UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CONSUMER FINANCIAL PROTECTION BUREAU, ***Plaintiff*,** **v.** **DANIEL A. ROSEN, INC., D/B/A CREDIT REPAIR CLOUD, AND DANIEL ROSEN,** ***Defendants*.**	**UNITED STATES DISTRICT COURT DISTRICT OF CALIFORNIA** **CENTRAL DISTRICT OF CALIFORNIA CIVIL ACTION NO. 2:21-cv-07492**

NON-PARTIES CHRISTOPHER GONZALEZ AND APEX ADVISING, LLC'S MOTION TO QUASH AND FOR PROTECTIVE ORDER FROM PLAINTIFF CONSUMER FINANCIAL PROTECTION BUREAU'S SUBPOENA TO TESTIFY AT A DEPOSITION AND SUBPOENA TO PRODUCE DOCUMENTS

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Pursuant to Federal Rule of Civil Procedure 45, non-parties Christopher Gonzalez ("Mr. Gonzalez") and Apex Advising, LLC ("Apex")(collectively, the "Non Party Respondents") move to quash Mr. Gonzalez's Subpoena to Testify at a Deposition ("Deposition Subpoena") and Apex's Subpoena to Produce Documents ("Document Subpoena"), in part, served on them by Plaintiff Consumer Financial Protection Bureau ("Plaintiff" or the "CFPB") in its case against Daniel A. Rosen, Inc., D/B/A Credit Repair Cloud, and Daniel Rosen ("Defendants"), and respectfully shows the Court as follows:

I. PRELIMINARY STATEMENT

The subpoenas served on the Non Party Respondents are unenforceable. On October 19, 2022, the Fifth Circuit Court of Appeals held that the CFPB's funding derives from an unconstitutional scheme and therefore, the Payday Lending Rule—a rule promulgated by the agency—is unenforceable. *Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, No. 21-50 ("*Community Financial*"). The holding in *Community Financial* is not limited to the Bureau's rule-making power, it extends to any action taken by the agency, including its enforcement and adjudicative powers. In short, the CFPB is barred from using tax payer dollars to carry out *any* action until its funding apparatus can pass constitutional scrutiny. Therefore, the CFPB cannot depose Mr. Gonzalez nor can it compel Apex to produce documents.

Additionally, even if the CFPB was permitted to enforce the laws of the United States, Mr. Gonzalez's deposition cannot take place because it would create an undue burden for him. Under the Apex doctrine, a rebuttable presumption exists that a high-level official's deposition represents a significant burden upon the deponent and that this burden is undue. Mr. Gonzalez is the CEO of Apex, and is therefore entitled to a presumption under the Apex Doctrine that the CFPB's questioning, will cause an undue burden. Indeed, preparing for and sitting in a deposition would cause an undue burden for Mr. Gonzalez, who is a non-party in this action.

Moreover, as Apex has been compiling documents pursuant to the Document Subpoena for the past several weeks, it has determined that the categories of information requested are overly broad and create an undue burden for Apex. For example, Document Request 2 seeks all call recordings, which involves over 100,000 recordings collectively spanning 828,220 hours. It would take counsel approximately 34,509 days and 4,930 weeks to review all of these recordings before they were produced, which would amount to approximately $434,000 in attorneys' fees. Responding to the Document Subpoena would impose an undue burden on Apex, a non-party protected by Rule 45(d)(3). Accordingly, this Court must quash the Document Subpoena served on Apex. *See* Rule 45(d)(3)(iv).

In sum, the Non Party Respondents should not be required to comply with unduly burdensome subpoena requests from a government agency that is unconstitutionally funded and unable to enforce the laws of the United States.

II. PROCEDURAL HISTORY

On or about October 10, 2022, Plaintiff served Mr. Gonzalez with a deposition subpoena causing him to appear at the United States Attorney's Office in Newark Jersey for a deposition on November 4, 2022. Declaration of Ryanne Hankla ("Hankla Decl.") at ¶ 2, Ex. A. That same day, Plaintiff served a document subpoena on Mr. Gonzalez's entity, Apex, seeking, essentially, all documents and communications between Apex and its clients. *Id*. at Ex. B. On October 17, 2022, counsel accepted service of the Subpoena on Mr. Gonzalez and Apex. *Id*. On October 19, and described more fully below, the Fifth Circuit issued its decision in *Community Financial*. The decision held that the CFPB's rule-making is unenforceable because its funding derives from an unconstitutional scheme. For the same reason, the CFPB does not have the authority to do *anything*, including subpoena third parties, or in this case non-parties, in enforcement actions. On October 26, 2022, within a week of the Fifth Circuit's landmark decision, counsel for Mr. Gonzalez met and conferred with the CFPB concerning the grounds for this motion. On November 1, 2022, Mr. Gonzalez filed this motion in the District of New Jersey.

III. FIFTH CIRCUIT OPINION IN *CMTY. FIN. SERVS. ASS'N OF AM. V. CONSUMER FIN. PROT. BUREAU*, NO. 21-50826, 2022 U.S. APP. LEXIS 29060 (5TH CIR. OCT. 19 2022)

Community Financial prevents the CFPB from taking any action, including enforcing non-party subpoenas, until its funding apparatus passes constitutional muster. A summary of the case, its procedural history, and the remedy issued by the Fifth Circuit, is provided below for the Court's convenience:

A. District Court Opinion *Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 558 F. Supp. 3d 350 (W.D. Tex. 2021)

In 2018, the Plaintiffs (two trade associations) brought an action on behalf of certain payday lenders and credit access businesses affected by the 2017 Payday Lending Rule issued by the CFPB. *CFSAA v. CFPB*, 558 F.Supp.3d 350 (W.D. Tex. 2021). In their challenge, Plaintiffs argued "the Bureau's structure continues to violate Separation of Powers principles" because "the Bureau's Director can establish its budget, up to a set percentage of the Federal Reserve's operating expenses, and that this budget is exempt from review by the congressional Appropriations Committees. According to the [Plaintiff's], this violates the constitutional proscription against taking money from the Treasury except 'in Consequences of Appropriations made by Law.'" *Id*., at 364.

The Court quickly dismissed Plaintiffs' argument, stating "[t]he Appropriations Clause 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.' [citations]. Therefore, if a

statute authorizes an agency to receive funds up to a certain cap, as the CFPA authorizes the Bureau to do, there is no Appropriations Clause issue." *Id*. In so holding, the District Court judge denied Plaintiff's motion for summary judgment.

B. Fifth Circuit Decision in *Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 2022 U.S. App. LEXIS 29060 (5th Cir. Oct. 19, 2022)

Plaintiffs appealed the District Court's ruling to the Fifth Circuit asking it to resolve the issue of whether "the Bureau's funding mechanism violates the Appropriations Clause of the Constitution." *Community Financial*, 2022 U.S. App. LEXIS 29060, at *10. In overruling the District Court, the Fifth Circuit first observed that the CFPB's funding apparatus derives from a unique structure:

> The [CFPB]'s funding scheme is unique across the myriad independent executive agencies across the federal government. It is not funded with periodic congressional appropriations. "Instead, the [Bureau] receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments." *Seila Law*, 140 S. Ct. at 2194. Each year, the Bureau simply requests an amount "determined by the Director to be reasonably necessary to carry out the" agency's functions. Id. § 5497(a)(1). The Federal Reserve must then transfer that amount so long as it does not exceed 12% of the Federal Reserve's "total operating expenses." *Id*. § 5497(a)(1)-(2). For the first five years of its existence (i.e., 2010-2014), the Bureau was permitted to exceed the 12% cap by $ 200 million annually so long as it reported the anticipated excess to the President and congressional appropriations committees. *Id*. § 5497(e)(1)-(2).

Community Finance, 2022 U.S. App. LEXIS 29060, at *5. Importantly, the Constitution guarantees "[n]o money shall be drawn from the Treasury, but in

Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. This Appropriations Clause "embodies the Framers' objectives of maintaining 'the necessary partition among the several departments,' The Federalist No. 51 (J. Madison), and ensuring transparency and accountability between the people and their government." *Id*. at *36.

"The Appropriations Clause's 'straightforward and explicit command' ensures Congress's *exclusive* power over the federal purse. [citation]. Critically, it makes clear that [a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Id*. (emphasis in the original). With these principles in mind, the court also noted:

> Congress did not merely cede direct control over the Bureau's budget by insulating it from annual or other time limited appropriations. **It also ceded indirect control by providing that the Bureau's self-determined funding be drawn from a source that is itself outside the appropriations process—a double insulation from Congress's purse strings that is "unprecedented" across the government.** *All Am. Check Cashing*, 33 F.4th at 225 (Jones, J., concurring). And where the Federal Reserve at least remains tethered to the Treasury by the requirement that it remit funds above a statutory limit, Congress cut that tether for the Bureau, such that the Treasury will never regain one red cent of the funds unilaterally drawn by the Bureau.
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> **This novel cession by Congress of its appropriations power—its very obligation "to maintain the boundaries between the branches," *id*. at 231—is in itself enough to give grave pause**.

Id. at*39-*40 (emphasis added). For these reasons, the Court held that the "Bureau's funding mechanism violates the Constitution's separation of powers." *Id*. at *32. In issuing a remedy, the Court held that Plaintiffs were entitled to a "rewinding" of the CFPB's actions:

> Because the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency's unconstitutional funding scheme, there is a linear nexus between the infirm provision (the Bureau's funding mechanism) and the challenged action (promulgation of the rule). **In other words, without its unconstitutional funding, the Bureau lacked any other means to promulgate the rule. Plaintiffs were thus harmed by the Bureau's improper use of unappropriated funds to engage in the rulemaking at issue. Indeed, the Bureau's unconstitutional funding structure not only "affected the complained-of decision," *id*. at 1801 (Kagan, J., concurring in part), it literally effected the promulgation of the rule. Plaintiffs are therefore entitled to "a rewinding of [the Bureau's] action." *Id*.**
>
> In considering other violations of the Constitution's separation of powers, the Supreme Court has rewound the unlawful action by granting a new hearing, *see Lucia v. SEC*, 138 S. Ct. 2044, 2055, 201 L. Ed. 2d 464 (2018), or invalidating an order, *see NLRB v. Noel Canning*, 573 U.S. 513, 521, 557, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014); see also 5 U.S.C. § 706(2)(A) (providing that, under the APA, a "reviewing court shall . . . **hold unlawful and set aside agency action . . . found to be . . . not in accordance with law**"). In like manner, we conclude that the district court erred in granting summary judgment to the Bureau and in denying the Plaintiffs a summary judgment "holding unlawful, enjoining and setting aside" the challenged rule. Accordingly, we render judgment in favor of the Plaintiffs on this claim and vacate the Payday Lending Rule as the product of the Bureau's unconstitutional funding scheme.

Id. at *51.

IV. LEGAL STANDARD FOR MOTION TO QUASH

Rule 45(d)(3)(A)(iv) of the Federal Rules of Civil Procedure provides that the Court must quash or modify a subpoena that "subjects a person to undue burden." *Harapeti v. CBS TV Stations Inc.*, 2021 U.S. Dist. LEXIS 258600, at *5 - *6 (D.N.J Dec. 1, 201). "Relatedly, Rule 26(c)(1) provides that the Court in the district in which a deposition is to be taken may 'issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id*. An undue burden exists when the subpoena is "unreasonable or oppressive." *In re Lazaridis*, 865 F. Supp. 2d 521, 524 (D.N.J. 2011 (quoting *Schmulovich* v. 1161 Rt. 9 LLC, No. CIV.A. 07-597, 2007 U.S. Dist. LEXIS 59705, 2007 WL 2362598, at *4 (D.N.J. Aug. 15, 2007). Additionally, a non-party to litigation is afforded greater protection from discovery than a party. *Korotki v. Cooper Levenson, April, Niedelman & Wagenheim, P.A.*, 2022 U.S. Dist. LEXIS 108271, at *7 (D.N.J. June 17, 2022). The standards for nonparty discovery require a stronger showing of relevance than for simple party discovery. *Id*. Finally, a motion to quash is to be decided in the district where compliance is required, unless exceptional circumstances are present. FRCP 45.

V. ARGUMENT

A. The CFPB Does Not Have the Authority To Issue the Subpoenas and Therefore the Subpoenas are Invalid.

An unconstitutional agency that is barred from enforcing the laws of the United States does not have the authority to take a non-party deposition in support of an enforcement action. *Community Finance*, 2022 U.S. App. LEXIS 29060 (finding that the CFPB, an agency with adjudicative, enforcement, and rule making powers, is unconstitutionally funded and therefore its actions are invalid). Allowing the deposition to take place would essentially divert taxpayer money into the pockets of an agency that is structured in violation of the Constitution. For this reason alone, the deposition cannot take place and the subpoena must quashed.

The Third Circuit Court of Appeals is yet to opine on the constitutionality of this funding issue. Only one district court within this Circuit has taken a contrary position to the Fifth Circuit. *Consumer Fin. Prot. Bureau v. Navient Corp.*, 2017 U.S. Dist. LEXIS 123825 (M.D. Penn. Aug 4, 2017). In *Navient*, the Court held that there is nothing "constitutionally concerning" about the CFPB's funding because several independent agencies have funding outside the normal appropriations process. The Fifth Circuit expressly rejected *Navient*'s reasoning, finding that:

> Such a comparison, focused only on whether other agencies possess a degree of budgetary autonomy, mixes apples with oranges. Or, more accurately, with a grapefruit. **Even among self-funded agencies, the Bureau is unique. The Bureau's perpetual self-directed, double-insulated funding structure goes a significant step further than that enjoyed by the other agencies on offer. And none of the agencies cited above "wields enforcement or regulatory authority remotely comparable to the authority the [Bureau] may exercise throughout the economy."** [citation]. Taken together, the

> Bureau's express insulation from congressional budgetary review, single Director answerable to the President, and plenary regulatory authority combine to render the Bureau "an innovation with no foothold in history or tradition." Seila Law, 140 S. Ct. at 2202. It is thus no surprise that the Bureau "brought to the forefront the subject of agency self-funding, a topic previously relegated to passing scholarly references rather than frontpage news." Charles Kruly, Self-Funding and Agency Independence, 81 Geo. Wash. L. Rev. 1733, 1735 (2013).

Id. at *45 (emphasis added), citing *Navient* in fn. 15. In sum, *Navient*'s rationale misses the mark because it fails to analyze idiosyncratic traits unique to the CFPB. Rather than engage in careful reasoning, the court in *Navient* hastily likened the CFPB to other agencies. This Court should reject *Navient's* flawed reasoning.

Further underscoring that the *Navient* decision is not based on sound reasoning—and should be rejected by this Court—is the fact that its other holding (based on the same logic) was expressly rejected by the Supreme Court in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200, 207 L. Ed. 2d 494 (2020). The *Navient* decision held "nor can the Court say that [the CFPB's] single director structure by itself violates the Constitution. Indeed, many executive agencies are headed by a single individual." *Navient*, 2017 U.S. Dist. LEXIS 123825, at *49. Again, the district court failed to carefully analyze the issue, and simply concluded because others do it, it must be fine. The Supreme Court was not as hasty in its analysis. In *Seila*, Justice Roberts, writing for the majority, held that "the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director's

removal protection is severable from the other statutory provisions bearing on the CFPB's authority." *Seila Law*, 140 S. Ct. at 2192. The funding issue was not decided in *Seila Law* because that challenge was not made to the Supreme Court. In sum, the Supreme Court has already rejected *Navient* on issues concerning the constitutionality of the CFPB. This Court should reject *Naveint*'s cursory logic and instead apply the Fifth Circuit's reasoning, which the Supreme Court is likely to adopt when this case is up on appeal.

Here, as in *Community Finance*, the CFPB is using unconstitutional funding to issue and enforce these non-party subpoenas. Without its unconstitutional funding, the Bureau lacks any other means to issue the Subpoenas. Allowing the Subpoenas to proceed will harm the Non Party Respondents by allowing the Bureau to improperly use unappropriated funds to enforce the Subpoenas. As in Community Finance, the Non Party Respondents are entitled to "a rewinding of [the Bureau's] action" as a remedy for the CFPB's unconstitutional wielding of its enforcement power. This remedy would be quashing both Subpoenas.

B. The Apex Doctrine Bars the Deposition From Taking Place Because it Imposes an Undue Burden on Mr. Gonzalez

This Court may quash the subpoena pursuant to FRCP 45(d)(3)(A)(iv) when it subjects a person to undue person. When that person from whom discovery is sought is a corporate executive, the Court's analysis is guided by the apex doctrine, which applies "a rebuttable presumption that a high-level official's deposition

represents a significant burden upon the deponent and that this burden is undue." *Harapeti v. CBS TV Stations Inc.*, 2021 U.S. Dist. LEXIS 258600, at *5 (D.N.J Dec. 1, 2021). In assessing whether the deposition of a corporate executive is appropriate, the Court considers "(1) whether the executive or top-level employee has personal or unique knowledge on relevant subject matters; and (2) whether the information sought can be obtained from lower-level employees or through less burdensome means, such as interrogatories." *Ford Motor Co. v. Edgewood Props.,* 2011 U.S. Dist. LEXIS 67227, at *3 (D.N.J. June 23, 2011) (quotation and alteration omitted).

Mr. Gonzalez is the CEO of Apex Financial and therefore he is entitled to a presumption that appearing as a non-party for this deposition would create an undue burden for him. *Harapeti*, 2021 U.S. Dist. LEXIS 258600, at *5 ("Courts have overwhelmingly recognized that 'depositions of high-level officers severely burden[] those officers and the entities they represent, and that adversaries might use this severe burden to their unfair advantage.'"). Mr. Gonzalez should not be required to miss a full day of running his business to sit for a deposition where is unlikely to have many of the answers the CFPB seeks. Moreover, considering that the CFPB is an unconstitutionally funded agency, Mr. Gonzalez would be further prejudiced if he is required to comply with a subpoena the CFPB has no power to issue.

Finally, Plaintiff has failed to provide a reason for why Mr. Gonzalez—a non-party—needs to be deposed beyond the fact that he was one of thousands of

customers who purchased the software at issue in Plaintiff's case against Credit Repair Cloud and Daniel Rosen. *Korotki*, 2022 U.S. Dist. LEXIS 108271, at *7 ("However, a non-party to litigation is afforded greater protection from discovery than a party. . . The standards for nonparty discovery require a stronger showing of relevance than for simple party discovery."). If every person who purchased Credit Repair Cloud's software was then susceptible to deposition, it would allow the CFPB free reign to issue thousands of non-party deposition subpoenas.

C. The Document Subpoena Creates an Undue Burden for Apex and it Should be Quashed.

"[A] non-party to litigation is afforded greater protection from discovery than a party." *Korotki*, 2022 U.S. Dist. LEXIS 108271, at *7. As a non-party, Apex should not be required to produce 100,000 pages, including 828,220 hours of phone recordings, in response to a Rule 45 subpoena by an agency that receives unconstitutional funding. The amount of time it will take Apex's attorneys to review these documents will take several weeks and cost Apex over $434,000 in fees. Courts in this district routinely hold that third parties should not bear such a burden. *Korotki*, 2022 U.S. Dist. LEXIS 108271, at *7 (granting motion to quash because subpoena imposed undue burden on third party). Of particular concern are the countless hours of phone recordings with Apex costumers. The cost of reviewing and producing these recordings is not proportional to the needs of this case. *In re: Riddell Concussion Reduction Litig.*, No. 13-7585, 2016 U.S. Dist. LEXIS 89120,

2016 WL 4119807, at *4 (D.N.J. July 7, 2016) ("the required Rule 26(b)(1) proportionality analysis may be different when the interests of a third-party are weighed as opposed to a party."); *Spring Pharms., LLC v. Retrophin, Inc.*, No. 18-CV-04553, 2019 U.S. Dist. LEXIS 133316, 2019 WL 3731725, at *3 (E.D. Pa. Aug. 8, 2019) ("The unwanted burden thrust upon non-parties" is afforded "special weight in evaluating the balance of competing needs in a Rule 45 inquiry."). Therefore, Apex moves to quash the subpoena in its entirety.

VI. CONCLUSION

This Court should quash Plaintiff's Subpoenas because both were issued by a federal agency that the Fifth Circuit Court of Appeals found to be unconstitutional based on its funding structure. Additionally, forcing Mr. Gonzalez to sit for the deposition would greatly prejudice Mr. Gonzalez—a non-party executive. Finally, requiring Apex to review and produce countless hours of recordings is unduly burdensome and outside the scope of the discovery permitted under Rule 45.

Accordingly, the Non Party Respondents respectfully request that the Court grant this Motion to Quash Plaintiff's Subpoenas; issue a protective order in that regard; and grant such further relief, at law or in equity, to which Mr. Gonzalez and Apex may be justly entitled.

DATED: November 2, 2022

Respectfully submitted,

By: */s/ Ryanne Hankla*

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