstanding that "[i]t also advise[d] getting advice from one's own tax and business advisor").

[24] New York General Obligations Law § 5-501 prohibits any "person or corporation" from "charg[ing], tak[ing] or receiv[ing] any money, goods or things in action as interest on the loan or forbearance of any money, goods or things in action at a rate exceeding" statutorily prescribed interest rates.

cash advances were actually loans or a forbearance (see *supra* at 23-45), the district court correctly concluded that the complaint adequately alleges violations of New York's civil and criminal usury laws. (S.A. 93-95.)

D. The Complaint States a Claim for Violations of New York General Obligations Law (Count VIII).

Finally, the district court correctly concluded that the complaint states a claim for violations of the General Obligations Law (GOL) § 13-101, under which a party may not transfer a "claim or demand" (i) to recover damages for a personal injury," or (ii) that "would contravene public policy." (*See* S.A. 95-96.) This prohibition is intended "to prevent unscrupulous strangers to an occurrence from preying on the deprived circumstances of an injured person." *Caldwell v. Ogden Sea Transp., Inc.*, 618 F.2d 1037, 1048 (4th Cir. 1980). And it was violated here because the contracts, if true assignments, purported to transfer the consumer's entire interest in a portion of an award that was intended to provide compensation for physical and mental illnesses and injuries. (J.A. 46-47.)

RD Legal is wrong when it argues (RD Br. at 67) that the assignment was a permissible transfer of only the *proceeds* of a claim for

personal injuries, not a claim itself. This argument takes too narrow a view of what constitutes a claim. Because the GOL does not define the term "claim," it must be given its "usual and commonly understood meaning." *Rosner v. Metropolitan Prop. & Liab. Ins. Co.*, 96 N.Y.2d 475, 479-80 (2001). And the meaning of the term "claim" is broad, including "any right to payment or to an equitable remedy, even if contingent or provisional." *Black's Law Dictionary* (11th ed. 2019) (Westlaw).[25] Thus, a person assigns a "claim" for purposes of the GOL when she assigns the right to demand direct repayment and sue a third party to recover for nonpayment.[26] *See, e.g.*, *Rehab. Med. Care of N.Y. v. Travelers Ins. Co.*, 188 Misc. 2d 176, 177 (2d Dep't App. Term 2001). Here, the agreements

---

[25] *See also, e.g.*, *Gutierrez v. State of New York*, 58 A.D.3d 805, 807 (2d Dep't 2009) (the "ordinary meaning" of "the term 'claim'" is "a demand for money or other legal remedy to which one asserts a right"); *Whitford Land Transfer Co. v. Seneca Ins. Co.*, No. 08-cv-71, 2008 WL 4792386, at *4 (E.D. Pa. Oct. 31, 2008) (collecting authorities and concluding that "the term imports the assertion, demand or challenge of something as a right; the assertion of a liability to the party making it to do some service or pay a sum of money" (quotation marks omitted)).

[26] *See, e.g.*, *Renfrew Ctr. v. Blue Cross & Blue Shield of Cent. N.Y., Inc.*, No. 94-cv-1527, 1997 WL 204309, at *4 (N.D.N.Y. Apr. 10, 1997) (recognizing that "the patient's 'right to collect money' for provided services . . . clearly encompasses a cause of action for non-payment").

purported to transfer to RD Legal consumers' entire "interest" in a portion of each award, including the right to direct payment from the fund administrators.[27] (*E.g.*, J.A. 56-57.) And RD Legal had the right to payment before the consumer could recover any balance. (*E.g.*, J.A. 57.) Such a transaction violates the GOL.

---

[27] The cases on which RD Legal relies to establish that the proceeds of a personal injury claim are assignable are thus inapposite, because none of the cases involved the transfer of the right to sue a third party for direct payment of the funds. *See, e.g.*, *Grossman v. Schlosser*, 19 A.D.2d 893, 893 (2d Dep't 1963).

CONCLUSION

For the reasons stated above, the decision of the district court should be affirmed in part and reversed in part.

Dated: New York, New York
August 12, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for the People of the State of New York

By: */s/ Caroline A. Olsen*
CAROLINE A. OLSEN
Assistant Solicitor General

28 Liberty Street
New York, NY 10005
(212) 416-6184

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
CAROLINE A. OLSEN
Assistant Solicitor General
of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Megan Chu, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 11,812 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and length limits of Local Rule 28.1.1.

/s/ *Megan Chu*