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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Consumer Financial Protection Bureau, Plaintiff, v. Morgan Drexen, Inc., and Walter Ledda, individually, and as owner, officer, or manager of Morgan Drexen, Inc., Defendants.	Case No. SACV13-01267 JLS (JEMx) **OPPOSITION TO DEFENDANTS' EX PARTE APPLICATION FOR AN ORDER TO STAY THIS ACTION**

INTRODUCTION

Defendants, Morgan Drexen, Inc. and its Chief Executive Officer, Walter Ledda, have had almost six weeks to file a motion to stay in the instant action. Instead of doing so, they have waited until days before their answer is due, and filed a meritless ex parte application that forces the Court and the Consumer Financial Protection Bureau ("Bureau") to respond to a last-second attempt to frustrate the Bureau from carrying out its mandate to protect consumers. The stay Defendants seek could seriously harm consumers as Defendants continue to enroll people from around the country in their debt relief program, for which, the Bureau alleges, Defendants have already charged thousands of consumers millions of dollars of illegal up-front fees for a service that rarely provides the promised benefits. A stay would allow Defendants to continue their harmful practices and would subvert the Bureau's right to bring an enforcement action to protect consumers in peril.

This Court should refuse to reach the merits of Defendants' ex parte application for four reasons. First, as a procedural matter, Defendants have not made any showing that bypassing the regular noticed motion procedure is appropriate.

Second, the Central District of California has made clear that ex parte applications are disfavored and should only be granted in extreme circumstances. No such circumstance exists here.

Third, Defendants cannot show that they would be prejudiced should the Court hear the underlying motion to stay according to regular noticed motion procedures, let alone suffer the "irreparable prejudice" required for a Court to dispense with regular noticed motion procedure.

Fourth, the purported prejudice suggested by Defendants – that they have to file an answer or motion in response to the instant complaint on or before October 21, 2013 – is *entirely* of Defendants' making. The Bureau notified Defendants in April that it was contemplating bringing an enforcement action against them. In an act of procedural gamesmanship that has now extended to this Court, Morgan Drexen filed a preemptory declaratory judgment action in the District Court for the District of Columbia ("DC Action") for the sole purpose of asserting that the Bureau's structure is allegedly unconstitutional – a claim that is most appropriately brought, if at all, as a *defense* in the instant action. The fact that Morgan Drexen raced to the courthouse to file a claim it knew it would raise as a defense in the Bureau's contemplated enforcement action should not be grounds for an ex parte application to foreclose the Bureau's ability to litigate and redress consumer harm, especially where, as is the case here, Defendants continue to engage in conduct the Bureau alleges violates the law. For these reasons, the Court should reject Defendants' ex parte application out of hand.

Should the Court choose to consider the merits of Defendants' stay request, it should deny it. The law does not give subjects of government enforcement actions the right to dictate the venue and timing for the resolution of their affirmative defenses by filing a preemptive strike declaratory judgment action. Further, Ninth Circuit case law makes clear that a stay is inappropriate here.

BACKGROUND

This case arises out of the Bureau's investigation of Morgan Drexen for potential violations of the Telemarketing Sales Rule, 16 C.F.R. part 310, and the Dodd-Frank Wall Street Reform and Consumer Protection Act. On April 22, 2013, the Bureau informed Morgan Drexen that it was "considering enforcement action" against the company and Walter Ledda. *See* O'Malley Decl. and Exh. A thereto. In accordance with its "Notice and Opportunity to Respond and Advise" process, the Bureau invited Defendants to offer their views on why the Bureau should not file such an action. *Id*. Defendants took advantage of that opportunity by submitting a written response to the Bureau on May 8, 2013. *Id.* and Exh. B thereto.

On July 22, 2013, before the Bureau had taken any further public action, Morgan Drexen (joined by Kimberly Pisinski) filed an action in the District Court of the District of Columbia claiming that the Bureau's structure violates the constitutional separation of powers and requesting declaratory and injunctive relief. O'Malley Decl. and Exh. C thereto.

On August 20, 2013, the Bureau filed the instant action against Morgan Drexen and Mr. Ledda, alleging that they have violated, and continue to violate, federal laws by charging consumers illegal up-front fees for debt-relief services and deceiving consumers about the likelihood they will become debt free by working with Morgan Drexen. The next day, counsel for the Bureau sent counsel for Morgan Drexen and Mr. Ledda a request for waiver of service pursuant to Federal Rule of Civil Procedure 4(d). *See* Miller Decl. and Exh. C.1 thereto. Through their counsel, Defendants agreed to waive service. *See* O'Malley Decl. and Exh. D thereto. As a result, they have until October 21, 2013 to answer or otherwise respond to the instant complaint.

On August 22, 2013, Morgan Drexen filed a motion for a preliminary injunction in the DC Action asking the court to enjoin the Bureau from bringing the instant action. *See* Miller Decl. and Exhs. B and C thereto. The Bureau and Morgan Drexen have completed briefing the issues raised by Morgan Drexen in the DC Action. *See Id.*; O'Malley Decl. and Exhs. E – O thereto. The court has not yet ruled on Morgan Drexen's request.

ARGUMENT

I. This Court Should Reject Defendants' Ex Parte Application Because They Have Not Met The Standard For Bypassing Normal Motion Procedure

A. Defendants Have Failed To Meet The Procedural Requirements Of An Ex Parte Application

Defendants' ex parte motion is procedurally flawed. "Properly designed ex parte motion papers . . . contain two distinct motions or parts." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). The first part "should address only why the regular noticed motion procedures must be by-passed." *Id.* The second "consists of papers identical to those that would be filed to initiate a regular notice motion (except they are denominated as a 'proposed' motion and they show no hearing date)." *Mission Power Eng'g Co.*, 883 F. Supp. at 492. These two aspects of a motion *"are separate, distinct elements for presenting an ex parte motion and should never be combined. The parts should be separated physically and submitted as separate documents." Id.* (italics included in original).

Here, Defendants have presented the Court with one and half pages of argument. They do not make any mention of regular noticed motion procedures, or why they must be by-passed. Instead, they mix argument about the alleged propriety of a stay with reference to alleged inefficiency and delay that will result if the instant action proceeds. This does not meet the requirements for ex parte motion papers and thus is grounds for the Court to reject Defendants' application.

B. The Central District of California Disfavors Ex Parte Applications

This Court should also reject Defendants' ex parte application because the Central District of California has made clear that it disfavors such applications. *Mission Power Eng'g Co.*, 883 F. Supp. at 490. In *In re Intermagnetics America, Inc.*, 101 B.R. 191 (C.D. Cal. 1989), the court articulated why ex parte applications are rarely justified, even where, as is the case here, the application is "hybrid," i.e. where counsel provides some minimal notice to the moving party:

> A "hybrid" form of ex parte communication has developed in recent years, which is even more pervasive than the pure form, and equally troubling. This hybrid is in the nature of a request for action by the court; it is made outside the framework of the Local Rules. . . .This hybrid suffers from virtually all of the same defects as the pure form of ex parte contact: the same practical problems arise; the same ethical considerations are implicated. Therefore, the hybrid form of ex parte communication is to be discouraged, just as much as the pure form."

In re Intermagnetics America, Inc., 101 B.R. at 193.

In another Central District of California case, *Mission Power Engineering Co.*, the court also enumerated reasons why such applications are disfavored. 883 F. Supp. at 490-92. First, the court explained, they "pose a threat to the administration of justice," as, "often, the moving parties' opportunities to prepare are grossly unbalanced." *Id.* at 490. Here, Defendants' counsel has had almost six weeks to prepare a motion to which the Bureau must respond in twenty-four hours. The court also noted the consequences for judges when an ex parte motion is filed: "The judge drops everything except other urgent matters to study the papers. It is assumed that the tomatoes are about to spoil or the yacht is about to leave the jurisdiction and that all will be lost unless immediate action is taken." *Id.* at 491-92. As discussed in greater detail below, Defendants have not presented the Court with "tomatoes" that are about to spoil, or a "yacht" that is leaving the Court's jurisdiction. Instead, they have merely raised a concern about having to file an answer or a submit a motion that is similar to one Morgan Drexen has already filed in the DC Action, hardly an issue that warrants departing from regular noticed motion procedure.

C. Defendants Have Not Shown That They Will Be Irreparably Prejudiced If The Motion Is Heard According to Regular Noticed Motion Procedures and Defendants Themselves Have Caused The Alleged Prejudice

Generally, a court will not grant ex parte relief unless the "'moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures'" and "'the moving party is without fault in creating the crisis that requires ex part relief, or . . . the crisis occurred as a result of excusable neglect.'" *Wescom Credit Union v. Dudley*, 2010 WL 4916578 (C.D. Cal. 2010), at *1 (quoting *Mission Power Eng'g Co.*, 883 F. Supp. at 492).

1. Defendants Have Not Shown Irreparable Prejudice

Defendants do not – and cannot – credibly argue that they will be prejudiced if a motion to stay is heard according to regular notice motion procedures. "To show irreparable prejudice, it [is] usually necessary to refer to the merits of the accompanying proposed motion, because if it is meritless, failure to hear it cannot be prejudicial." *Mission Power Eng'g Co.*, 883 F. Supp. at 492. To measure the threat of prejudice, courts use "a sliding scale" that has been described as follows:

> If the threatened prejudice would not be severe, then it must be apparent that the underlying motion has a high likelihood of success on the merits. If drastic harm is threatened, then it is sufficient to show that there are close issues that justify the court's review before the party suffers harm.

Id.

Here, the only alleged prejudice that Morgan Drexen raises is that, absent a stay, "the parties would engage in duplicative briefing of the same issue now pending in the District Court of Columbia (the constitutionality of [sic] CFPB, which Morgan Drexen would raise in a motion to dismiss this case absent a stay)." Defs.' Ex Parte Application For An Order To Stay This Action, at 3. The preparation of an answer or cutting and pasting of a defense raised in another action, as Defendants suggest they would do, simply does not rise to the level of prejudice contemplated by courts when considering whether to forego the regular notice motion procedures. Further, as set forth in Section II of this brief, Defendants' request for a stay is not likely to succeed on the merits, so "failure to hear [the ex parte request] cannot be prejudicial." *Mission Power Eng'g Co.*, 883 F. Supp. at 492.

2. Defendants Themselves Are The Cause Of The Alleged Crisis They Argue Requires An Ex Parte Motion

When determining whether the movant is the cause of the alleged crisis that requires an ex parte application, it is "the creation of the crisis – the necessity for bypassing regular motion procedures – that requires explanation." *Mission Power Eng'g Co.*, 883 F. Supp. at 493. Assuming, *arguendo*, that a "crisis" exists, it is wholly Morgan Drexen's creation. After receiving a letter from the Bureau indicating that it was contemplating an enforcement action, Morgan Drexen rushed to the courthouse in the District of Columbia to file a claim that is most appropriately addressed as a defense in the instant action. Had Morgan Drexen simply filed its constitutional defense in this litigation, no "crisis" would exist. Moreover, *Defendants could have filed a motion to stay under regular notice motion procedures weeks ago.* As Judge Rymer of the Central District of California warned, "Ex parte applications are not intended to save the day for parties who have failed to present requests when they should have . . ." *In re Intermagnetics America, Inc.*, 101 B.R. at 193.

Lastly, as noted above, the alleged "crisis" Defendants face requires little action on their part. All they must do if the Court rejects the ex parte application is file an answer or a motion that includes constitutional arguments Morgan Drexen has already made in the DC Action.

II. If This Court Reaches The Merits Of Defendants' Ex Parte Motion To Stay, It Should Deny The Motion

A. The Ninth Circuit's Balancing Test Counsels Against Granting A Stay

On the merits, a stay of this matter is inappropriate. "A court's power to stay proceedings is incidental to its inherent power to control the disposition of its cases in the interests of efficiency and fairness to the court, counsel, and litigants." *Karoun Dairies, Inc. v. Karlacti, Inc.*, 2013 WL 4716202, at *2 (S.D. Cal. Sept. 3, 2013)(citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)); *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997). In determining whether a stay is appropriate, a court "must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. The Ninth Circuit has noted that such competing interests include:

> The possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Karoun Dairies, *Inc.*, 2013 WL 4716202 at *2 (citing *CMAX*, *Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)); *Landis*, 299 U.S. at 254-55.

The Ninth Circuit has further established that if there is a fair possibility that the stay will "work damage to someone else" the stay "may be inappropriate absent a showing by the moving party of hardship or inequity." *Karoun Dairies,* 2013 WL 4716202 at *2 (citing *Dependable Highway Express*, *Inc*. *v. Navigators Ins. Co.***,** 498 F.3d 1059, 1066 (9th Cir. 2007)); *Landis*, 299 U.S. at 255. The Supreme Court has also noted that the party moving for a stay bears the burden of showing that it will provide some advantage in terms of efficiency or fairness. *Clinton*, 520 U.S. at 708 ("The proponent of a stay bears the burden of establishing its need").

The factors set forth by the Ninth Circuit in *Karoun Dairies, Inc.* counsel against granting a stay. First, a stay could result in serious harm to consumers. The Bureau has alleged that at least 22,000 consumers have enrolled in Morgan Drexen's debt relief program since October 27, 2010 and that Morgan Drexen has charged these consumers millions of dollars in illegal up-front fees. Even as the Court reviews this brief, Defendants continue to advertise, sell debt relief services across the country, and charge the up-front fees the Bureau contends are illegal. A stay would shut down the Bureau's action, and, effectively, grant Defendants a free pass to continue engaging in conduct that is harming thousands of people.

The Ninth Circuit also reviews "the hardship or inequity" a party may suffer if a case proceeds. Here, Defendants sole claim of hardship is that they will have to defend the instant suit and engage in "duplicative briefing," an argument that has been rejected by the Ninth Circuit. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) ("Being required to defend a suit [if the stay is vacated], does not constitute a clear case of hardship or inequity within the meaning of *Landis*.").

Lastly, courts look to how a stay would affect the orderly course of justice. Here, a stay would severely undermine the course of justice as it would, in effect, allow Defendants, who the Bureau alleges are currently engaged in illegal conduct that causes great harm to consumers, to shut down an enforcement action against them while they continue to engage in the very conduct the Bureau alleges harms consumers.

B. The Timing of Defendants' DC Action Does Not Warrant A Stay

Defendants make two last arguments in support of a stay. The Court should disregard both. First, Defendants argue that the "ex parte procedure is necessary to safeguard the interests protected by the first-to-file rule." In support of this argument, Defendants cite to *Micron Technology, Inc. v. Mosaid Technologies, Inc.*, 517 F.3d 897, 904 (Fed. Cir. 2008). There, the Court found that the first-to-file forum "typically" determines whether to "keep the case" or permit the parties to proceed in the second forum. *Id.* Here, Morgan Drexen has already filed a motion to stay in the DC Action. That court has not, to date, seen fit to stay this action, and there is no reason this Court should either.

The Ninth Circuit has set forth factors to be weighed when addressing a motion to stay in a "first to file" context: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the similarity of the issues. *Z-Line Designs, Inc. v. Bell'o Int'l LLC,* 218 F.R.D. 663, 665 (N.D. Cal. 2003); *see also Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994); *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625-26 (9th Cir. 1991).

These factors counsel against a stay. The instant action and DC action were filed within twenty nine days of each other. Where there is a "relatively short time period between the two filings, the importance of the earlier filing date is diminished." *Z-Line*

Designs, Inc., 218 F.R.D. at 667; *see Capitol Records, Inc. v. Optical Recording Corp.*, 810 F. Supp. 1350, 1355 (S.D.N.Y. 1992)(refusing to apply first to file rule where twenty days separated the actions).

Moreover, the parties in the instant action and the DC Action are different. In this action, the Bureau has sued Morgan Drexen and Mr. Ledda. In the DC Action, Morgan Drexen and Kimberly Pisinski have sued the Bureau. Lastly, the issues raised in the two actions are different. The sole question in the DC Action is whether the Bureau's structure is constitutional. In the instant case, the Bureau has brought claims against Defendants under the Telemarketing Sales Rule and the Dodd-Frank Wall Street Reform Act that relate to Defendants' alleged deceptive and otherwise unlawful conduct in selling and providing debt relief services.

Even if the Court finds that the threshold factors for a stay of this action are met, it may still, "in the exercise of [its] discretion, dispense with the rule for reasons of equity." *Z-Line Designs, Inc.*, 218 F.R.D. at 665. "Circumstances under which the first to file rule will not be applied include bad faith, anticipatory suit, and forum shopping." *Id.*; *Alltrade,* 946 F.2d at 628. A suit is "anticipatory" when the plaintiff filed upon receipt of specific, concrete indications that a suit by defendant was imminent. *Z-Line Designs, Inc.*, 218 F.R.D. at 665; *see Ward*, 158 F.R.D. at 648; *Guthy-Renker Fitness, L.L.C. v. Icon Health & Fitness, Inc.*, 179 F.R.D. 264, 271 (C.D. Cal. 1998). "Such anticipatory suits are disfavored because they are examples of forum shopping." *Z-Line Designs, Inc.*, 218 F.R.D. at 665; *see Alaris Med. Sys. V. Filterek, Inc.*, 64 U.S.P.Q.2d 1955 (S.D. Cal. 2001) (citing *Mission Ins. Co. v. Puritan Fashions Corp*., 706 F.2d 599, 602 n. 3 (5th Cir. 1983)). A court may also refuse to apply the first to file rule if the balance of convenience weighs in favor of the later-filed action. *Z-Line Designs, Inc.*, 218 F.R.D. at 665; *Ward,* 158 F.R.D. at 648.

Here, Defendants received a "specific, concrete" indication that a suit against them was imminent when the Bureau provided them with notice in April. Once it became aware of the likelihood of a lawsuit against it, Morgan Drexen filed a preemptive suit in the District of Columbia, a jurisdiction that has very little connection to Morgan Drexen (located in California), its employees (also in California), or the consumers the Bureau alleges Defendants have harmed (few reside in the District of Columbia). As such, the "balance of convenience" weighs in favor of this action proceeding. Moreover, Morgan Drexen's anticipatory suit and forum shopping should not be rewarded by this Court.

Defendants raise one last argument near the end of their brief, claiming that, if Morgan Drexen is successful in the DC Action, and the court rules that the Bureau is unconstitutionally structured, that decision "would enjoin [sic] CFPB from proceeding in this Court," and, therefore, this Court should stay this action. Defs.' Ex Parte Application For An Order To Stay This Action, at 4. This argument assumes that that Morgan Drexen's hail mary claim about the constitutionality of the Bureau will be successful. The Court should dismiss this line of reasoning. Should the DC Action result in a finding that the Bureau is unconstitutional – and unlikely event, to be sure – this Court should address how that decision affects the instant action at that time.

CONCLUSION

For the above-stated reasons, the Bureau respectfully requests that the Court deny Defendants' Ex Parte Application For An Order To Stay This Action.

Respectfully submitted,

LUCY E. MORRIS
Deputy Enforcement Director For Litigation

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Dated: October 16, 2013

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Consumer Financial Protection Bureau, Plaintiff, v. Morgan Drexen, Inc., and Walter Ledda, individually, and as owner, officer, or manager of Morgan Drexen, Inc., Defendants.	Case No. SACV13-01267 JLS (JEMx) **DECLARATION OF R. GABRIEL D. O'MALLEY**

DECLARATION OF R. GABRIEL D. O'MALLEY

1. I am an Enforcement Attorney at the Consumer Financial Protection Bureau ("CFPB") and counsel for Plaintiffs in this matter.

2. I submit this Declaration in support of Plaintiffs' Opposition to Defendants' Ex Parte Application for an Order to Stay this Action.

3. Attached as Exhibit A is a true and correct copy of the CFPB's "Notice and Opportunity to Respond and Advise" letter ("NORA letter") that was mailed to Defendants on April 22, 2013.

4. Attached as Exhibit B is a true and correct copy of Defendants' written response to CFPB's NORA letter, dated May 8, 2013.

5. Attached as Exhibit C is a true and correct copy of the July 22, 2013 complaint filed by Morgan Drexen and Kimberly Pisinski against the CFPB in *Morgan Drexen et al. v. CFPB*, D.C. Civil Action No. 1:13-cv-01112-CKK.

6. Attached as Exhibit D is a true and correct copy of Defendants' Waiver of Service of Summons filed in this Action.

7. Attached as Exhibits E through O are true and correct copies of the dispositive papers filed in *Morgan Drexen et al. v. CFPB*, D.C. Civil Action No. 1:13-cv-01112-CKK.

Executed this 16th day of October, 2013, at Washington, D.C.

R. Gabriel D. O'Malley

EXHIBIT A

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

cfpb Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

April 22, 2013

Randal Shaheen, Esq.
Venable LLP
575 Seventh Street NW
Washington, DC 20004

Dear Mr. Shaheen,

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

A NORA submission is a written statement setting forth any reasons of law or policy why your clients believe the Bureau should not take legal action against them. Any facts presented or factual assertions relied upon by your clients in the written statements must be made under oath by someone with personal knowledge of such facts. The written statements shall be submitted on 8.5 by 11 inch paper, double spaced, in at least 12-point type, and no longer than 40 pages, and must be received no later than May 6, 2013. To ensure timely delivery, any submission should be e-mailed to wendy.weinberg@cfpb.gov, or hand-delivered to me at: Consumer Financial Protection Bureau, 1750 Pennsylvania Ave. NW, 10th Floor, Washington, DC 20006. Please inform me by no later than April 29, 2013 whether your client will be making a submission.

Please be advised that the Bureau may use information contained in any submission as an admission, or in any other manner permitted by law, in connection with CFPB enforcement proceedings or otherwise. For your information, I have enclosed a copy of the NORA bulletin. Please also be advised that submissions may be discoverable by third parties in accordance with applicable law.

As described more fully in the bulletin, this letter does not create or confer upon any person any substantive or procedural rights or defenses that are enforceable in any manner.

cfpb Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

If you have any questions, please contact me at (202) 435-7688.

Sincerely,

Wendy Weinberg

Wendy Weinberg
Consumer Financial Protection Bureau
Enforcement Attorney

Enclosure: Early Warning Notice Bulletin

The Consumer Financial Protection *Bureau*

CFPB Bulletin 2011-04 (Enforcement)

Date: November 7, 2011 (updated January 12, 2012)

Subject: Notice and Opportunity to Respond and Advise (NORA)

This is the first in a series of periodic bulletins that the Consumer Financial Protection Bureau (CFPB) intends to issue in order to provide information about the policies and priorities of the Bureau's Office of Enforcement. These bulletins are intended to inform the public in a transparent manner about some of the types of legal violations that the Office intends to investigate for potential enforcement action, and the procedures and methods that it will use to do so.

Before the Office of Enforcement recommends that the Bureau commence enforcement proceedings, the Office of Enforcement may give the subject of such recommendation notice of the nature of the subject's potential violations and may offer the subject the opportunity to submit a written statement in response (view a sample NORA letter). The decision whether to give such notice is discretionary, and a notice may not be appropriate in some situations, such as in cases of ongoing fraud or when the Office of Enforcement needs to act quickly. The objective of the notice is to ensure that potential subjects of enforcement actions have the opportunity to present their positions to the Bureau before an enforcement action is recommended or commenced.

The primary focus of the written statement in response should be legal and policy matters relevant to the potential enforcement proceedings. Any factual assertions relied upon or presented in the written statement must be made under oath by someone with personal knowledge of such facts. Submissions may be discoverable by third parties in accordance with applicable law.

Unless otherwise specified in the Office of Enforcement's notice, the written statement shall be submitted on 8.5 by 11 inch paper, double spaced, in at least 12-point type, and no longer than 40 pages; and must be received by the Bureau no more than 14 calendar days after the notice. The written statement should be sent to the Bureau staff conducting the investigation, and shall clearly reference the specific investigation to which it relates. If the Office of Enforcement ultimately recommends the commencement of an enforcement proceeding, the written statement will be included with that recommendation.

Persons involved in an investigation who wish to submit a written statement on their own initiative at any point during an investigation should follow the relevant procedures described above.

The CFPB created the Early Warning Notice process solely for the administrative use of its employees. It is not intended to nor should it be construed to: (1) restrict or limit in any way the CFPB's discretion in exercising its authorities; (2) constitute an interpretation of law; or (3) create or confer upon any person, including one who is the subject of a CFPB investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner.

EXHIBIT B

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

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May 8, 2013

CONFIDENTIAL

Lucy Morris, Esq.
Consumer Financial Protection Bureau
1750 Pennsylvania Avenue, NW
Washington, DC 20006

Re: NORA Response Letter

Dear Lucy:

We are writing in response to Ms. Weinberg's April 22, 2013 letter. We are not, at this time, addressing in detail the preliminary conclusions reached by staff concerning Morgan Drexen's conduct.

Rather, because the Company believes staff's concerns can and should be resolved by a fair and reasonable settlement our letter is directed primarily toward this outcome. While there is consensus among the attorneys supported by Morgan Drexen that the FTC (and the CFPB) do not have jurisdiction over their law practice (*ABA v. FTC*, 671 F. Supp. 2d 64 (D.D.C. 2009) (subsequently vacated on grounds of mootness), their goal (and the goal of the Company, itself) has always been to comply with the provisions of the amended TSR and other relevant laws. While the Company does not share staff's views regarding its compliance, it is more than willing to work cooperatively with staff to reasonably amend its practices and advertising to address staff's concerns.

While we do not wish to respond to staff's concerns in detail here, any discussion of settlement would be incomplete without at least noting some of the significant legal difficulties facing the Bureau should it opt to pursue the allegations outlined by staff.

Allegations Relating to Fees

Staff's primary allegation is that fees are collected in violation of the amended TSR. The amended TSR prohibits the collection of any fees for debt settlement services prior to the actual settlement of a debt, so-called "upfront fees." The regulations do not prohibit any other type of fee nor is there any way to construe its language otherwise. The difficulty with staff's theory is that upfront fees are not collected in connection with debt settlement. Rather, the attorneys charge two types of fees for services other than debt settlement.

First, some of the attorneys Morgan Drexen supports provide bankruptcy services with debt settlement as an ancillary service. That is, the attorneys have been retained by their clients for bankruptcy services; however, in connection with that service and prior to the filing of the petition, efforts are made to resolve unsecured debt in order to obviate the need for bankruptcy or forestall the event. Other attorneys believe that preparation of a bankruptcy petition in parallel with efforts at debt settlement provides their clients with greater leverage in settlement negotiations. For the same reason, some consumers opt to retain counsel for both debt settlement and bankruptcy but engage separate counsel for each.

Whenever a law firm client retains counsel for bankruptcy representation under any of the above scenarios, fees are collected for services performed pursuant to the bankruptcy engagement. Nothing in the amended TSR prohibits the imposition or collection of fees for the performance of other legal services.[1]

Second, law firm clients also pay a small monthly retainer fee. This fee permits them to meet with their attorney at a substantially reduced rate for any purpose outside of the scope of their debt settlement and/or bankruptcy representation (for example, if they are sued by a creditor, need assistance with the preparation of a will, or the review/revision of a legal document.) In 2012, Morgan Drexen calendared for attorneys it supports over 20,951 such meetings. As with the fees associated with the provision of bankruptcy services nothing in the amended TSR prohibits the collection of a retainer fee which gives the client the right to additional legal representation at a substantially reduced rate.

Allegation That Services are not Provided by an Attorney

Staff has also alleged that the claim that a debt settlement client is represented by an attorney is deceptive. Staff's preliminary conclusion in this regard contravenes the plain facts and the findings of numerous states and state bars.

The facts demonstrate that the "debt settlement" clients are, in fact, clients of the attorneys and that a legitimate attorney-client relationship exists. The attorneys dictate how their prospective clients can be solicited. The attorneys named in the advertisements review and approve each advertisement run on behalf of their law firms. It is the attorneys who determine what information they require from prospective clients who are interested in their firms' services. The attorneys themselves make the determination that they will or will not represent a prospective client. The attorneys, utilizing their independent legal knowledge and training, determine the appropriate legal tactic to utilize in assisting their client resolve their unsecured debts. Once the attorneys have decided to provide legal representation to a client, the attorneys communicate via a letter on their firm letterhead with their client's creditors to notify the creditors that they are representing the debtor and to request that all communication be directed

[1] Nor has staff alleged that such services are not actually performed. Individualized and accurate bankruptcy petitions, with supporting schedules, are prepared for each and every client who decides to retain his attorney for bankruptcy services.

to the attorneys. The attorneys set up, in their state of residence, an IOLTA, or other similar lawyer trust account, for their clients' funds to be deposited. The attorneys are tasked by their regulator – the judiciary or state bar – with making sure that each penny is accounted for, and, should there be a deficit, the attorneys are ultimately responsible to their clients. The attorneys communicate with their clients on a monthly basis in order to provide their clients with updates on the progress of their clients' accounts and any and all transactions made from their clients' trust accounts. The attorneys review all offers of settlements made by their clients' creditors and determine whether to accept, reject, or make a counteroffer to the creditor's offer. The attorneys periodically review their clients' files in order to determine whether debt settlement will continue to work for their clients or if they will need to explore other legal tactics. The attorneys are responsible for supervising the services performed by their in-house and outsourced staff and remain accountable to their clients for any errors committed by their staff.

Indeed, this point is made quite clear by the fact that Morgan Drexen has different procedures for the attorneys it supports. For example, some attorneys offer their clients the EDAF program (which provides funds in advance to help settle a debt) and some do not. There are also differences among the attorneys Morgan Drexen supports with respect to client engagement terms and the application of the preferred creditor program. If, as staff posits, the debt settlement services are actually being provided by Morgan Drexen then why would there be any need to accommodate the differing preferences or practices of the attorneys that Morgan Drexen supports?

While one state agency's recent finding is incongruent, that finding stands alone among a vast array of courts, hearing officers and state bars who have found that Morgan Drexen's services are just that – outsourced administrative support services provided to attorneys pursuant to Rule 5.3 of the Rules of Professional Responsibility.

a. Colorado: In late 2011, Donald Drew Moore ("DDM"), Lawrence W. Williamson ("LWW"), and Morgan Drexen, Inc. ("MD") brought a lawsuit against the Attorney General ("AG") and the Administrator of the Uniform Debt-Management Services Act ("Administrator"). DDM, LWW, and MD sought declaratory relief from the District Court of Colorado for an order stating that the AG and the Administrator's attempt to regulate in-state and/or out-of-state attorneys, legally practicing law within the State of Colorado, and the attorneys' support staff was an unconstitutional encroachment of the judiciary's exclusive power to regulate the practice of law under the separation of powers doctrine. The District Court Judge found for DDM, LWW, and MD, holding that the AG's and the Administrator's attempt to regulate the attorneys, in-state and out-of-state, and MD violated the separation of powers doctrine and was unconstitutional. More significantly to this matter, the Court found that (1) Morgan Drexen's services constituted "legal services;" (2) the services were provided in an attorney-client relationship; and (3) the evidence demonstrated that Morgan Drexen was providing services under the supervision of the attorneys in rendition of the attorneys' professional services.

b. Connecticut: Beginning in 2009, the Connecticut State Bar and the Connecticut Department of Banking reviewed the use of MD by Connecticut attorney, Kimberly A. Pisinski ("KAP"), in support of KAP's bankruptcy and debt settlement legal practice. The Disciplinary Counsel of the State Bar found that KAP's use of MD was permissible under the Connecticut Rules of Professional Conduct. Additionally, the Dept. of Banking acknowledged that KAP's use of MD in her bankruptcy/debt settlement practice area did not trigger separate licensure under the state's Debt Adjustors & Negotiators Act for either KAP or MD.

c. New Hampshire: Beginning in 2007, the New Hampshire Department of Banking began looking into the back office support provided by MD to out-of-state and in-state attorneys for the attorneys' debt settlement legal practice. After an extensive investigation which included multiple meetings with attorneys using the support of Morgan Drexen, the Dept. of Banking found that MD, as back office service provider for attorneys lawfully practicing in New Hampshire, is exempted from the licensing regulations found in state's Debt Adjusting Act.

d. New Jersey: In 2012, the New Jersey State Bar reviewed Milton Bouhoutsos' utilization of Morgan Drexen's support services in his debt settlement legal practice. The State Bar concluded that Milton's utilization of MD was a legitimate outsourcing of paraprofessional services. And, based upon its review, the State Bar concluded that Mr. Bouhoutsos, and not Morgan Drexen, was the attorney providing services.

e. Nevada: In 2012, Michael S. Terry ("MST"), prior to making the decision to utilize MD's back office support in connection with his bankruptcy practice, contacted the NV Dept. of Business and Industry, Division of Financial Institutions ("Division"), for clarification on the Division's interpretation of NV's Debt Management Services Act ("Act"). MST received confirmation from the Division that, constitutionally, the Division cannot regulate attorneys and the attorneys' legal practice. As such, the Division verified that the Act does not apply to the attorneys and/or the attorneys' in-house/outsourced support staff.

f. Utah: In October of 2010, an administrative law judge at the Utah Department of Commerce – Division of Consumer Protection, after a full evidentiary hearing, found that the law firms were providing services to Utah Consumer in compliance with the Utah Rules of Professional Conduct. After conducting an investigation, the Chief Investigator of the Utah Division of Consumer Protection acknowledged Morgan Drexen's support role and confirmed that, in that capacity, Morgan Drexen was exempted from licensure under Utah's Debt Management Services Act.

g. Virginia: On or about August 16, 2011, the Virginia State Corporation Commission – Bureau of Financial Institutions ("BFI") began reviewing the services provided by the attorneys supported by MD and MD's support of the attorneys. The BFI found that MD was, in fact, supporting the Virginia attorneys. The BFI raised a concern, based on the Virginia Rules of Professional Conduct, with MD's access to the attorney's IOLTA trust account. However, upon discussion of a modified protocol in connection with the trust account, the BFI permitted MD to continue in its support role without the necessity of complying the state's registration requirements of Virginia's Debt Management Plan statutes.

h. Florida: In 2011, the Florida Bar opened an Unlicensed Practice of Law investigation in regard to Morgan Drexen's services. After an extensive investigation that lasted more than a year, the UPL Counsel of the State Bar concluded that there was attorney supervision.

i. Mississippi: In 2009, the Mississippi Bar opened an investigation into attorney Tami Munsch and her use of Morgan Drexen. After an extensive investigation, in 2010, the Bar concluded: "The use of the base and paralegal services under her supervision amount to outsourced paraprofessional services which does not appear to violate Rules 5.3 and 5.4(a), MRPC." Accordingly, the Bar complaint be dismissed.

j. California: The state bar of California reviewed the practice of Howard/Nassiri, P.C. and its use of Morgan Drexen and determined that matter be closed with no action. (November 23, 2011)

k. Arizona: In 2008, the Arizona State Bar opened up an investigation into Morgan Drexen's practices and whether they constituted the unauthorized practice of law. The State Bar concluded it investigation: "We believe it your intention to remain in full compliance with the Arizona Supreme Court Rules 31. Accordingly we are closing the file related to this matter. (March 2, 2009)

l. Ohio: In January 2010, the Unauthorized Practice of Law Committee of the Ohio State Bar Association opened up an investigation of Morgan Drexen and the attorney using its services. The Committee "carefully considered the claim … following such consideration, it was the determination of the Committee that the matter should be dismissed and the filed closed. (June 1, 2010)

Settlement of Staff's Concerns Based Upon the Use of Enhanced Disclosures Preserves Consumer Choice and Avoids Any Violation of the First Amendment

Notwithstanding the clear legal and practical obstacles staff's allegations would face in Court, the Company believes staff's concerns should be resolved through settlement rather than litigation. With regard to fees the Company has expressed a willingness to discuss heightened or additional disclosures. For example, disclosures concerning the availability and fees for ancillary services such as bankruptcy or the monthly retainer fee could be heightened. Similarly, to address staff's concern that many of the bankruptcy petitions that are prepared are never filed, the Company is prepared to discuss a disclaimer that discloses the percentage of clients who actually file for bankruptcy.[2]

Staff, however, has taken the position that its concerns cannot be alleviated by disclosures and that instead Morgan Drexen should be prohibited from supporting attorneys who provide any services in parallel with debt settlement.

Staff's position is both bad policy and bad law. It is bad policy because there are legitimate reasons why consumers might freely choose to retain counsel for both debt settlement and bankruptcy. First, if a client believes they will be able to settle one or more debts then dual engagement provides them with a significant savings with respect to the fee charged for successful debt settlement. Last year over 26,418 debts were settled by clients with dual engagements, resulting in savings of over $ 30,726,650 in debt settlement fees.

Second, the attorneys supported by Morgan Drexen believe that a parallel bankruptcy representation provides their clients with significant leverage in debt settlement negotiations. Discussions with creditors on behalf of dual engagement law firm clients routinely include mention of preparation of bankruptcy pleadings. Creditors, therefore, are loathe to push too hard

[2] In making this offer, the Company is not in any way conceding that its current disclosures are inadequate or that it has an obligation to inform potential law firm clients what percentage of clients actually file for bankruptcy.

on debtors who have already invested in the preparation of bankruptcy papers because they recognize that such individuals have little to lose (or fear) from rejection of an unreasonable debt settlement offer.

Not only is this a common sense proposition, it is also supported by data. Morgan Drexen will be able to show the Bureau that the filing of collection lawsuits by creditors has dropped significantly since the attorneys it supports began offering dual engagements.

Staff's position is also bad law in that – consistent with the First Amendment – courts have consistently favored the use of disclaimers over prohibition. There can be no doubt that it is possible to communicate to potential debt settlement clients the nature of the service or services available and the fees for such services (and any applicable discounts.) Such disclosures are routinely made for a wide range of services. In addition, as noted above, to address staff's concern the Company is willing to disclose the percentage of law firm clients who actually file for bankruptcy. Once adequately informed, potential clients are then able to freely choose whether to retain an attorney supported by Morgan Drexen for one or both services.

Staff's view boils down to the proposition that consumers should not be able to freely make that choice. Congress, of course, has the right to so declare and agencies, upon an appropriate showing and within the limits of their authority, can adopt rules or regulations to restrict consumer choice. However, what agencies cannot do is interpret laws designed to prevent consumer deception to also prevent the exercise of free choice, however rational or irrational it may be, by adequately informed consumers.

On a number of occasions courts have struck down efforts by FDA to do just that. Indeed, the FTC, whom the CFPB has frequently cited as its lodestar for its enforcement authority, has also counseled FDA to insure that consumers are adequately informed while preserving the exercise of consumer choice. For example, in *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), the Court held that the FDA violated the First Amendment when it refused to allow dietary supplement manufacturers to make claims that fell short of the "significant scientific agreement" standard even with the use of appropriate disclaimers. FDA had argued that the government was "not obligated to consider requiring disclaimers in lieu of an outright ban on all claims that lack significant scientific agreement." *Id.* at 655.

Applying *Central Hudson's* commercial speech standard, the court concluded that there was not a "reasonable fit" between the government's goals of protecting public health and preventing consumer fraud and the "means chosen to advance those goals" which was the rejection of a proposed health claim without consideration of a corrective disclaimer. *Id.* at 656-58. In language, of which we believe the CFPB should take note, the Court held that under the commercial speech doctrine there "was a preference for disclosure over outright

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suppression" and for the "less restrictive and more precise means" of regulating commercial speech. *Id.* at 656-58.[3]

Further, in a related, similar case, *Whitaker v. Thompson*, 248 F.Supp.2d 1 (D.D.C. 2002) the Court held that any complete ban of a claim would be approved only under narrow circumstances, i.e., where the government provided empirical evidence proving that the public would still be deceived even if the claim was qualified by a disclaimer *Id.* at 11.

In the wake of these decisions the FDA sought comments with regard to how to balance the First Amendment and its mission to protect public health. The FTC approved the submission of comments by its staff that emphasized the importance the FTC places on "remedies that favor disclosures and qualification over outright bans."[4] The Bureau is no more immune from the First Amendment than FDA and Staff has not made the requisite showing here that the alleged consumer deception and violations of the amended TSR that it believes the Company is engaged in cannot be "cured" by disclaimers.

Sincerely,

Randal M. Shaheen

cc: Wendy Weinberg, Shirley Chiu

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[3] There should be no question that staff's proposed ban on the Company supporting attorneys who provide parallel debt settlement and bankruptcy services implicates the First Amendment. The First Amendment has long been held to extend to conduct prohibitions and, in any event, staff's proposed ban would also clearly prohibit the advertising and promotion of such services.

[4] Before the Food and Drug Administration: *In the Matter of Request for Comment on First Amendment Issues,* Docket No. 02N-0209: Comments of the Staff of the Bureau of Economics, the Bureau of Consumer Protection and the Office of Policy Planning of the Federal Trade Commission.

EXHIBIT C

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIMBERLY A. PISINSKI, an individual, 54 Hazard Avenue, Suite 118, Enfield, Connecticut 06082 and MORGAN DREXEN, INC., a Nevada Corporation, 675 Anton Boulevard, Costa Mesa, California 92626, Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU, 1700 G Street NW, Washington, District of Columbia 20552 Defendant.	Case No.: 13-CV-1112 **COMPLAINT**

Plaintiffs Kimberly A. Pisinski ("Pisinski") and Morgan Drexen, Inc. ("Morgan Drexen") (together, "Plaintiffs"), by and through their undersigned counsel, file this Complaint against Defendant Consumer Financial Protection Bureau (the "CFPB"), a federal agency recently created pursuant to the Dodd-Frank Act, Title X, 12 U.S.C. §§ 5481 *et seq*. ("Dodd-Frank Act"), making the following allegations based on personal knowledge and upon information and belief.

NATURE OF THE ACTION

1. Plaintiffs bring this action because CFPB's structure insulates it from political accountability and internal checks and balances in violation of the United States Constitution. Unbridled from constitutionally-required accountability, CFPB has engaged in *ultra vires* and abusive practices, including attempts to regulate the practice of law (a function reserved for state bars), attempts to collect attorney-client protected material, and overreaching demands for, and

mining of, personal financial information of American citizens, which has prompted a Government Accountability Office ("GAO") investigation, commenced on July 12, 2013.

2. Serious constitutional questions have been raised about CFPB's structure and insulation from mandatory checks and balances, but to date, no court has passed on these questions. CFPB obtained its first Senate-confirmed Director only days ago on July 16, 2013. CFPB has threatened Plaintiffs with legal action and has used improper and coercive tactics against Plaintiffs.

3. Plaintiffs seek an order halting these tactics and declaring CFPB's structure to be unconstitutional, and declaring unconstitutional the provisions of the Dodd-Frank Act creating and empowering the CFPB.

PARTIES

4. Pisinski is an attorney licensed to practice law in Connecticut, with a physical office at 54 Hazard Avenue, Suite 118, Enfield, Connecticut 06082. Pisinski contracts with Morgan Drexen for support services and for use of the company's proprietary software for select practice areas that she offers to her clients.

5. Morgan Drexen is a Nevada Corporation with its principal place of business at 675 Anton Boulevard, Costa Mesa, California 92626.

6. CFPB is a recently-created agency of the United States that is charged with regulating consumer protection as it relates to financial products and services. CFPB's business address is 1700 G Street NW, Washington, District of Columbia 20552.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action and the parties under 28 U.S.C. § 1331 (federal question).

8. Venue lies in this district under 28 U.S.C. § 1391(e) because a substantial part of the activities alleged herein occurred in this judicial district.

FACTUAL ALLEGATIONS

I. KIMBERLY A. PISINSKI'S LEGAL PRACTICE

9. Pisinski is an attorney licensed to practice law in Connecticut.

10. From 1998 to 2000, Pisinski served as a Deputy Assistant Public Defender in Litchfield County, Connecticut.

11. Since 2000, Pisinski has focused her practice on providing legal representation to adults and children in criminal court, juvenile court, civil court, administrative hearings, and education settings.

12. When not providing the underprivileged with legal advice and counseling, Pisinski spends her time volunteering for non-profit organizations such as MotherWoman, Inc., and Zonta International – organizations dedicated to promoting and improving the welfare of women and children worldwide.

13. Pisinski is a solo practitioner.

14. In order to continue providing legal services to the underprivileged, Pisinski keeps her operation costs down by employing a very limited office staff.

15. Pisinski offers her clients bankruptcy services.

16. As a part of any bankruptcy engagement with Pisinski, clients may elect for her to first attempt to amicably resolve their debts with creditors prior to filing a bankruptcy petition.

17. Pisinski's efforts at resolving her clients' debts are ancillary to, and a part of, the bankruptcy services that she provides for her clients.

18. Pisinski does not charge an additional upfront fee if her clients request that she first attempt to amicably resolve their debts with their creditors.

19. Pisinski does not collect any fees for the time and expense she incurs in attempting to settle with her clients' creditors until she successfully obtains a settlement agreement for the account on behalf of her clients and at least one payment is made per the terms of the agreement.

20. Law firms which provide bankruptcy services to consumers are often high volume practices.

21. Pisinski may represent dozens of individual bankruptcy clients at a time.

22. In representing her clients in bankruptcy or other legal matters Pisinski can delegate tasks to non-attorney support staff when such staff is supervised by Pisinski, pursuant to Rule 5.3 of the Connecticut Rules of Professional Conduct, and Pisinski remains responsible for her non-attorney staff.

23. In order to represent her clients in the most efficient and cost-effective way possible, and rather than hiring additional full-time paralegals and administrative staff, Pisinski has chosen to engage independent contractor non-lawyer assistants to provide support services for her law practice.

24. Pisinski has exercised her right as an attorney to engage Morgan Drexen as a non-lawyer assistant to provide her with these legal support services.

25. Morgan Drexen personnel serve as Pisinski's paralegals and support staff.

26. By contracting with Morgan Drexen for these legal support services, Pisinski is able to realize efficiencies and significant cost savings for her law practice and serve a greater number of consumers with dire legal needs, but limited financial means.

27. Pisinski maintains supervisory authority over the non-lawyer support staff at Morgan Drexen and remains responsible for the services delegated to Morgan Drexen.

II. MORGAN DREXEN'S SUPPORT SERVICES FOR LAWYERS

28. Morgan Drexen licenses its proprietary software and provides live paraprofessional and support services to lawyers and law firms.

29. By contracting with Morgan Drexen, law firms can reduce their overhead fees, improve efficiencies, and realize greater profitability.

30. Morgan Drexen has provided support services to attorneys in the areas of debt resolution, bankruptcy, personal injury, mass tort litigation, and tax preparation.

31. The attorneys who use Morgan Drexen's services direct and supervise Morgan Drexen to ensure that the quality of all services provided to their clients is compatible with their professional obligations as attorneys.

32. The attorneys control the services performed by Morgan Drexen and maintain ultimate responsibility for services Morgan Drexen performs for the attorneys' clients.

33. Pisinski has retained Morgan Drexen to provide legal support services of the nature described above, including: assisting in intake based upon screening parameters proscribed by Pisinski; assisting in document collection and processing; handling scheduling matters; offering the first line of communication to Pisinski for her clients and the clients' creditors; completing necessary paperwork; assisting in accounting; and otherwise providing administrative support.

34. All of the services provided by Morgan Drexen are designed to ensure that the attorneys contracting with Morgan Drexen, including Pisinski, and their clients are kept informed of all events and developments during the course of the legal representation.

35. Morgan Drexen is retained and compensated by the attorneys that engage its services.

36. Morgan Drexen is not compensated by any client of the attorneys.

37. Morgan Drexen does not directly contract with consumers.

38. Morgan Drexen only contracts to provide its services to attorneys.

III. CFPB'S INVESTIGATION OF MORGAN DREXEN AND DEMAND FOR CONFIDENTIAL AND PRIVILEGED FINANCIAL DATA

39. On March 13, 2012, CFPB issued a Civil Investigative Demand ("CID") to Morgan Drexen seeking various categories of information.

40. The information sought by CFPB is relevant to Morgan Drexen's business and its relationship with attorneys that provide debt settlement services that are ancillary to their legal representation.

41. Morgan Drexen cooperated with CFPB's investigation, providing numerous responses to interrogatories and producing documents. The following occurred as part of CFPB's investigation:

a. CFPB sent CIDs or similar documents seeking information to at least one attorney supported by Morgan Drexen;

b. CFPB sent CIDs or similar documents seeking information to financial institutions and other companies associated with Morgan Drexen;

c. CFPB demanded that Morgan Drexen produce confidential financial information belonging to the clients of the attorneys supported by Morgan Drexen; and

d. CFPB deposed various officers of Morgan Drexen, including its Chief Executive Officer, Walter Ledda.

42. Most recently, on April 22, 2013, CFPB staff contacted counsel for Morgan Drexen by telephone.

43. CFPB staff advised that CFPB was proceeding in accordance with its Notice and Opportunity to Respond and Advise (NORA) process, and that CFPB was considering enforcement action against Morgan Drexen.

44. CFPB has also taken the position that the attorneys supported by Morgan Drexen are in violation of the Telemarketing Sales Rule ("TSR"), 16 C.F.R. §§ 310.1 *et seq.*, because CFPB considers the attorneys' hour rates for bankruptcy services as "upfront" fees, apparently because the attorneys also perform ancillary debt-settlement services.

45. CFPB staff sent a letter on April 22, 2013, inviting Morgan Drexen to submit its own written statement as to why CFPB should not take action against Morgan Drexen.

46. On May 8, 2013, counsel for Morgan Drexen responded with a written submission refuting CFPB's allegations.

47. Specifically, Morgan Drexen explained that CFPB did not have jurisdiction over the law practice of the attorneys supported by Morgan Drexen; that the fees charged by the attorneys supported by Morgan Drexen for bankruptcy services are not collected in connection with debt settlement and are thus not "upfront fees" prohibited by the TSR; and that CFPB could not prohibit Morgan Drexen from supporting attorneys who provide services in parallel with debt settlement because this would be tantamount to an outright ban on commercial speech in violation of the First Amendment.

IV. GAO'S INVESTIGATION OF CFPB FOR DATA-MINING PERSONAL INFORMATION OF AMERICAN CITIZENS

48. On April 23, 2013, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing on the Semi-Annual Agenda of CFPB.

49. At the April 23, 2013 hearing, United States Senator Mike Crapo (R-Idaho) raised concerns regarding CFPB's data collection efforts.

50. On May 16, 2013, Senator Crapo sent a letter to CFPB Director Richard Cordray requesting that CFPB furnish information concerning its "legal authority to collect consumer lending and credit data for the agency's Big Data initiative."

51. On May 23, 2013, Director Cordray sent a letter to Senator Crapo responding to Senator Crapo's May 16, 2013 letter and disputing that CFPB had a "Big Data initiative."

52. On July 2, 2013, Senator Crapo wrote to the Comptroller General of GAO, requesting an investigation into CFPB's data collection practices.

53. On July 12, 2013, GAO accepted Senator Crapo's request as within the scope of its authority and stated that it would begin the work (*i.e.*, investigate CFPB's data collection practices) "shortly."

54. Other government officials and groups, including public watchdog groups, have expressed concern about CFPB's actions in collecting personal consumer financial data.

55. For example, Judicial Watch President Tom Fitton stated that CFPB's actions were "a more direct assault on American citizens' reasonable expectation of privacy than the gathering of general phone records."

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

57. David T. Hirschmann, the President and Chief Executive Officer of the U.S. Chamber of Commerce's Center for Capital Markets, wrote in a letter to Director Cordray that

CFPB "should not misuse the supervision process to demand huge amounts of data" and expressed concern that CFBP's requests are otherwise improper.

58. John Berlau, a scholar of the Competitive Enterprise Institute, has called CFPB's data collection activities "an NSA-style surveillance program without any serious justification, such as terrorism."

59. Randy E. Barnett, a professor of constitutional law at Georgetown University, wrote in the Wall Street Journal that NSA and CFPB's activities "dangerously violate[] the most fundamental principles of our republican form of government" (the Fourth Amendment's prohibition against unreasonable searches and seizures, and the requirement that no warrants shall issue but upon probable cause). Mr. Barnett further rote that: "[t]he secrecy of these programs makes it impossible to hold elected officials and appointed bureaucrats accountable."

V. CFPB LACKS CONSTITUTIONALLY-REQUIRED ACCOUNTABILITY

A. Unlawful Delegation of Broad, Undefined Power

60. Congress created CFPB through Title X of the Dodd-Frank Act.

61. Section 1011(a) of the Dodd-Frank Act established CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a).

62. The Dodd-Frank Act grants authority to CFPB over consumer financial product and service firms.

63. Section 1031(a) of the Dodd-Frank Act authorizes CFPB to take any of several enumerated actions, including direct enforcement action, to prevent a covered person from engaging in "unfair," "deceptive," or "abusive" practices. 12 U.S.C. § 5531(a).

64. Section 1031(b) of the Dodd-Frank Act authorizes CFPB to prescribe rules identifying such practices under Federal law. 12 U.S.C. § 5531(b)

65. The Dodd-Frank Act provides no definition for "unfair" or "deceptive" acts or practices, leaving those terms to CFPB to interpret and enforce, either through ad hoc litigation or regulation.

66. CFPB is not bound by prior agencies' interpretations of similar statutory terms.

67. The Dodd-Frank Act does not provide meaningful limits on what CFPB can deem an "abusive" act or practice.

68. Section 1031(d) leaves the term "abusive" to be defined by CFPB, subject only to the limitations that the act or practice "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; (2) takes unreasonable advantage of (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." 12 U.S.C. § 5531(d).

69. These limits offer no transparency or certainty for covered persons.

70. These limits are subjective factors that can be interpreted broadly by CFPB.

71. The Dodd-Frank Act's open-ended grant of power over what CFPB deems to be "unfair," "deceptive," or "abusive" practices is exacerbated by CFPB's discretion under Section 1022(b)(3) to unilaterally exempt any class of covered person, service providers, or consumer financial products or services from the scope of any rule promulgated under Title X. 12 U.S.C. 5512(b)(3).

72. The Dodd-Frank Act grants CFPB wide-ranging investigation and enforcement powers.

73. Section 1052 authorizes CFPB to engage in investigations, issue subpoenas, civil investigative demands, and commence judicial proceedings. 12 U.S.C. § 5562.

74. Section 1053 authorizes CFPB to conduct hearings and adjudicative proceedings to ensure or enforce compliance with the Dodd-Frank Act, any rules promulgated thereunder, or any other Federal law that CFPB is authorized to enforce. 12 U.S.C. § 5563.

75. Section 1054 authorizes CFPB to commence a civil action against any person whom it deems to have violated a Federal consumer financial law, and to seek all legal and equitable relief. 12 U.S.C. § 5564.

76. On May 7, 2013, CFPB announced that it has undertaken a "comprehensive effort to prevent consumer harm in the debt-relief industry."

B. Elimination of Checks and Balances

77. Title X of the Dodd-Frank Act eliminates the Constitution's fundamental checks and balances that would ordinarily limit or channel CFPB's use of power.

78. Congress has no power of the purse over CFPB, because the Dodd-Frank Act authorizes CFPB to fund itself by unilaterally claiming funds from the Federal Reserve Board ("FRB").

79. The Director of CFPB cannot be removed at the pleasure of the President.

80. The Director of CFPB determines the amount of funding CFPB receives from FRB under Section 1017(a)(1) of the Dodd-Frank Act. 12 U.S.C. § 5497(a)(1).

81. FRB must then transfer those funds to CFPB.

82. Section 1017(a)(2)(B) authorizes CFPB to claim an increasing percentage of the Federal Reserve System's 2009 operating expenses, beginning in fiscal year 2011 at up to 10

percent of those expenses, and reaching up to 12 percent in fiscal year 2013 and thereafter, adjusted for inflation. 12 U.S.C. § 5497(a)(2)(B).

83. This structure will permit CFPB's Director to unilaterally requisition up to $597,600,000 in 2013, and thereafter, adjusted for inflation.

84. CFPB's automatic budget authority is nearly double the FTC's entire budget request to Congress for fiscal year 2013.

85. Section 1017(a)(2)(C) also prohibits the House and Senate Appropriations Committees from attempting to "review" CFPB's self-funded budget. 12 U.S.C. § 5497(a)(2)(C).

86. The Dodd-Frank Act also insulates CFPB from the President's oversight.

87. Under Section 1011(c), after appointment (with the advice and consent of the Senate), CFPB's Director receives a five-year term in office and may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c).

88. Thus, all of CFPB's power is vested in its Director, without the moderating influence of other commissioners, officials, or governors.

89. Judicial oversight is also reduced, because Section 1022(b)(4)(B) requires that courts grant the same deference to CFPB's interpretation of federal consumer financial laws that they would "if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." 12 U.S.C. § 5512(b)(4)(B).

90. The foregoing violates the Constitution's separation of powers.

VI. CFPB'S ATTEMPT TO USURP STATE FUNCTIONS BY ATTEMPTING TO REGULATE LAWYERS IN THE PRACTICE OF LAW

91. Section 1011(a) of the Dodd-Frank Act established CFPB to "regulate the offering and provision of consumer financial products or services under the Federal Consumer Financial Laws." 12 U.S.C. 5491(a).

Case 1:13-cv-01112 Document 1-1 Filed 07/16/13 Page 13 of 22

92. Among the authority transferred to CFPB by the Federal Trade Commission ("FTC") is the authority to regulate "debt relief services" under the TSR.

93. While the Dodd-Frank Act bestows upon CFPB relatively broad authority to regulate many aspects of "financial products or services," Section 1027(e) explicitly carves out an exception for attorneys engaged in the practice of law. 12 U.S.C. § 5517(e).

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

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

95. Thus, CFPB cannot exercise authority over attorneys that fall within this exclusion pursuant to the Dodd-Frank Act.

96. Sections 1061 to 1067 of the Dodd-Frank Act also granted to CFPB the authority to enforce certain business practices transferred to it by other administrative agencies. 12 U.S.C. §§ 5581-5587.

97. On August 10, 2010, the FTC, in exercising its rulemaking authority amended the TSR to extend its reach to "debt relief services." The amendments of the TSR have been codified as 16 C.F.R. § 310 *et seq*.

98. The FTC explained that the purpose of the amendments was to "protect consumers from deceptive or abusive practices in the telemarketing of debt relief service." 75 Fed. Reg. 48458, 48458 (Aug. 10, 2010).

99. The FTC amended the TSR to accomplish the following:

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

Id.

100. Under the amended TSR, the term "debt relief services" was defined to include "any program or service represented, directly or by implication to negotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecure creditor or debt collector." 16 C.F.R. § 310.2.

101. The TSR does not include an exemption for attorneys practicing law.

102. The FTC explained that "an exemption from the amended rule for attorneys engaged in the telemarketing of debt relief services is not warranted." 75 Fed. Reg. 48458, 48468. The FTC based its findings on the following:

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

b. Second, attorneys generally meet their prospective clients in person before agreeing to represent them. *Id.*

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

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

e. Fifth, the existing scope of the TSR and several other statutes and FTC rules designed to curb deception, abuse, and fraud" also does not exempt attorneys from their regulations. 75 Fed. Reg. 48458, 48469.

103. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

104. Aside from the attorney exemption found in the Dodd-Frank Act, the U.S. Supreme Court and the U.S. District Court for the District of Columbia have both found that the licensing and regulation of lawyers is left exclusively to the states, including the setting forth of professional standards and discipline for attorneys. *See, e.g., ABA v. FTC,* 430 F.3d 457 (D.C. Cir. 2005); *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

105. The States have the power to regulate the practice of law absent a clear Congressional statement in the language of a statute indicating otherwise. *ABA v. FTC*, 430 F.3d 457, 471-72 (D.C. Cir. 2005).

VII. CFPB'S ACTIONS THREATEN PLAINTIFFS WITH IRREPARABLE HARM

106. CFPB has demanded that Morgan Drexen produce documents that contain the personal financial information that belongs to clients of attorneys (like Pisinski) that are supported by Morgan Drexen, and that have been retained with regard to possible bankruptcy.

107. Morgan Drexen does not have authorization from the attorneys to disclose this information, which is protected by the attorney-client privilege, as well as any applicable state laws that require the safekeeping of client information, including personal financial information.

108. Providing this information to CFPB would cause Morgan Drexen harm because:

a. Attorneys who contract with Morgan Drexen will potentially terminate their contracts in favor of other companies that are not being required to produce their clients' personal financial information to CFPB;

b. Clients of the attorneys that contract with Morgan Drexen would potentially terminate their attorneys (who would then stop paying Morgan Drexen for its services); and

c. Morgan Drexen would potentially be at risk for lawsuits related to the violation of any applicable laws requiring the protection of client confidences and personal financial data, particularly if Morgan Drexen produces such data to an unconstitutional entity and one that is under investigation by the GAO.

109. CFPB agents have stated to Morgan Drexen that the only way it can comply with CFPB's directives is to stop providing non-attorney/paralegal services to attorneys who offer their clients debt settlement services as a component of the attorneys' bankruptcy services or as a separate engagement along with the attorneys' bankruptcy services.

110. Stopping the provision of these services would cause irreparable harm to Plaintiffs for several additional reasons:

a. The attorneys supported by Morgan Drexen believe that providing debt settlement services while a bankruptcy petition is being deliberated and prepared is a component of the attorney's strategy; and

b. If Morgan Drexen cannot support such attorneys with regard to such engagements (*i.e.*, bankruptcy and debt settlement), they will likely seek support elsewhere, or, alternatively, be forced to re-evaluate the cost of their services because they will not benefit from the economies of scale and efficiencies that Morgan Drexen provides.

111. The foregoing engagements comprise a large percentage of Morgan Drexen's total business, and any requirement that Morgan Drexen stop providing these services to attorneys would threaten the viability of Morgan Drexen's business.

112. In addition to the foregoing, CFPB's investigation has caused Morgan Drexen significant harm, including:

a. Morgran Drexen has diverted substantial attention and resources, in terms of paying attorney's fees, as well as the company time necessary to provide officers for depositions, collect and review documents, and otherwise respond to CFPB's demands;

b. CFPB's investigation has significantly increased Morgran Drexen's costs with respect to accessing credit. For example, CFPB sent a CID to Morgan Drexen's banking partners, which led to the company's losing its credit facilities. CFPB also sent a CID to U.S. Capital, which has impacted Morgan Drexen's ability to obtain reasonable financing. Morgan Drexen now pays 22% interest where, before the CID, Morgan Drexen was able to obtain financing at 4.5%;

c. Responding to CFPB's investigation has placed a severe strain on Morgan Drexen's business operations;

d. CFPB has demanded documents from certain of attorneys supported by Morgan Drexen;

e. CFPB has demanded documents of Kovel/Fuller, which partners with Morgan Drexen to provide marketing services to the attorneys supported by Morgan Drexen;

f. CFPB's investigation, coupled with Morgan Drexen's disclosure of the investigation to its attorney business customers, has been stigmatizing to Morgan Drexen; and

g. CFPB has threatened to send CIDs to all of Morgan Drexen's attorney customers in order to obtain their clients' bankruptcy information.

113. Section 1011(b)(2) of the Dodd Frank Act requires that CFPB have a Senate-confirmed Director. *See* 12 U.S.C. § 5491(b)(2) ("[T]he Director shall be appointed by the President, by and with the advice and consent of the Senate.").

114. Until recently, no Senate-confirmed director was in place.

115. On July 16, 2013, the Senate confirmed CFPB's first Director.

CAUSES OF ACTION

COUNT I
(Violation of United States Constitution)

116. Plaintiffs re-allege and incorporate by reference the allegations contained in all of the preceding paragraphs.

117. The Constitution provides that all "legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1.

118. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . ." U.S. Const. art. I, § 9.

119. The Constitution provides that the "executive Power shall be vested in a President," U.S. Const. art. II, § 1, and that "he shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3.

120. By delegating effectively unlimited powers to CFPB, by eliminating Congress's power of the purse over CFPB, by eliminating the President's power to remove CFPB's Director at will, and by limiting judicial review of CFPB's actions and legal interpretations, Title X of the Dodd-Frank Act violates the Constitution's separation of powers.

121. Title X's delegation of unlimited power to CFPB, together with the elimination of the necessary checks and balances on CFPB's exercise of that power, is unconstitutional, must be declared unconstitutional, and must be enjoined.

122. Because CFPB has taken the position that Pisinski and Morgan Drexen are directly subject to CFPB's authority, Title X's violation of the separation of powers creates a here-and-now injury entitling Pisinski and Morgan Drexen to judicial review to ensure that any enforcement will only be by a constitutional agency accountable to the Executive.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Provide for expeditious proceedings in this action in light of CFPB's threatened actions and irreparable harm faced by Plaintiffs;

B. Enter judgment in the Plaintiffs' favor;

C. Declare unconstitutional the provisions of the Dodd-Frank Act creating and empowering CFPB;

D. Provide for preliminary and permanent injunctive relief;

A. Award the Plaintiffs their costs and reasonable attorneys' fees incurred in this action pursuant to 28 U.S.C. § 2412; and

B. Grant Plaintiffs such other relief as the Court deems just and proper.

<u>RESERVATION OF RIGHTS</u>

In the event that CFPB is found to be constitutional, Plaintiffs preserve their other claims, including their claims that:

a. CFPB's application of the CFPB and the TSR to attorneys engaged in the practice of law violates the Tenth Amendment and the statutory exemption in the Dodd Frank Act, 2 U.S.C. § 5517(e);

b. Pursuant to 5 U.S.C. § 706(2)(c), CFPB has acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right";

c. The application of the CFPB and the TSR to lawyers engaged in the practice of law is arbitrary, capricious and contrary to law pursuant to 5 U.S.C. § 706(2)(a), and CFPB has failed to articulate, among other things: an explanation of how the manner in which lawyers offer services to and bill their clients can be considered a violation of the TSR or the Dodd-Frank Act; how legal services constitute a "financial product or service," or any legally supportable basis for application of the TSR or the Dodd-Frank Act to lawyers and their staff engaged in the practice of law.

Case 1:13-cv-01112 Document 15-4 Filed 07/22/13 Page 22 of 22

Dated: July 22, 2013

Respectfully submitted,

/s/

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Counsel for Plaintiffs Morgan Drexen, Inc. and Kimberly A. Pisinski

EXHIBIT D

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Consumer Financial Protection Bureau, PLAINTIFF(S)	CASE NUMBER SACV 13-01267 JST (JEMx)
v.	
Morgan Drexen, Inc. and Walter Ledda, individually, and as owner, officer, or manager of Morgan Drexen, Inc., DEFENDANT(S).	**WAIVER OF SERVICE OF SUMMONS**

To: Morgan Drexen, Inc., C/O Randal Shaheen, Esq., Venable LLP, 575 7th Street, NW, Washington, DC 20004
(Name of Plaintiff's Attorney or Unrepresented Plaintiff)

I hereby acknowledge receipt of your request that I waive service of a summons in the above-entitled action. I have also received a copy of the complaint in the action, two copies of this waiver form, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4 of the Federal Rules of Civil Procedure.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served within 60 days after* August 21, 2013, or within 90 days after that date if the request was sent outside the United States.

**Date Notice of Lawsuit and Request for Waiver of Service Summons is sent*

9/4/2013	Randall K. Miller
Date Signed by Receiving Party	*Signature*
Randall K. Miller	703 905 1449
Name	*Telephone Number and Fax Number*
8010 Towers Crescent Dr	Counsel
Street Address	*Relationship to Entity on Whose Behalf I am Acting*
Tysons Corner VA 22182	Morgan Drexen Inc
City, State, Zip Code	*Name of Party Waiving Service*

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of summons was received.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Consumer Financial Protection Bureau, PLAINTIFF(S) v. Morgan Drexen, Inc. and Walter Ledda, individually, and as owner, officer, or manager of Morgan Drexen, Inc., DEFENDANT(S).	CASE NUMBER SACV 13-01267 JST (JEMx)
	WAIVER OF SERVICE OF SUMMONS

To: Walter Ledda, C/O Randal Shaheen, Esq., Venable LLP, 575 7th Street, NW, Washington, DC 20004
(Name of Plaintiff's Attorney or Unrepresented Plaintiff)

I hereby acknowledge receipt of your request that I waive service of a summons in the above-entitled action. I have also received a copy of the complaint in the action, two copies of this waiver form, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4 of the Federal Rules of Civil Procedure.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served within 60 days after* August 21, 2013, or within 90 days after that date if the request was sent outside the United States.

**Date Notice of Lawsuit and Request for Waiver of Service Summons is sent.*

9/4/2013	Randall Miller
Date Signed by Receiving Party	*Signature*
Randall Miller	703 905 1449
Name	*Telephone Number and Fax Number*
8010 Towers Crescent Dr	Counsel
Street Address	*Relationship to Entity on Whose Behalf I am Acting*
Tysons Corner VA 22102	Walter Ledda
City, State, Zip Code	*Name of Party Waiving Service*

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of summons was received.

EXHIBIT E

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and
KIMBERLY A. PISINSKI,

***Plaintiffs*,**

v.

CONSUMER FINANCIAL
PROTECTION BUREAU,

***Defendant*.**

Civil Action No. 13-01112 (CKK)

EXPEDITED BRIEFING SCHEDULE

MOTION FOR SUMMARY JUDGMENT

Plaintiffs Kimberly A. Pisinski ("Pisinski") and Morgan Drexen, Inc. ("Morgan Drexen") (together, "Plaintiffs"), by and through their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 56, Local Civil Rule LCvR 7(h), and this Court's Scheduling and Procedure Order [Docket No. 8], hereby move for summary judgment against Defendant Consumer Financial Protection Bureau ("CFPB") that Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. §§ 5481 *et seq.*) be declared unconstitutional for violating the Constitution's separation of powers.

Plaintiffs file herewith a Statement of Undisputed Material Facts, a Memorandum of Supporting Points and Authorities, and a Proposed Order.

WHEREFORE, Plaintiffs respectfully request that their motion be granted.

Respectfully submitted,

VENABLE LLP
/s/

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Attorneys for Plaintiffs Morgan Drexen, Inc. and Kimberly A. Pisinski

EXHIBIT F

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI, *Plaintiffs,* v. **CONSUMER FINANCIAL PROTECTION BUREAU,** *Defendant.*	Civil Action No. 13-01112 (CKK) **EXPEDITED BRIEFING SCHEDULE** **LOCAL RULE LCvR 7(h)(1) STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Kimberly A. Pisinski ("Pisinski") and Morgan Drexen, Inc. ("Morgan Drexen") (together, "Plaintiffs"), by and through their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 56, Local Rule LCvR 7(h)(1), and this Court's Scheduling and Procedure Order [Docket No. 8], present the following material facts in support of their Motion for Summary Judgment against Defendant Consumer Financial Protection Bureau ("CFPB"):

I. LEGISLATIVE HISTORY: INTENT TO CREATE A SUPER AGENCY OF UNPRECEDENTED POWER AND INDEPENDENCE

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

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

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

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

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

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

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

8. Christopher Dodd, Chairman, Committee on Banking, Housing, and Urban Affairs, stated "[a]n independent consumer protection agency can and should be very good for

business, not just for consumers. It can and should protect the financial well-being of American consumers so that businesses can rely on a healthy consumer base as they seek to build long-term profitability. It can and should eliminate the regulatory overlap and bureaucracy that comes from the current Balkanized system of consumer protection regulation. It can and should level the playing field by applying a meaningful set of standards, not only to the highly regulated banks but also to their nonbank competitors that have slipped under the regulatory radar screen." *Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation, Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, S. Hrg. 111-274 (2009).

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

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

11. Rachel Barkow, Professor of Law, New York University School of Law, stated "[m]any of these agencies fall short in their efforts to protect consumers because they become captured by the industries they are charged with regulating. The experience of these agencies therefore offers some valuable insights in thinking about how to structure the CFPA . . . Agency capture is further exacerbated by the fact that industry groups are also well positioned to contribute to political campaigns and to lobby, which in turn gives them influence with the

agency's legislative overseers." *Proposed Consumer Financial Protection Agency, Hearing Before Subcomm. on Commerce, Trade, and Consumer Protection*, 111th Cong. (available at http://democrats.energycommerce.house.gov/Press_111/20090708/testimony_barkow.pdf) (last visited Aug. 5, 2013).

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

II. CREATION OF CFPB AS A SUPER AGENCY OF UNPRECEDENTED POWER AND INDEPENDENCE

13. On July 21, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), as "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 111-176, at 2 (2010).

A. Title X Severely Limits Executive Oversight of CFPB By Vesting All Power In A Single Director With Tenure Protection

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

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

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

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

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

B. Title X Eliminates Congressional Oversight of CFPB Because There Is No Power of the Purse

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

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

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

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

23. The Dodd-Frank Act prohibits the House and Senate Appropriations Committees from reviewing CFPB's self-funded budget. 12 U.S.C. § 5497(a)(2)(C) ("Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this

subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.").

C. Title X Limits Judicial Oversight of CFPB by Limiting Judicial Review of CFPB's Interpretation of Consumer Financial Laws

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

D. Title X Delegates Broad Authority and Discretion to CFPB

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

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

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

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

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

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

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

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

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

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

35. The Dodd-Frank Act transferred to CFPB authority from seven different agencies. *See* 12 U.S.C. § 5581(a)(2)(A) ("Board of Governors (and any Federal reserve bank . . ., the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development").

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

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

38. Section 1031(d) leaves the term "abusive" to be defined by CFPB, subject only to the limitations that the act or practice "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; (2) takes unreasonable advantage of (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." 12 U.S.C. § 5531(d).

39. During a January 24, 2012 hearing before a subcommittee of the U.S. House Committee on Oversight and Government Reform, Director Cordray stated that the Act's use of the term "abusive" is "a little bit of a puzzle because it is a new term"; CFPB has "been looking at it, trying to understand it, and we have determined that that is going to have to be a fact and

circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs." *How Will the CFPB Function Under Richard Cordray, Hearing Before the Subcomm. on TARP, Financial Services, and Bailouts of Public and Private Programs*, 112th Cong., 112-107, at 69 (2012).

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

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

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

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

E. CFPB Asserts Power to Regulate Lawyers Practicing Law Despite a Statutory Exception for Lawyers

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

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

> Except as provided under paragraph (2), the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to

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

12 U.S.C. § 5517(e).

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

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

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

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

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

Id.

50. Under the amended TSR, the term "debt relief services" was defined to include "any program or service represented, directly or by implication to negotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecure creditor or debt collector." 16 C.F.R. § 310.2(m).

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

52. The FTC based its findings on the following:

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

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

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

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

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

58. On July 21, 2011, the Federal Trade Commission ("FTC") transferred to CFPB its authority to regulate "debt relief services" under the TSR. Designated Transfer Date, 75 Fed. Reg. 57252, 57253 (Sept. 20, 2010).

III. APPOINTMENT AND CONFIRMATION OF RICHARD CORDRAY AS DIRECTOR

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

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

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

IV. CFPB'S INVESTIGATION OF MORGAN DREXEN AND THREAT OF IMMINENT LITIGATION TO PUT MORGAN DREXEN OUT OF BUSINESS

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

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

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

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

66. The CID stated: "[t]he delivery of this demand to you by any method prescribed by Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service and may subject you to a penalty imposed by law for failure to comply." Shaheen Decl. Ex. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

83. CFPB also demanded documents directly from certain of Morgan Drexen's attorney business partners, such as Howard Law, P.C. Ledda Decl. ¶ 14(d); Shaheen Decl. Exs. 27-28.

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

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

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

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

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

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

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

91. CFPB has initiated suits against other entities accused of violating the Telemarketing Sales Rule, seeking permanent injunctions, restitution, disgorgement, civil money penalties, and attorneys' fees. *See Consumer Financial Protection Bureau v. Mission Settlement Agency*, No. 13-CV-3064, 2013 WL 1891278 (S.D.N.Y. May 7, 2013); *Consumer Financial Protection Bureau v. Jalan*, No. SACV12-02088, 2012 WL 6584110 (C.D. Cal. Dec. 3, 2012).

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

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

Shaheen Decl. Ex. 32.

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

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

V. PISINSKI'S RIGHT TO PRACTICE LAW WITHOUT CFPB REGULATION AND INTERFERENCE

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

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

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

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

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

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

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

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

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

VI. CFPB HAS GREATER POWER AND LESS CHECKS AND BALANCES THAN ANY COMPARABLE AGENCY

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

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

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

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

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

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

109. The Office of the Comptroller of the Currency ("OCC") has a head (the Comptroller) who serves a five year term. 12 U.S.C. §§ 1-2.

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

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

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

Case 1:13-cv-01312-CKK Document 13-1 Filed 10/08/13 Page 20 of 26

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. THE STRUCTURE OF CFPB, ITS ACTIONS, AND WHETHER IT VIOLATES THE CONSTITUTIONES SEPARATION OF POWERS HAVE BEEN THE SUBJECT OF SIGNIFICANT DEBATE AMONG MEMBERS OF CONGRESS, ADVOCACY GROUPS, SCHOLARS, AND REGULATED ENTITIES

132. Even after enactment, members of Congress continue to call for a restructuring of CFPB that would require a multimember commission structure for CFPB. *See* News Release,

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

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

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

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

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

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

VIII. CFPB'S UNACCOUNTABILTY IS EVIDENCED BY ITS ACTIONS IN COLLECTING PERSONAL DATA FROM U.S. CITIZENS

138. On April 23, 2013, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing on the Semi-Annual Agenda of CFPB. *The Consumer Financial Protection Bureau's Semi-Annual Report to Congress, Hearing Before the S. Committee on Banking, Housing, and Urban Affairs*, 113th Cong. (Apr. 23, 2013) (available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=765a704e-a287-4f96-910e-5866ac0fc352) (last visited Aug. 2, 2013).

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

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

141. On May 23, 2013, Director Cordray sent a letter to Senator Crapo responding to Senator Crapo's May 16, 2013 letter and disputing that CFPB had a "Big Data initiative." Letter from Richard Cordray, Director, Consumer Financial Protection Bureau to Senator Mike Crapo

(May 23, 2013) at p. 2 (available at http://www.cfpbmonitor.com/files/2013/06/CFPBdatacollection-esponse.pdf) (last visited Aug. 2, 2013).

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

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

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

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

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

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

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

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

Respectfully submitted,

Dated: August 7, 2013

/s/

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EXHIBIT G

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and
KIMBERLY A. PISINSKI,

Plaintiff,

v.

CONSUMER FINANCIAL
PROTECTION BUREAU,

Defendant.

Civil Action No. 13-01112 (CKK)

EXPEDITED BRIEFING SCHEDULE

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Dated: August 7, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This is a constitutional challenge to Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), 12 U.S.C. §§ 5481 *et seq.*, which created Defendant Consumer Financial Protection Bureau ("CFPB"). Plaintiff Morgan Drexen, Inc. ("Morgan Drexen"), which provides "back office" support for attorneys such as Plaintiff Kimberly Pisinski ("Pisinski"), has been the target of a burdensome CFPB investigation and an imminent litigation threat, where CFPB has demanded the production of documents – including privileged attorney-client communications and confidential personal material held by Morgan Drexen for lawyers like Pisinski. Plaintiffs challenge the structure of CFPB as violating the Constitution's separation of powers given: (1) the extraordinary scope of power delegated to CFPB; and (2) the lack of political oversight and necessary checks and balances.

As set forth in Plaintiffs' Statement of Undisputed Material Facts (hereinafter, "SF") the Dodd-Frank Act created CFPB as a super agency with broad discretion – consolidating rulemaking, supervision, and enforcement authority, with market wide coverage, over both banks and nonbanks that provide consumer financial products and services. Title X transferred enforcement authority from seven different agencies (each with appropriate checks and balances) to CFPB, and empowered CFPB to remedy any practice that it finds to be unfair, deceptive, or abusive (with "abusive" being a "puzzle" and "new term" that cannot be defined according to CFPB's Director, SF ¶ 39). CFPB has authority over banks, thrift, savings and loans, credit unions, and virtually every company that extends credit to consumers or tries to collect or settle consumer debt. In a very real sense, CFPB's authority extends into virtually every boardroom and living room in America.

Despite granting CFPB significant power, however, Congress withheld typical oversight, especially the President's power to remove the CFPB Director at-will, a built-in multimember commission (which has been the hallmark of independent agencies for more than 125 years), and political accountability through the appropriations process. Congress did this after hearing testimony about immunizing CFPB from political influence. SF ¶ 12. But Congress went too far. The Constitution demands accountability for government entities that wield such extraordinary government power to protect against "tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996).

CFPB's combination of power and insulation from political accountability is unprecedented. Scholars, Members of Congress, the U.S. Chamber of Commerce, and regulated entities have identified and discussed serious constitutional issues emanating from CFPB's structural design (SF ¶¶ 132-37), but no court has passed on these questions. Moreover, the harm that flows from CFPB's unconstitutional structure is not theoretical: Congress confirmed CFPB's first Director weeks ago yet CFPB is already pushing beyond its statutory mandate and seeking to regulate lawyers engaged in the practice of law (SF ¶¶ 62-103), a state function, and aggregating personal financial information (SF ¶ 138-49), without appropriately balancing privacy and other interests. CFPB's actions have triggered a GAO investigation into its data mining practices (SF ¶ 143). For the reasons stated herein, the Court should declare Title X unconstitutional.

SUMMARY OF PROCEDURAL BACKGROUND AND ACCELERATED SCHEDULE

This case was commenced on July 22, 2013 when Plaintiffs filed their Complaint and Motion for Preliminary Injunction. Plaintiffs requested expedited proceedings and submitted declarations demonstrating irreparable harm, including, but not limited to, facts showing that CFPB's investigation and demands were creating significant impairment to Morgan Drexen's and Pisinski's business and reputation, and that CFPB had threated imminent litigation. The Court held telephonic hearings on July 24, 2013 and July 25, 2013 "during which Plaintiffs consented to withdraw their . . . motion for preliminary injunction and both parties consented to instead proceed with an expedited briefing on the merits of Plaintiffs' Complaint." [Docket No. 8]. "[I]n order to administer this civil action in a manner fair to the litigants and consistent with the parties' interest in completing this litigation in the shortest possible time and at the least possible cost," the court ordered an "expedited procedure on the merits." *Id*. In accordance with the Court's order, Plaintiffs are filing herewith a Notice of Withdrawal of their Motion for Preliminary Injunction and substituting this Motion for Summary Judgment.[1]

ARGUMENT

LEGAL STANDARD

Summary judgment is warranted when the pleadings and any discovery materials and declarations demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Facts are "material" if their establishment "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). Although the Court must view the facts and the inferences from those facts in the light most favorable to the nonmoving party, the party opposing summary judgment may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999).

[1] The expedited schedule provides as follows: "(a) On or before August 7, 2013, Plaintiffs shall file their motion for summary judgment; (b) On or before August 27, 2013, Defendant shall file its opposition to Plaintiffs' motion for summary judgment and cross-motion to dismiss and/or for summary judgment; (c) On or before September 13, 2013, Plaintiffs shall file their reply in further support of their motion for summary judgment and opposition to Defendant's cross-motion; and (d) On or before September 25, 2013, Defendant[] shall file its reply in further support of its cross-motion to dismiss and/or for summary judgment." [Docket No. 8].

THE COURT HAS AUTHORITY TO CONSIDER THIS MATTER

A. PLAINTIFFS HAVE STANDING

"[T]he gist of the question of standing" is, "at bottom," whether plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness" that "sharpens" the presentation of issues to the Court. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). To assure such "adverseness," a plaintiff must demonstrate that "[1] it has suffered a concrete and particularized injury that is either actual or imminent, [2] that the injury is fairly traceable to the defendant, and [3] that it is likely that a favorable decision will redress that injury." *Massachusetts*, 549 U.S. at 517 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Even the "threat of relatively small financial injury [is] sufficient to confer Article III standing." *Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451, 454 (D.C. Cir. 2004) (describing holding of *Franchise Tax Bd. of Ca. v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990)). For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, the court need not consider the standing of the other plaintiffs to raise the claim." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

Here, Plaintiffs have standing for several independent reasons as set forth below.

1. Morgan Drexen Is Subject to Enforcement

Morgan Drexen has standing to challenge the constitutionality of CFPB because it is directly subject to enforcement, "the paradigm of direct governmental authority." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993)). In *Free Enter. Fund v. Pub. Co. Acct'ing Oversight Bd.*, 130 S. Ct. 3138 (2010), the Supreme Court held that the petitioners were "entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." *See Free Enter. Fund*, 130 S. Ct. at 3150-51 (citing *Bowsher v. Synar*, 478 U.S. 714, 727, n.5 (1986)) for the proposition that a separation of powers violation may create a "here-and-now" injury that can be remedied by a court) (internal quotation marks omitted)).

Here, CFPB has purported to subject Morgan Drexen to its direct authority, including through the issuance of Civil Investigative Demands ("CIDs"). SF at ¶¶ 64, 75. Morgan Drexen has incurred significant costs in complying with the CIDs, has produced over 17,000 pages of documents to CFPB (SF ¶ 74) along with four of its officers for depositions (SF ¶ 77), and incurred significant attorneys' fees. SF ¶ 78. Like the petitioners in *Free Enterprise Fund*, Morgan Drexen is entitled to ensure that the investigation to which it has been subject is conducted by a constitutional agency, and Morgan Drexen is suffering a "here-and-now" injury because CFPB violates the Constitution's separation of powers.

CFPB's counsel has suggested that its CIDs are paper tigers that are not self-enforcing. *See* July 24, 2013 Hearing Tr., at 5 ("the nature of those demands is that they are not self-enforcing. So, the defendant -- or the plaintiff, really, doesn't have an obligation to comply with them under the law"); July 25, 2013 Hrg. Tr. at 6-7 (the CIDs are "not self-enforcing, so if we -- they don't actually have an obligation to do anything until we receive them -- an order from a District Court to enforce those investigative demands."). However, in contrast to these statements, the CIDs use mandatory language, referring to: "demand"; "[a]ction [r]equired"; "[a] penalty imposed by law for failure to comply"; and "must." SF ¶¶ 64-67. Instruction G to the CID states that any petition to modify the demand "must be filed . . . within twenty calendar days after service of the CID . . ." SF ¶ 68. In *Sackett v. EPA*, 132 S. Ct. 1367 (2012), the Environmental Protection Agency ("EPA") issued landowners a "compliance order" directing them to undertake certain actions and provide "access to all records and documentation related to conditions at the Site." *Sackett* at 1371. The plaintiffs sued for declaratory and injunctive relief. *Id.* The EPA argued that "compliance orders are not self-executing, but must be enforced by the agency in a plenary judicial action" and that the compliance order was a "step in the deliberative process, rather than as a coercive sanction that itself must be subject to judicial review." *Id.* at 1373. The Supreme Court disagreed: "The mere possibility that an agency might reconsider in light of 'informal discussion' does not suffice" to defeat jurisdiction. *Id.* at 1372. *See also Free Enter. Fund*, 130 S. Ct. at 3151 ("We normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law") (citations and quotations omitted).

2. Morgan Drexen Faces an Immediate Threat of Further Injury

The Supreme Court has recognized that "certainly impending" injury would "constitute injury in fact" for standing purposes. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (rejecting challenge to a surveillance statute where the plaintiffs could not prove that they were the target of surveillance); *see also Dearth v. Holder*, 641 F.3d 499, 401 (D.C. Cir. 2011) (holding that where a plaintiff is seeking declaratory or injunctive relief he "must show that he is suffering an ongoing injury or faces an immediate threat of injury"). Here, CFPB has taken the position that Morgan Drexen is acting illegally. SF ¶¶ 89-93 (Shaheen Decl. ¶ 43). CFPB sent Morgan Drexen a "Notice and Opportunity to Respond and Advise (NORA)" stating that "the staff expects to allege that [Morgan Drexen] violated Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. § 5536 and the Telemarketing Sales Rule, 16 CFR § 310." SF ¶ 92 (Shaheen Decl. Ex. 32). CFPB also threatened "injunctive and monetary relief." *Id.* CFPB's NORA letter constitutes the type "certainly impending" threat that gives Morgan Drexen standing to challenge its constitutionality.

Case 1:13-cv-01112-CKK Document 18-2 Filed 10/08/13 Page 13 of 35

3. Morgan Drexen Suffered Concrete and Presently-Existing Harm When CFPB Sent CIDs to Morgan Drexen's Business Partners

CFPB also caused Morgan Drexen concrete and presently-existing harm by sending CIDs to Morgan Drexen's business partners. CFPB's actions caused Morgan Drexen to lose its credit facilities (SF ¶¶ 79-80) and impacted its ability to obtain reasonable financing. SF ¶ 81. Morgan Drexen now pays 22% interest where, before the CID to US Capital, Morgan Drexen had financing at 4.5% (SF ¶ 82). CFPB also sent a CID to Morgan Drexen's attorney business partners and its marketing services business partner, which stigmatized Morgan Drexen and harmed its reputation. SF ¶¶ 83-87. The total effect of CFPB's actions in the aggregate has caused significant and concrete harm. *See Pyramid Lake Paiute Tribe of Indians v. Nevada, Dept. of Wildlife*, No. 11-16470, 2013 WL 3889091, *4 n.11 (9th Cir. 2013) (citing case law that "the total effect on the Tribe's water rights is ultimately the sum of the individual parts" and likening agency action to "death by a thousand cuts").

4. CFPB Demanded Privileged Information

CFPB has also substantially burdened Morgan Drexen's business by demanding that it produce documents that are protected by the attorney-client privilege. SF ¶¶ 85-86. These documents include the private notes by attorneys of their communications with clients. SF ¶ 69. Morgan Drexen maintains these documents for its business partners (attorneys like Pisinski), who expect that their client's confidences and privileges will be honored. SF ¶ 86. CFPB's demands present Morgan Drexen with a Hobson's choice: either produce the confidential data (thus violating Morgan Drexen's ethical obligations and harming its client relationships) or refuse to produce the documents and face CFPB retribution. Plaintiffs have standing to challenge this demand.

B. Plaintiffs' Claims Are Ripe

Courts consider two factors in determining ripeness: "[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)). Here, the Court "assume[s] that issue is suitable for judicial review" because Plaintiffs have raised "a purely legal question." *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540 (D.C. Cir. 1999). There is "hardship to the parties" for the same reason that Plaintiffs have demonstrated standing.

Plaintiffs need not exhaust administrative remedies before bringing this challenge. *See Free Enter. Fund v. Pub. Co. Acct'ing Oversight Bd.*, 537 F.3d 667, 670-71 (D.C. Cir. 2008), *aff'd in relevant part*, 130 S. Ct. 3138, 3150-51 (2010) (sustaining a constitutional challenge to an agency's implementing statute without first requiring the plaintiff to exhaust its administrative remedies); *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) (holding that a separation of powers violation may create a "here-and-now" injury that can be remedied by a court prior to a plaintiff exhausting its administrative remedies); *Hettinga v. United* States, 560 F.3d 498, 504 (D.C. Cir. 2009) ("Prudential exhaustion is not required where . . . [the agency] lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute"); *Andrade v. Lauer*, 729 F.2d 1475, 1490-93 (D.C. Cir. 1984) (reversing dismissal and holding that plaintiffs could bring their constitutional claim in federal court without first exhausting administrative remedies).

Unlike a plaintiff who challenges a typical enforcement proceeding, Plaintiffs' constitutional challenge relates to the foundational authority of CFPB as an institution – a question that has been raised but not passed upon by any court. Such a challenge need not be pursued through an administrative regime. *See Gen. Elec. Co. v. Environmental Protection Agency*, 360 F.3d 188, 191-92 (D.C. Cir. 2004) (holding that GE's facial due process challenge to the CERCLA statute was not the type of pre-enforcement action that Congress sought to preclude) (citing *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)) (distinguishing between facial, or "systemic," and as-applied, or particularized challenges in holding that a provision barring review of individual veterans benefit challenges did not bar a constitutional challenge to the statute itself."); *see also Elk Run Coal Co., Inc. v. U.S. Dept. of Labor*, 804 F. Supp. 2d 8, 15-23 (D.D.C. 2011) (exercising jurisdiction over constitutional claims challenging an administrative review process of the Mine Act).[2]

The Dodd-Frank Act does not provide an administrative process for reviewing the type of claim alleged here, nor does CFPB have any specialized expertise to bear on the claim. Hence, there is neither an avenue for administrative relief nor any prudential justification for requiring this challenge to be pursued through administrative channels. *See Free Enter. Fund*, 130 S. Ct. at 3150 (2010) (courts "presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'") (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994)).

Free Enterprise Fund is again illustrative. There, the plaintiff brought a facial challenge to the Sarbanes-Oxley Act on the grounds that it violated the separation of powers and the Appointments Clause of the Constitution by conferring wide-ranging executive power on the Public Company Accounting Oversight Board ("PCAOB"), comprised of members appointed by

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[2] Plaintiffs' constitutional challenge against CFPB distinguishes this case from *POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 44-45 (D.D.C. 2012), where Judge Roberts declined to exercise jurisdiction over a challenge brought by POM Wonderful. There, Judge Roberts relied on the fact that POM Wonderful could raise its issues as affirmative defenses in an existing FTC administrative proceeding. *Id.* at 44-45. Here, however, Plaintiffs are entitled to challenge the constitutionality of the agency purporting to exercise authority over them.

the Securities and Exchange Commission ("SEC"), without subjecting it to presidential control. *Id.* The government argued lack of jurisdiction, claiming the plaintiff should have challenged the constitutionality of PCAOB through SEC review of the Board's standards or rules, or by ignoring PCAOB's request for documents and testimony thereby provoking a sanction that could be appealed. The Supreme Court held that the plaintiff "object[s] to the Board's existence, not to any of its auditing standards," and concluded that the "general challenge to the Board [was] 'collateral' to any Commission orders or rules from which review might be sought." *Id.* at 3150. Here, as in *Free Enterprise Fund*, Plaintiffs' constitutional challenge to CFPB's existence is collateral to any CFPB action and is exclusively within the purview of an Article III court.

CFPB'S STRUCTURE IS UNCONSTITUTIONAL

A. Applicable Legal Principles

Administrative agencies are essential to the functioning of our federal government and have long been recognized as constitutional, provided that Congress, in creating them, ensures that such agencies: (1) satisfy the Constitution's separation of powers, which imposes "checks and balances" to limit agency power; (2) have political accountability to the President and Congress, and indirectly, the electorate; and (3) operate pursuant to an "intelligible principle" that provides reasonable limits on agency discretion.

"The Framers recognized that . . . structural protections against abuse of power [are] critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). Separation of powers is "at the heart of our Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976), and is essential to defend against "tyranny," *Loving*, 517 U.S. at 756, and to "the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The Constitution's separation of powers is "intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps." *INS v. Chadha*, 462 U.S.

919, 957 (1983). The Supreme Court has adopted a "flexible understanding" of separation of powers, recognizing "that the greatest security against tyranny . . . lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power . . . ." *Mistretta v. United States*, 488 U.S. 361, 381 (1989).

Of relevance here, Article I provides that all "legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. 1, § 1. Notably, the Constitution gives Congress the power of the purse, such that "[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. Similarly, the Constitution provides that "executive Power shall be vested in a President," U.S. Const. art. II, § 1, and that "he shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. The President "shall appoint" all "officers of the United States." U.S. Const. art. II, § 2, cl. 2.

Political accountability enables the public to monitor and check through the ballot box government actions to "ensure that those who wield[]" power are "accountable to political force and the will of the people." *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991); *see also Edmond v. United States*, 520 U.S. 651, 663 (1997) (discussing the importance of preserving "political accountability relative to important government assignments"). Congress must also establish an intelligible principle for agencies to follow so as to avoid unlimited agency discretion and an unlawful delegation of legislative power. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The required structural protections are influenced by the scope of power delegated to the agency and its degree of discretion. *See id.* at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

In *Free Enterprise Fund*, the Supreme Court invalidated the structure of PCAOB, noting that "[b]y granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers." *Id.* at 3155.

Although Congress may have created CFPB in good faith to remedy certain financial ills, good intentions are not a suitable replacement for constitutionally-required checks and balances. Courts have not hesitated to invalidate similarly well-intentioned statutes that violate the Constitution's separation of powers. *See Free Enter. Fund*, 130 S. Ct. at 3164; *see also Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act); *Chadha*, 462 U.S. at 953-54 (invalidating a one-house veto of proposed administrative action); *Bowsher*, 478 U.S. at 726 (holding that Congress may not constitutionally remove officers charged with executing the laws, other than by impeachment); *Buckley*, 424 U.S. at 1 (holding that Congress may not appoint members of the Federal Election Commission); *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding that Congress may not interfere with the President's power to remove the postmaster).

It is no answer to say that Congress acted with executive consent. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). "Perhaps an individual President"—or Congress—"might find advantages in tying his own hands," the Supreme Court recently noted, "[b]ut the separation of powers does not depend on the views of individual Presidents"—or particular Congresses. *Free*

Enter. Fund, 130 S. Ct. at 3155. This is true regardless of "whether 'the encroached-upon branch approves the encroachment.'" *Id*. (*quoting New York v. United States*, 505 U.S. 144, 182 (1992)).

B. CFPB Is Unconstitutional Whether It Is an Executive or Independent Agency

CFPB's structure is unprecedented because it is greatly insulated from the political branches (the President and Congress) and lacks internal checks and balances. There are at least five structural features of CFPB that, viewed in the aggregate, make CFPB unconstitutional. First, CFPB is controlled by a single Director who serves a fixed term of five years and is removable only for cause (and not at-will) by the President. SF ¶¶ 16-17 (12 U.S.C. § 5491(b)(2) and (c)). Second, CFPB is not subject to Congressional oversight through the appropriations process[3]; instead, CFPB automatically receives a fixed sum that it can use to carry out its activities – up to a twelve percent (12%) cap of the Federal Reserve's total operating expenses (about a half a billion dollars). SF ¶¶ 20-21 (12 U.S.C. § 5497(a)(2)(A)). Third, the final version of Dodd-Frank did not retain the original multimember commission structure in the House-passed version, a structural feature that has been the hallmark of independent agencies for more than 125 years. SF ¶¶ 104-06. Fourth, CFPB is insulated from accountability from the Federal Reserve, which does not review or approve CFPB actions. Fifth, the Dodd-Frank Act limits judicial review over CFPB actions. *See* 12 U.S.C. § 5512(b)(4)(B) (requiring that courts grant the same deference to CFPB's interpretation of federal consumer financial laws that they would "if [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."). This striking provision requires *Chevron* deference for all statutes transferred to CFPB – and essentially unwinds decades of precedent

[3] The appropriations process also implicates the President's authority including because the President has the right to veto any appropriations bill.

created by other agencies and courts reviewing those other agencies. CFPB's structure is unprecedented in the federal government. *See* Declaration of Law Professor Todd Zywicki [Docket No. 3-4] ¶¶ 13-20. Indeed, as described below, at least one of the checks and balances missing from CFPB is present with respect to each of the entities from whom authority was transferred. Unlike these entities, CFPB is unaccountable to the political branches of government and lacks the oversight and checks and balances that the Constitution requires.

Cases have established two different types of agency structures that comply with the Constitution: executive agencies (or departments) and independent agencies. CFPB is not structured properly as either an executive or independent agency. For executive agencies, the head typically serves at the pleasure of the President and is removable at-will by the President. This is not the case for CFPB, which limits removal of its director to "for cause," which Dodd-Frank defines as "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

For so-called "independent agencies," accountability is provided with other features like a multimember bipartisan structure, such as the FTC. As Professor Zywicki observes, a multimember and typically bipartisan commission structure is usually identified as a defining feature of an independent agency.[4] *See* Zywicki Decl. ¶ 16; *see also Humphrey's Ex'r*, 295 U.S. at 624 ("The commission is to be *non-partisan*, and it must from the very nature of its duties, act with entire impartiality. . . Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a *body of experts* 'appointed by law and informed by experience.'") (quoting *Illinois Central R. Co. v. Interstate Commerce Comm'n*, 206 U. S. 441 (1907); and *Standard Oil Co. v. United States*, 283 U. S. 235 (1931)) (emphasis added). In

[4] The Board of Governors of the Federal Reserve is not expressly bipartisan. However, its seven members serve staggered 14 year terms. 12 U.S.C. §§ 241-42. Thus, as a practical matter, the Board of Governors will be bipartisan since no party has controlled the White House for 14 consecutive years since Franklin D. Roosevelt.

addition, independent agencies are sometimes, but not always accountable to Congress through the appropriations process.

CFPB does not conform to the recognized models of agency structure and accountability: it is neither an executive nor an independent agency. It is effectively an independent agency housed inside another independent agency, isolated from effective accountability to Congress, the President, or the Federal Reserve. Indeed, CFPB lacks even the limited accountability that the PCAOB had to the SEC—a structure that was held to be unconstitutional. As Professor Zywicki states, "CFPB [is] one of the most powerful and publicly unaccountable agencies in American history" (Zywicki Decl. ¶ 17) — in fact, wielding so much unaccountable power and discretion as to be unconstitutional.

We discuss each of these factors below and the importance that courts place on the role they play in creating political accountability and providing for appropriate checks and balances. Whether the Constitution requires one of these factors or several is a question the Court need not reach given the unprecedented circumstance that *none* are present in CFPB.

C. CFPB Does Not Have Constitutionally-Required Political Accountability

To pass constitutional muster and to maintain democratic accountability, CFPB must be subject to political oversight, typically through the President's removal power and Congress's power of the purse. The Dodd-Frank Act stripped away these mechanisms and severed the necessary responsiveness to the electorate.

No Presidential Power to Discipline Through At-Will Removal. First, the Director's protection from presidential removal interferes with the democratically-elected President's ability to supervise his Article II power and therefore, the electorate's ability to check CFPB. The Dodd Frank Act calls CFPB an executive agency and gives CFPB executive authority. SF ¶ 15 (12

U.S.C. § 5491(a)). Article II vests all of the "executive power" in a democratically-elected President precisely to ensure both that the people can easily identify and correct its misuses and to ensure that the execution of executive power is free from legislative influence. *See Free Enter. Fund, supra*. In dividing the powers of the Federal Government among three coordinate Branches, the Framers "consciously decid[ed] to vest Executive authority in one person rather than several." *Clinton v. Jones,* 520 U.S. 681, 712 (1997) (Breyer, J., concurring). Congress may not "impermissibly interfere[] with the President's exercise of his constitutionally appointed functions." *See Mistretta*, 488 U.S. at 382; *Morrison v. Olson*, 487 U.S. 654, 685 (1988).[5] By prohibiting the President from removing the Director at-will, the Dodd-Frank Act violates this stricture. As the Supreme Court has held, "[b]y granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers." *Free Enter. Fund,* 130 S. Ct. at 3155.

No Appropriations Oversight. Article I, Section 9 provides, in part: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Dodd-Frank exempts CFPB from the congressional appropriations power because the Dodd-Frank Act authorizes the Director to unilaterally requisition half a billion dollars (12% of the Fed's budget), without congressional approval. SF ¶¶ 19-21. In fact, Dodd-Frank states: "Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection *shall not be subject to review* by the Committees on Appropriations of the House of

[5] In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court held that tenure protection for the Independent Counsel was constitutionally sustainable only because the Independent Counsel was an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and without policymaking or significant administrative authority. *Id.* at 691.

Representatives and the Senate." 12 U.S.C. § 5497(a)(2)(C) (emphasis added). This eliminates the electorate's ability to check CFPB's power through Congress. Thus, Congress's "ultimate weapon of enforcement" – the power of the purse – which essentially gives voice to the electorate – is unavailable. *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974).

In other cases, courts have grappled with which political institution -- Congress or the President – had the power to oversee a federal agency, a classic separation of powers dispute between two coordinate branches.[6] In this case, by disabling removal and insulating CFPB from the appropriations process, Congress has eviscerated CFPB's political accountability to both itself and the President, and violated the constitutionally-required protections for the electorate.

D. CFPB Does Not Have a Constitutionally-Required Multimember Commission

Given the scope of CFPB's power and its corresponding lack of political accountability, Congress's departure from the structure of other independent agencies by establishing a single Director instead of the House-passed multimember commission (SF ¶¶ 2-4) is a constitutional violation. The Dodd Frank Act aggregates unilateral decision making authority over all CFPB regulatory and enforcement decisions in a single tenure-protected Director serving for a fixed five-year term. SF ¶¶ 16-17. There is no internal check on the Director's judgment or decision. The Director need not confer with anyone, and no vote or deliberation or expression of minority viewpoints at CFPB need occur, prior to the Director's exercise of power.

This stands in sharp contrast to the multimember commission structure that for more than 125 years has been the hallmark of other so-called "independent agencies" which – like CFPB – exercise broad rulemaking and enforcement powers. For example, the FTC, SEC, Commodity

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[6] *See Bowsher*, 478 US at 734 (1986) ("by placing the responsibility for the execution of the [laws] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.").

Futures Trading Commission ("CFTC"), Federal Communications Commission ("FCC"), Federal Energy Regulatory Commission ("FERC", and the Consumer Products Safety Commission ("CPSC") (SF ¶ 106)[7], as well as other agencies, use a multimember commission structure. The Federal Reserve operates under the authority of a Board of Governors. SF ¶ 107 (12 U.S.C. § 241). The subject of *Free Enterprise Fund* also uses a multimember structure. *Free Enter. Fund*, 130 S. Ct. at 3142; 15 U.S.C. § 7211(e)(1) (establishing a five person Board for PCAOB).

The multimember structure and its attributes of collegial decision-making pervade federal administrative regulatory and enforcement authority exercised in the United States. For example, the SEC is composed of five Commissioners who are appointed by the President with the advice and consent of the Senate. No more than three Commissioners may be members of the same political party. 15 U.S.C. § 78d(a). The SEC's canons of ethics state that SEC's pluralistic decision-making is designed to "safeguard against the domination of this Commission by less than a majority." 17 C.F.R. § 200.57. A "quorum" is required for the SEC to conduct business. 17 C.F.R. § 200.41. "Valid agency action depends on the effective concurrence of a majority of the designated quorum."[8] *Braniff Airways, Inc.* v. *Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967); *accord Falcon Trading Group, Ltd.* v. *SEC*, 102 F.3d 579 (D.C. Cir. 1996). "The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons." *Assure Competitive Trans., Inc.* v. *United States*, 629 F.2d 467, 473 (7th Cir. 1980) (citation omitted).

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[7] The statutory citations are: FTC (15 U.S.C. § 41); SEC (15 U.S.C. § 78d(a)); CFTC (7 U.S.C.A. § 2); FCC (47 U.S.C. § 154); FERC (42 U.S.C. § 7171(b)(a)(5); and CPSC (15 U.S.C. § 2053(a)).

[8] "A quorum is '[t]he minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted.'" *Railroad Yardmasters of America* v. *Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (citations omitted).

Courts have recognized that a multimember agency structure safeguards fairness and individual liberty *See David B. Lilly Co., v. United States*, 571 F.2d 546, 548-49 (Fed. Cl. 1978) (upholding an order of the Renegotiation Board only after ensuring that the respondent's position was considered as part of a "deliberative process" among a quorum of the Board). In *Lilly*, the critical factor was "the integrity of the deliberative process through which the Board acts." *Id.* at 549. The respondent to the Board's action had "a right to present his claim to a quorum of the Board" and the "quorum of the Board must fully consider the claim." *Id*. Former SEC Chairman Arthur Levitt, testified before Congress that the Commission's experience substantiates the presumption that deliberation is beneficial to the Commission's functions: "The Commission believes that the ability to confer as a larger, five member body has contributed greatly to the quality of the Commission's decision-making process."[9]

Here, whether such a multimember agency structure is constitutionally required in light of the scope and breadth of CFPB is a matter of first impression. An affirmative answer is justified by the circumstances of this case. Congress has consistently used multimember deliberative bodies to head independent agencies that have power similar (albeit not as broad) as CFPB (including the FTC and SEC). The Supreme Court in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) approved the prohibition on presidential at-will removal of FTC commissioners only after noting the protections afforded by the multimember structure of the FTC. *Id*. at 624 (noting that the agency would act with "impartiality" through the "the trained judgment of a body of experts."). Requiring a multimember commission is consistent with the

[9] *Deregulating Capital Markets: Hearings on Securities Reform and H.R. 2131, the Capital Markets Deregulation and Liberalization Act of 1995 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Commerce*, 104th Cong. (1995) (testimony of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission). In *Free Enterprise. Fund*, the Court assumed that SEC commissioners were removable for cause, even in the absence of a statutory for-cause removal restriction, noting the multimember structure of the agency and the fixed terms for its commissioners. 139 S. Ct. at 3153 (2010).

logic, history, and structure of the separation of powers doctrine to avoid tyranny that is threated by the concentration of legislative, executive, and judicial power in a single unelected individual. A multimember structure diffuses power among various members, and creates a vital internal check that allows for collective deliberation among persons with diverse views, expertise, and backgrounds. The Constitution may not require that every independent agency have a multimember commission format; however, under the circumstances presented here, where there is an extremely broad delegation yet where political accountability (and judicial review) are seriously curtailed, a multimember format provides a modicum of the checks and balances envisioned by the Framers of the Constitution.

E. CFPB's Lack of Structural Protections Is Unconstitutional In Light of Congress's Broad Delegation of Power

Each of the structural features described above -- especially the lack of presidential power to remove the Director at-will, the absence of congressional appropriation oversight, and the lack of a multimember commission structure – raise serious constitutional issues. Combined together, however, the constitutional violation is unavoidable.

An independent way to evaluate the constitutionality of CFPB's structure is to undertake a two-part inquiry to: (1) evaluate the overall scope of delegated power and degree of agency discretion; and (2) assess the sufficiency of the overall combined structural protections of accountability and checks and balances in light of the scope of delegated power and degree of agency discretion. Stated differently, the level of regulatory discretion and scope of delegation inform the degree of structural accountability and checks and balances needed. *See Whitman,* 531 U.S. at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *see generally Morrison v. Olson,* 487 U.S. at 695-97 (finding less protection is necessary when the agency in question had a targeted and narrow scope of delegated power exercised by inferior officers). The more unfettered the powers exercised or delegated, the greater is the need for internal as well as external, congressional and presidential, checks to preserve the separation of powers and promote democratic control of government.

Here, in step 1, CFPB has great power and great discretion. CFPB was created to exercise the authority of seven separate agencies and assume market wide coverage. As noted above, with respect to virtually every boardroom and living room, CFPB exercises rulemaking, adjudicatory, and enforcement powers; it conducts investigations, issues subpoenas and civil investigative demands for the attendance and testimony of witnesses and production of documents and materials, and commences administrative and judicial proceedings; it can take actions, including direct enforcement action, to prevent "unfair," "deceptive," or "abusive act[s] or practice[s]" ("UDAAP" authority) where the term "abusive" is, according to CFPB's Director, "a little bit of a puzzle because it is a new term" and its meaning will have to be developed on a case-by-case basis. SF ¶¶ 36-39.

In step 2, however, instead of providing *additional* protections in light of the broad delegation, Congress created unprecedented *insulation*. Concentration of power in a single Director, free from congressional appropriations oversight, who does not serve at the pleasure of the President, and whose agency is subject to curtailed judicial review – all of these structural features create extreme isolation from political process and checks and balances. CFPB's lack of structural protection cannot be reconciled with its broad delegation of power.

F. THE DODD-FRANK ACT TRANSFERS AUTHORITY TO CFPB FROM AGENCIES THAT HAVE CONSTITUTIONALLY COMPLIANT CHECKS AND BALANCES

Congress created CFPB in order to consolidate in one agency the authority to supervise, make rules, enforce and issue orders and guidance for federal consumer financial laws. In doing so Congress transferred authority to CFPB from seven other agencies -- (1) the Federal Reserve Board of Governors; (2) Comptroller of the Currency ("OCC"); (3) Office of Thrift Supervision ("OTS"); (4) Federal Deposit Insurance Corporation ("FDIC"); (5) National Credit Union Administration ("NCUA"); (6) FTC; and (7) Department of Housing and Urban Development ("HUD"). 12 U.S.C. § 5581. Although Congress is free to exercise its discretion consistent with the Constitution, it cannot transfer authority to enforce laws from agencies that have appropriate checks and balances and accountability to one that has neither of these protections.

Section 1063(i) of the Dodd-Frank Act requires CFPB to publish a list of rules and orders that it will enforce as a result of the transfer of authority described above. CFPB published such a list in July 2011. Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43569 (July 21, 2011). This list demonstrates the unprecedented breadth and scope of authority transferred from seven accountable agencies to a single unaccountable agency. CFPB now has enforcement and other related authority over forty-nine (49) pre-existing consumer financial protection rules, including the Equal Credit Opportunity Act, Fair Credit Reporting Act, Truth in Lending Act, Truth in Savings Act, Adjustable Rate Mortgages Act, the Telemarketing Sales Rule, and the Real Estate Settlement Procedures Act.

The accountability and checks and balances that previously existed with respect to these forty-nine consumer financial protection rules is set forth below. Strikingly, the Dodd-Frank Act insulated CFPB from the type of rigorous judicial review that previously surrounded these rules by requiring that courts defer to the interpretation of CFPB and not any other agency with respect to interpretation of these rules.[10] In addition, in its federal register notice, CFPB left itself

[10] The possibility of conflicting interpretation exists for two reasons. First, in some instances, CFPB shares jurisdiction with another agency for enforcement of a rule. *See* 12 U.S.C. § 5581(b)(5) (outlining the authority of the CFPB and Federal Trade Commission to enforce consumer law). Second, CFPB was not given jurisdiction over some consumer financial protection rules for certain designated persons.

considerable discretion in determining whether to continue to apply existing guidance issued with respect to these forty-nine rules by the transferor agency. Identification of Enforceable Rules and Orders, 76 Fed. Reg. at 43570.

Federal Reserve. The Federal Reserve is overseen by a seven member board, including a Chair and Vice-Chair, who each serve 4 year terms. 12 U.S.C. § 242. The 7 board members serve 14 year staggered terms, the term of a board member expiring every 2 years. *Id.* Thus, the Federal Reserve is held accountable by the deliberative nature of a multimember commission. Additionally, each new President has the opportunity to appoint at least two board members.

OCC. The OCC is charged with the specific task of chartering, regulating and supervising all national banks and federal savings associations. It has a single director who serves a five year term at the pleasure of the President and can be removed for any reason, provided that the President communicate the reasons for removal to the Senate. 12 U.S.C. § 2. The Comptroller must carry out his duties under the "general direction" of the Secretary of the Treasury (12 U.S.C. § 2) and, unlike CFPB,[11] cannot appoint his immediate subordinates. Instead the Secretary of the Treasury appoints Deputy Comptrollers. 12 U.S.C. § 4.

OTS. Title III of the Dodd-Frank Act eliminated the OTS. 12 U.S.C. § 5412. Before its elimination, OTS was headed by a single director who serves a five year term at the pleasure of the President. 12 C.F.R. § 500.10. The statute did not provide tenure protection through "for cause" removal (12 USC § 1462a(c)(2) (prior to 2010 amendment)), and the Office of Legal Counsel expressed the view that the Director served at the President's pleasure. *See* Post-Employment Restriction of 12 U.S.C. § 1812(e), 2001 WL 35911952, at *4 (O.L.C. Sept. 4, 2001) ("We do not endorse the view that tenure protection for the Director should be inferred

[11] 12 U.S.C. §§ 5491, 5493(a).

under the statute here") (available at http://www.justice.gov/olc/2001/otspost2.pdf) (last visited Aug. 5, 2013). In addition, like the OCC, the Director carried out his or her duties under the general oversight of the Secretary of the Treasury and the Secretary was authorized to appoint the OTS Deputy Directors. 12 U.S.C. 1462a(a)-(b) (prior to 2010 amendment).

FDIC. The FDIC insures deposits in banks and thrift institutions and identifies, monitors, and addresses risk to the deposit insurance funds. The FDIC is run by a five person Board of Directors, all of whom are appointed by the President and confirmed by the Senate. 12 U.S.C. § 1812(a)(1).[12] No more than three may be from the same political party. 12 U.S.C. § 1812(a)(2).

NCUA. Congress created the NCUA was to charter and supervise federal credit unions and insure credit union deposits. It is governed by a three member board that serve staggered six year terms. 12 U.S.C. § 1752a(a)-(c). Each board member is appointed by the President and confirmed by the Senate. *Id.* No more than two board members can be from the same political party. *Id.*

FTC. The FTC is charged with enforcing the Federal Trade Commission Act 15 USC § 45 which prohibits deceptive or unfair acts or practices as well as issuing regulations and enforcing various federal statutes designed to protect consumers. It is governed by a five-person Commission that serves staggered five year terms. 12 U.S.C. § 41. Each Commissioner is appointed by the President and confirmed by the Senate. *Id.* In addition, the President also has authority to designate the Chairperson from among the five Commissioners. *Id.* Unlike the banking agencies described above, the FTC's budget is appropriated by Congress. 15 U.S.C. § 57c.

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[12] Two of the five board members are ex officio but are also appointed by the President to their other position (Comptroller of the Currency and the Director of CFPB).

HUD. HUD is a cabinet level agency. 42 U.S.C. § 3532(a). Like other cabinet officials, the HUD Secretary is appointed by the President and confirmed by the Senate and serves at the pleasure of the President. *Id.* In addition, HUD's budget is appropriated by Congress. 42 U.S.C. § 3535(s).

In summary, the supervision, interpretation, promulgation of regulations, and the enforcement of the consumer financial laws was previously under the auspices of agencies subject to a robust system of checks and balances and accountability. Each of the transferee agencies had at least one of the following: Presidential removal power, multimember commissions, bipartisan representation, and/or congressional budgetary appropriation. By transferring authority to CFPB, the Dodd-Frank Act put an end to these checks and balances. These laws, which reach into virtually every boardroom and living room in America, are now under the auspices of an agency which has a single Director, removable by the President only under extreme circumstances, and who needs no budgetary appropriations from any other branch of government or government agency. The following chart, submitted to the Senate by the U.S. Chamber of Commerce, demonstrates that these features are not aggregated in any other comparable agency.

	Checks and Balances on Leadership Power and Decision Making						Budget Oversight
	Commission/ Board Structure	Requirement of Bipartisan Representation on Commission/ Board	Outside Officials Serve on Agency's Decisionmaking Body or Appoint Some of Its Top Officials	Head Subject to At-Will Removal by the President	Cabinet Official Statutorily Authorized to Supervise Agency	Dedicated Inspector General	Budget Dependent on Appropriations
CONSUMER FINANCIAL PROTECTION BUREAU	✗	✗	✗	✗	✗	✗	✗
Federal Reserve System	✓					✓	
National Credit Union Administration	✓	✓				✓	
Office of the Comptroller of the Currency			✓	✓	✓		
Office of Thrift Supervision			✓	✓	✓		
Social Security Administration			✓			✓	✓
Consumer Product Safety Commission	✓	✓				✓	✓
Federal Communications Commission	✓	✓				✓	✓
Federal Deposit Insurance Corporation	✓	✓	✓			✓	
Commodity Futures Trading Commission	✓	✓				✓	✓
Securities and Exchange Commission	✓	✓				✓	✓
Federal Energy Regulatory Commission	✓	✓					✓
Federal Trade Commission	✓	✓				✓	✓

Statement Andrew Pincus on behalf of the U.S. Chamber of Commerce on "Enhanced Consumer Financial Protection After the Financial Crises," *U.S. Senate Committee on Banking, Housing, and Urban Affairs*, at 29 (July 19, 2011) (available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=19e3efe3-0c50-47df-bb3c-b75ff93e7a5f) (lasted visited Aug. 5, 2013).

G. CFPB's Unconstitutional Structure Has Harmed Plaintiffs

In many cases involving the separation of powers, the potential for injury caused by agency overreach remains theoretical. Here, however, CFPB is overstepping its bounds by attempting to regulate lawyers like Pisinski (through their support provider, Morgan Drexen) who are providing bankruptcy services. Regulation of lawyers is prohibited under CFPB's enabling statute. *See* 12 U.S.C. § 5517(e) (providing that CFPB "may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law"). CFPB has taken the position that this exception does not apply to the regulation of debt settlement under the Telemarketing Sales Rule because it is transferred authority under 12 U.S.C. §§ 5581-5587.[13] However, CFPB is seeking to expand this limited exception, for example, by demanding production of information concerning the amount of any given "engagement fee under the bankruptcy fee agreement" and any "bankruptcy filing fee." (SF ¶ 76) (Shaheen Decl. Ex. 34). Of course, whether someone is engaged in the unauthorized practice of law is reserved to the States under the Tenth Amendment.

Equally troubling, the GAO is investigating whether CFPB is using such personal financial data (provided to lawyers in the context of attorney-client confidentiality) to build a database without adequately balancing privacy concerns. The scope of CFPB's power and its actions in investigating Morgan Drexen call to mind the warning that "[t]he accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 46, p. 334 (H. Dawson ed. 1876) (J. Madison).

[13] The FTC has taken the position that the prohibitions relating to debt settlement found in the Telemarketing Sales Rule apply to attorneys who otherwise meet the jurisdictional requirements for the Rule. Whether the FTC was constitutionally correct in making that determination, (see *Am. Bar Ass'n v. F.T.C.*, 671 F. Supp. 2d 64 (D.D.C. 2009), *vacated as moot*, 636 F.3d 641 (D.C. Cir. 2011) (invalidating attempt by FTC to regulate lawyers)), is not a question this Court need now address because CFPB's attempt to exercise jurisdiction over the provision of legal counseling relating to bankruptcy falls outside the scope of the TSR.

<u>RELIEF REQUESTED</u>

Plaintiffs request that the Court enter an order declaring unconstitutional those portions of Title X of the Dodd-Frank Act that create CFPB. If the Court does so, Congress can remedy CFPB's structure to comply with the Constitution's separation of powers. Indeed, Congress has specifically considered remedies, such as replacing the Director with a multimember commission. SF ¶ 132.

Case 1:13-cv-01112-CKK Document 13-2 Filed 08/07/13 Page 35 of 35

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that their motion for summary judgment be granted.

Dated: August 7, 2013

Respectfully submitted,

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EXHIBIT H

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI, ***Plaintiffs*,** **v.** **CONSUMER FINANCIAL PROTECTION BUREAU,** ***Defendant*.**	Civil Action No. 13-01112 (CKK) **EXPEDITED BRIEFING SCHEDULE** **PROPOSED ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

It is hereby ORDERED that the motion for summary judgment filed by Plaintiffs Kimberly A. Pisinski ("Pisinski") and Morgan Drexen, Inc. ("Morgan Drexen") (together, "Plaintiffs"), pursuant to Federal Rule of Civil Procedure 56, Local Civil Rule LCvR 7(h), and this Court's Scheduling and Procedure Order [Docket No. 8] is GRANTED.

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. §§ 5481 *et seq.*) ("Dodd-Frank Act") establishing Defendant Consumer Financial Protection Bureau ("CFPB") is declared unconstitutional for violating the Constitution's separation of powers. CFPB is hereby enjoined from taking any further action against Plaintiffs.

SO ORDERED

Date: _______________, 2013

____
COLLEEN KOLLAR-KOTELLY
United States District Judge

EXHIBIT I

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI, *Plaintiffs,* v. **CONSUMER FINANCIAL PROTECTION BUREAU,** *Defendant.*	Civil Action No. 13-cv-01112 (CKK)

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

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

Dated: August 27, 2013

Respectfully submitted,

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EXHIBIT J

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and
KIMBERLY A. PISINSKI,

Plaintiffs,

v.

CONSUMER FINANCIAL
PROTECTION BUREAU,

Defendant.

Civil Action No. 13cv-01112 (CKK)

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Regulations

Rules

Other Authorities

INTRODUCTION

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

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

Case 1:13-cv-01111-CKK Document 11-1 Filed 08/27/13 Page 13 of 52

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

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

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

Finally, Plaintiffs' request that this Court find a new separation-of-powers restriction that is tailored uniquely to the Bureau's structure and authorities has no basis. Plaintiffs complain about the Bureau's broad powers, but even if the scope of the Bureau's powers were relevant to the separation-of-powers inquiry, Plaintiffs utterly fail to show that the Bureau's authority is out of step with that exercised by other federal regulatory agencies. Plaintiffs' other claim—that the Constitution *compels* a commission or board structure for the Bureau—is completely unmoored not only from precedent, but also from any separation-of-powers principle. Indeed, if anything, the separation of powers suggests that the policymaking judgment as to how the leadership of the Bureau should be structured falls squarely within Congress's ken.

BACKGROUND

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

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

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

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

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

Federal consumer financial law also includes Title X itself. *See id.* § 5481(14). Title X prohibits "covered persons" (in the main, providers of consumer financial products and services, *see id.* § 5481(6)) and their "service provider[s]" from "engag[ing] in any unfair, deceptive, or abusive act or practice" in violation of Title X or from violating, or offering or providing consumers with a financial product or service not in conformity with, Federal consumer financial law. *Id.* §§ 5531(a), 5536(a)(1). Title X also authorizes the Bureau to adopt rules requiring "full[], accurate[], and effective[]" disclosures to consumers, *id*. § 5532, and ensuring consumers' access to other information in covered persons' control or possession, *id*. § 5533.

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

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

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

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

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

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

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

B. The Bureau's Investigation of Morgan Drexen

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

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

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

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

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

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

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

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

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

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

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

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

C. Kimberly Pisinski

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

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

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

ARGUMENT

I. The Legal Standard

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

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

A court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material only if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facial challenges,

Case 1:13-cv-01112-CKK Document 11-1 Filed 08/27/13 Page 22 of 52

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

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

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

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

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

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

Case 1:13-cv-01112-CKK Document 11-1 Filed 08/27/13 Page 23 of 52

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

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

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

The D.C. Circuit's decision in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), is instructive in this regard. In that case, an independent counsel appointed under the Ethics in Government Act was investigating a former White House official, Michael Deaver, for possibly illegal lobbying activities. Before any indictment issued, Deaver filed a civil complaint challenging the independent counsel provisions of the Ethics in Government Act on separation-of-powers grounds. *Id.* at 66-67. Deaver sought a declaratory judgment and an injunction barring the independent counsel from obtaining an indictment, alleging that without such relief he would suffer irreparable harm in the form of "'continuing destruction of his business,' 'injury to his reputation and dignity,' and 'the expenditure of substantial resources in his defense.'" *Id.* at 67-68. The D.C. Circuit directed dismissal of the complaint, reasoning that Deaver could raise his constitutional claims through a motion to dismiss any eventual criminal prosecution. He could not, however, "by bringing ancillary equitable proceedings, circumvent federal criminal procedure." *Id.* at 71; *see also id.* at 71-73 (Ginsburg, D.H., concurring) (relying on the principle that "'courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief'" (quoting *Younger v. Harris*, 401 U.S. 37, 43-44 (1971))).

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

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

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

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

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

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

Likewise, Morgan Drexen's assertion that the Bureau has "substantially burdened [its] business by demanding that it produce documents that are protected by the attorney-client privilege," Pl. Mem. at 7, does not "'establish the basic requisites of the issuance of equitable relief . . .—the likelihood of substantial and immediate irreparable injury.'" *Lyons*, 461 U.S. at 103 (quoting *O'Shea*, 414 U.S. at 502). As an initial matter, recipients of Bureau CIDs may assert any applicable privilege, including the attorney-client privilege, in response to any such demand. *See* 12 C.F.R. § 1080.8(a). Indeed, Instruction D of the CID that the Bureau sent Morgan Drexen advised the company of its right to assert any applicable privilege. *See* Shaheen Decl. Ex. 1 at 3. More fundamentally, Bureau CIDs can never impose irreparable harm because they are not self-enforcing. The Bureau may not impose sanctions for failing to comply with a CID, but instead must petition a district court for an order enforcing the CID. *See* 12 U.S.C. § 5562(e); 12 C.F.R. § 1080.10. The CID recipient faces sanctions only if it fails to comply with the court's order. *See* 12 C.F.R. § 1080.10(b)(2).

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

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[6] Contrary to Plaintiffs' contention (Pl. Mem. at 5), words like "demand," "[a]ction [r]equired," and "must" in the March 2012 CID do not suggest otherwise. The CID sets forth what the Bureau "demand[s]" and "require[s]"; it does not indicate that the Bureau may enforce those demands and requirements without going to court. Likewise, the statement in the CID that noncompliance "may" subject recipients to a "penalty imposed by law" is simply a reference to the Bureau's regulation on this subject, which provides that the Bureau may "[s]eek civil contempt or other appropriate relief in cases where a court order enforcing a civil investigative demand has been violated." 12 C.F.R. § 1080.10(b)(2). Indeed, the FTC CIDs contain similar language. *See, e.g.*, Exhibit 1 to FTC Denial of Petition to Quash CID issued to Countrywide Periodicals, LLC, *available at* http://www.ftc.gov/os/quash/X080036countrywideorderdenyingpetitiontoquash.pdf.

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

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

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

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

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

Case 1:13-cv-01112-CKK Document 11-1 Filed 08/21/13 Page 28 of 52

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

2. Morgan Drexen is not entitled to declaratory relief

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

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

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

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

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

Indeed, the events leading up to this case reveal that the only conceivable purpose for bringing this action is an inappropriate one. After being advised of possible enforcement action by the Bureau, Morgan Drexen brought suit seeking "an anticipatory adjudication, at the time and place of its choice, of the validity of the defenses it expect[ed] to raise against . . . claims it expect[ed] to be pressed against it." *Hanes*, 531 F.2d at 592. But "[t]he anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse." *Id.* at 592-93; *see also Swish Mktg.*, 669 F. Supp. 2d at 77; *POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 44-45 (D.D.C. 2012). Indeed, "'[c]ourts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum.'" *Swish Mktg.*, 669 F. Supp. 2d at 78 (quoting *AmSouth Bank v. Dale*, 386 F.3d 763, 788 (6th Cir. 2004)). As the Court in *Swish Marketing* put it: "Where a putative defendant files a declaratory action whose only purpose is to defeat liability in a subsequent coercive suit, no real value is served by the declaratory judgment except to guarantee to the declaratory plaintiff [its] choice of forum—a guarantee that cannot be given consonant with the policy underlying the Declaratory Judgment Act." *Swish Mktg.*, 669 F. Supp. 2d at 79 (quoting *Gov't Emps. Ins. Co. v. Rivas*, 573 F. Supp. 2d 12, 15 (D.D.C. 2008)). The absence of any reason to entertain Morgan Drexen's request for declaratory relief is a sufficient basis to deny the request.

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

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

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

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

Finally, courts exercising their discretion under the Declaratory Judgment Act must be "keenly mindful . . . that judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty [the courts are] called on to perform.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). Generally, courts "'will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Id.* (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984)). Requiring Morgan Drexen to raise its constitutional arguments as a defense to the Bureau's enforcement action may, if Morgan Drexen prevails on some statutory ground, obviate the need to address the constitutional question. Accordingly, because the controversy between the parties may be resolved on other grounds, the constitutional issue presented here is not of "sufficient immediacy" to warrant declaratory relief. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

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

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

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

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

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

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

Article III of the Constitution limits federal courts' authority to resolving "Cases" and "Controversies." U.S. Const. art. III, § 2. "For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have 'standing.'" *Hollingsworth v. Perry*, —U.S.—, 133 S. Ct. 2652, 2659 (2013). To establish standing, plaintiffs must first show that they have suffered an "injury in fact," that is, the violation of a legally protected interest that is "(a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotations omitted). Second, "there must be a causal connection between the injury and the conduct complained of." *Id.* Third, it must be "likely" that the injury would be "redressed by a favorable decision." *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Where a plaintiff is seeking declaratory or injunctive relief, she "must show [s]he is suffering an ongoing injury or faces an immediate threat of injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011).

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

* * *

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

III. The Bureau's Structure Is Constitutional

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

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

The Dodd-Frank Act provisions that establish the Bureau comply with these principles. In creating the Bureau, Congress did not aggrandize or abdicate its own powers or encroach on another branch's. The President, Congress, and the courts all maintain their traditional constitutional authorities with regard to the Bureau, and well-established precedent confirms that those authorities are constitutionally sufficient. Moreover, contrary to Plaintiffs' contention, there is nothing unique about the Bureau that would call the application of that precedent into question or give rise to new constitutional requirements specially tailored for the Bureau.

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

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

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

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

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

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

Case 1:13-cv-01115-CKK Document 11-1 Filed 08/27/13 Page 37 of 52

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

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

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

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

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

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

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

No court has ever held that otherwise-permissible for-cause removal restrictions become unconstitutional if applied to an agency headed by a single individual. Contrary to Plaintiffs' contention (Pl. Mem. at 19), *Humphrey's Executor* offers no support for that proposition. To be sure, the Court in that case noted that the FTC was to be a non-partisan body of experts—but only as evidence that Congress intended for-cause removal to be the exclusive avenue for removing commissioners. *Humphrey's Executor*, 295 U.S. at 624. The FTC's status as a multimember body had no bearing on the Court's conclusion that for-cause removal was consistent with the Constitution. *See id.* at 626-32.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Case 3:13-cv-01111-IEG-KSC Document 11-1 Filed 07/22/13 Page 44 of 53

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

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

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

b. Congress has other tools for overseeing the Bureau

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

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

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

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

Case 1:13-cv-01131-CKK Document 11-1 Filed 08/27/13 Page 45 of 52

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

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

3. The Bureau is subject to ordinary judicial review

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

The statutory provision on judicial review to which Plaintiffs object does not provide otherwise. That provision simply directs courts to defer to Bureau interpretations of Federal consumer financial law "as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." 12 U.S.C. § 5512(b)(4)(B). Far from "insulat[ing]" the Bureau from judicial review (Pl. Mem. at 22), this provision merely clarifies that courts should review Bureau interpretations under well-established principles of agency deference, regardless of whether other agencies share authority to administer the laws that the Bureau has interpreted.[17]

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

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

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

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

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

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

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

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

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

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

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

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

As an initial matter, Plaintiffs' contention that the Bureau lacks accountability or has an extraordinary scope of power has already been refuted. As explained above, the Bureau is fully accountable to the President and Congress; its actions are subject to ordinary review by the judiciary; and its powers are comparable to the powers exercised by other regulatory agencies. The Bureau therefore lacks any unique qualities that could somehow trigger a new constitutional requirement for a multimember commission.

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

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

Case 1:13-cv-01112-CKK Document 17-1 Filed 07/22/13 Page 50 of 52

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

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

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

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

Case 1:12-cv-01012-CKK Document 17-1 Filed 08/27/13 Page 51 of 52

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

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

CONCLUSION

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

Respectfully submitted,

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Dated: August 27, 2013

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EXHIBIT K

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI, ***Plaintiffs,*** **v.** **CONSUMER FINANCIAL PROTECTION BUREAU,** ***Defendant.***	Civil Action No. 13-01112 (CKK)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

at 2 (2010).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Case 1:13-cv-01311-EMC-KK Document 17-2 Filed 08/27/13 Page 9 of 43

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

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

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

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

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

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

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

Case 1:13-cv-01112-CKK Document 17-2 Filed 08/27/13 Page 10 of 43

a full and accurate statement of its contents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Case 1:12-cv-01112-CKK Document 17-2 Filed 08/21/13 Page 15 of 43

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: This statement is not a material fact.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: This statement is not a material fact.

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

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

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

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

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

<u>Response:</u> Undisputed.

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

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

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

Ex. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: Undisputed.

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

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

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

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

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

Response: Undisputed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: This statement is not a material of fact.

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

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

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

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

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

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

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

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

Response: Undisputed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a full and accurate statement of its contents.

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

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

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

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

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

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

<u>Response:</u> This statement is not a material fact.

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

<u>Response:</u> This statement is not a material fact.

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

<u>Response:</u> This statement is not a material fact.

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

Response: This statement is not a material fact.

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

Response: This statement is not a material fact.

Respectfully submitted,

Dated: August 27, 2013

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EXHIBIT L

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI, *Plaintiffs,* v. **CONSUMER FINANCIAL PROTECTION BUREAU,** *Defendant.*	Civil Action No. 13-cv-01112 (CKK)

[PROPOSED] ORDER

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

The above-captioned case is hereby DISMISSED.

SO ORDERED this ____ day of ____________________, 2013.

____
Colleen Kollar-Kotelly
United States District Judge

EXHIBIT M

TO THE DECLARATION OF R. GABRIEL D. O’MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI, ***Plaintiffs*,** **v.** **CONSUMER FINANCIAL PROTECTION BUREAU,** ***Defendant*.**	Civil Action No. 13-01112 (CKK) **PLAINTIFFS' OPPOSITION TO CFPB'S MOTION TO DISMISS**

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TABLE OF CONTENTS

TABLE OF AUTHORITES

CASES

STATUTES

RULES

REGULATIONS

INTRODUCTION

Plaintiffs Morgan Drexen, Inc. ("Morgan Drexen") and Kimberly A. Pisinski, Esq. ("Pisinski") oppose the motion to dismiss of the Consumer Financial Protection Bureau ("CFPB"). Despite CFPB's arguments to the contrary, Plaintiffs have every right to bring this facial constitutional challenge under the Supreme Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.* 130 S. Ct. 3138 (2010), and controlling D.C. Circuit precedent. The D.C. Circuit has held that facial challenges—like those advanced by Plaintiffs here—are "presumptively reviewable." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs (NAHB II)*, 440 F.3d 459, 464 (D.C. Cir. 2006) (internal quotations omitted).

CFPB's motion does nothing to address this controlling authority. Instead, CFPB contends that Plaintiffs are not entitled to (1) injunctive relief because they are not suffering irreparable harm; (2) declaratory relief because they are engaging in procedural gamesmanship; or (3) any relief because the constitutional challenges can be resolved in California.

CFPB's arguments are simply wrong. This Court has jurisdiction to entertain Plaintiffs' facial constitutional challenge. Plaintiffs' claims are ripe. Plaintiffs have standing (indeed, CFPB does not even contest Morgan Drexen's standing). Plaintiffs filed this action only after suffering significant injury and being threatened with significantly greater harm. There is no doctrine that requires Plaintiffs to wait like sitting ducks in CFPB's crosshairs, unable to bring a constitutional challenge unless and until CFPB files an enforcement action. As explained below, numerous cases hold the exact opposite.

CFPB's arguments about procedural gamesmanship are belied by the timing and merits of Plaintiffs' suit. CFPB itself represented to the Court that it had not decided whether to file an enforcement action even after Plaintiffs filed suit. Accordingly, CFPB cannot now contend that Plaintiffs somehow knew it would file suit and beat it to the punch. Finally, this Court should exercise its jurisdiction and resolve the constitutional challenge in this case, where both parties consented to an expedited schedule and where merits briefing has already been submitted and will soon be closed. Plaintiffs should not be required to start over again in California in the context of an enforcement proceeding, the resolution of which could take years.

SUMMARY OF RELEVANT FACTUAL BACKGROUND[1]

I. MORGAN DREXEN'S SUPPORT SERVICES AND PISINSKI'S LAW PRACTICE

Morgan Drexen is in the business of licensing its proprietary software to law firms and providing these firms with live paraprofessional and support services. SF ¶ 62. Morgan Drexen provides non-attorney paralegal support services to attorneys in the areas of debt resolution, bankruptcy, personal injury, mass tort litigation, and tax preparation. SF ¶ 63.

Pisinski is a lawyer practicing law in Connecticut. SF ¶ 95. Pisinski is among those attorneys who have contracted with Morgan Drexen to provide non-attorney/paralegal services that support her law practice. SF ¶ 97. Pisinski depends on Morgan Drexen to assist her in providing her clients with high quality and relatively low cost legal services. SF ¶ 98. Pisinski remains responsible for tasks delegated to Morgan Drexen pursuant to Rule 5.3 of the Connecticut Rules of Professional Conduct. Compl. ¶¶ 22, 27.

II. CFPB'S INVESTIGATION OF MORGAN DREXEN

On March 13, 2012, CFPB issued a Civil Investigative Demand ("CID") to Morgan Drexen. SF ¶ 64. The CID contained various mandatory language, including the following:

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[1] The facts are taken from Plaintiffs' Complaint, the Statement of Facts in Support of Motion for Summary Judgment (Docket No. 13-1) ("SF"), and from other materials outside the pleadings given that CFPB seeks dismissal under Federal Rule of Civil Procedure 12(b)(1).

- The "[a]ction [r]equired" is to "[p]roduce [d]ocuments and/or [t]angible [t]hings" and to "[p]rovide [w]ritten [r]eports and/or [a]nswers to [q]uestions" by April 13, 2012." SF ¶ 65.
- "The delivery of this demand to you by any method prescribed by Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service and may subject you to a penalty imposed by law for failure to comply." SF ¶ 66.
- "You must contact Wendy J. Weinberg . . . to schedule a meeting . . . to be held within 10 calendar days after receipt of this CID . . . ." SF ¶ 67.
- Any petition to modify the demand "must be filed . . . within twenty calendar days after service of the CID . . . ." SF ¶ 68.

The CID requested information including communications between Morgan Drexen and its supported attorneys like Pisinski concerning attorney clients, and various personal financial data (including written notes memorializing communications with clients). SF ¶ 69.

Morgan Drexen responded to the CID on April 13, 2012. SF ¶ 70. CFPB followed up on Morgan Drexen's responses with language requiring further production. SF ¶ 72. On April 24, 2012, CFPB wrote: "In light of Morgan Drexen's unacceptable failure to provide the materials described above, it is critical that you produce them immediately and in any event by close of business Friday, April 27, 2012." SF ¶ 73. Over the course of the investigation, Morgan Drexen produced over seventeen thousand pages of documents to CFPB. SF ¶ 74.

Over the course of its investigation, CFPB deposed Jeffrey Katz, David Walker, Laura Wiegman, and Walter Ledda, all from Morgan Drexen. SF ¶ 77.

III. CFPB'S INVESTIGATION INJURES PLAINTIFFS

CFPB's investigation—aside from the California Lawsuit, and aside from any attempt to judicially enforce compliance with the CIDs—has caused significant injury to Morgan Drexen. It has forced Morgan Drexen to "divert[] substantial attention and resources, in terms of paying attorney's fees, as well as the company time necessary to provide officers for depositions, collect and review documents, and otherwise respond to CFPB's demands." SF ¶ 78. CFPB's investigation has significantly increased Morgan Drexen's costs with respect to accessing credit. SF ¶ 79. For example, CFPB's CIDs caused the loss of Morgan Drexen's credit facilities and impacted Morgan Drexen's ability to obtain reasonable financing. SF ¶¶ 80-81. Morgan Drexen now pays 22% interest where, before the CID, Morgan Drexen was able to obtain financing at 4.5%. SF ¶ 82.

CFPB also demanded documents directly from certain of Morgan Drexen's attorney business partners and its marketing services firm (SF ¶¶ 83-84). It also threatened to send subpoenas to all of Morgan Drexen's attorney customers. SF ¶ 88. In addition, during the investigation, CFPB informed counsel to Morgan Drexen that its work with supported attorneys was in violation of the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 *et seq*. SF ¶ 89. CFPB informed counsel to Morgan Drexen that it would not accept any resolution short of Morgan Drexen refusing to support attorneys engaged by clients for both bankruptcy counseling and debt settlement. SF ¶ 93. These engagements comprise a large percentage of Morgan Drexen's total business, and any requirement that Morgan Drexen stop providing these services to attorneys would threaten the viability of Morgan Drexen's business. SF ¶ 94.

CFPB's investigation is causing ongoing injury to Pisinski as well, although for different reasons. Pisinski faced an agency seeking to violate the attorney-client privilege between her and her clients by essentially sending a subpoena to her paralegal. *See* SF ¶¶ 85-86, 97-98, 102-

Case 1:13-cv-01112-CKK Document 14-20 Filed 09/13/13 Page 10 of 28

103. Furthermore, Pisinski depends on Morgan Drexen for paralegal support. SF ¶ 97. If CFPB stops Morgan Drexen from providing its services to Pisinski, it will disrupt Pisinski's legal practice. SF ¶ 99. CFPB has also taken the position that Pisinski's paralegal is acting unlawfully, in performing the precise services that Morgan Drexen performs for Pisinski and for attorneys around the county. SF ¶ 92. This necessarily means that CFPB has taken the position that attorneys who contract with Morgan Drexen to assist in providing bankruptcy and debt resolution services are acting unlawfully. SF ¶ 89. More fundamentally, Pisinski is a lawyer actively engaged in the practice of law, SF ¶ 95, and CFPB is effectively trying to regulate her practice by investigating (and ultimately suing) Morgan Drexen, her paralegal.

IV. PLAINTIFFS SUE CFPB IN THIS COURT

In light of CFPB's actions, the harm caused to Plaintiffs, and CFPB's demands for information protected by the attorney-client privilege (the production of which would violate the attorney client privilege between Pisinski and her clients), Plaintiffs filed the instant suit on July 22, 2013. Docket No. 1.

During a telephone conference with the Court, CFPB represented that it had "not yet determined whether or not to file an enforcement action, and I can't commit to what we will do in that regard . . ." 7/25/13 Tr. 5:10-6:11. The Court commented that it would make an "expedited decision," and therefore it "would be helpful, probably, not to have an enforcement action . . . going on at the same time." *Id.* at 5:20-24. The Court set a summary judgment briefing schedule, with the consent of all parties, and issued an order on July 25, 2013 that provided for merits briefing to be completed by September 25, 2013. Docket No. 8.

Plaintiffs initially sought a temporary restraining order and preliminary injunction, but withdrew their motion after the conference with the Court and in light of the Court's view that this matter was better resolved on summary judgment pursuant to an expedited briefing schedule.

V. **CFPB SUES MORGAN DREXEN IN CALIFORNIA**

Notwithstanding the July 25, 2013 hearing, CFPB filed suit in the United States District Court for the Central District of California against Morgan Drexen and its Chief Executive Officer on August 20, 2013. *CFPB v. Morgan Drexen Inc.*, No. 8:13-cv-01267 (filed Aug. 20, 2013) (the "California Lawsuit"); *see also* Docket No. 14-1. In its Complaint, CFPB alleged that Morgan Drexen and its Chief Executive Officer were in violation of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531(a), 5536(a), 5564(a), and 5581, and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6102(c)(2) and 6105(d). Cal. Compl. ¶ 1.

The same day it filed the California Lawsuit, CFPB issued a press release, stating among other things: "The company falsely claims that it does not charge consumers upfront fees for debt-relief services and falsely represents to consumers that they will become debt free in months if they work with Morgan Drexen."[2] Unlike other statements in CFPB's press release, the foregoing is not couched in terms of what is "alleged" or what CFPB "believes." CFPB presents its allegations as fact.

Pisinski is not a defendant in the California Lawsuit.

Plaintiffs have moved to enjoin the prosecution of the California Lawsuit pending the outcome of this case. *See* Docket Nos. 15, 18-19. That motion is fully briefed and pending resolution.

[2] Press Release, Consumer Protection Financial Bureau, "CFPB Files Suit Against Morgan Drexen for Charging Illegal Fees and Deceiving Consumers" (Aug. 20, 2013) *available at* http://www.consumerfinance.gov/pressreleases/cfpb-files-suit-against-morgan-drexen-inc-for-charging-illegal-fees-and-deceiving-consumers/.

Case 1:13-cv-01510-CKK Document 14 Filed 10/31/13 Page 12 of 28

ARGUMENT

I. LEGAL STANDARD

CFPB moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Mem. in Supp. of Def.'s Mots./Opp to Pls.' Mot. ("Def.'s Br.") 10 (Docket No. 17-1). This Court has recently set forth the applicable standards in ruling on a motion to dismiss under these rules. *See Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv.*, --- F. Supp. 2d ---, 2013 WL 1398570, at *7-8 (D.D.C. Apr. 8, 2013) (Kollar-Kotelly, J.) (granting-in-part, denying-in-part motion to dismiss). By way of summary, Plaintiffs' complaint is "to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact." *Id* at *7 (citing *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005)). Under Rule 12(b)(1), Plaintiffs have the "burden to prove subject matter jurisdiction by a preponderance of the evidence." *Id.* Although the Court may consider "materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction . . . the court must still accept all of the factual allegations in the complaint as true." *Jerome Stevens Pharms., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (internal quotations omitted). Under Rule 12(b)(6), Plaintiffs must allege facts that give rise to a "plausible" claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. THIS COURT HAS JURISDICTION TO HEAR PLAINTIFFS' PRE-ENFORCEMENT FACIAL CONSTITUTIONAL CHALLENGE

A. CFPB Fails to Address Controlling Authority Permitting This Suit

CFPB's memorandum in support of its motion to dismiss ignores the longstanding principle that courts can and should exercise jurisdiction over facial challenges to an agency's enabling statute independent of statutory mechanisms or defenses to enforcement actions.

In *Free Enterprise Fund*, the government argued that the plaintiff had no "private right of action directly under the Constitution" to challenge the agency's structure, asserting that such challenges could only be raised "through established statutory mechanisms or as ***defenses to enforcement actions***." Brief for the United States, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 3290435, at *22-23 (emphasis added). The Court rejected the government's argument, holding that federal courts have original jurisdiction and equitable power to hear and remedy such constitutional claims. *Free Enterprise Fund*, 130 S. Ct. at 3151 n.2. The Court found that the petitioner's constitutional claim was "collateral" to particular agency orders and rules because petitioners more fundamentally "object to the Board's ***existence***." *Id.* at 3150 (emphasis added). Accordingly, the petitioner was "entitled to declaratory relief sufficient to ensure that the [rules] to which they are subject will be enforced only by a constitutional agency . . . ." *Id*. at 3164.

Here, like the plaintiff in *Free Enterprise Fund*, Plaintiffs bring a facial constitutional challenge to CFPB's enabling statute. Like the plaintiff in *Free Enterprise Fund*, Plaintiffs fundamentally object to CFPB's existence – not to any particular CID or any given agency action. Accordingly, the Court has jurisdiction over this action.

This conclusion is further required by controlling D.C. Circuit precedent. *See Gen. Elec. Co. v. E.P.A.*, 360 F.3d 188, 190-94 (D.C. Cir. 2004) (holding that the district court should have exercised jurisdiction over a "facial" constitutional challenge to the CERCLA regime, and emphasizing that the "usual practical considerations counseling against pre-enforcement review are not present in the adjudication of a facial [constitutional] claim."); *Hettinga v. United States*, 560 F.3d 498, 506 (D.C. Cir. 2009) (exercising jurisdiction over a constitutional claim and rejecting the government's argument that the claim first required exhaustion of administrative remedies); *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996) (exercising jurisdiction and noting that there is a "necessary distinction between a constitutional challenge that is exclusively directed to the source of putative agency authority and a challenge to the manner in which the agency has exercised or . . . failed to exercise that authority."); *Elk Run Coal Co. v. U.S. Dep't of Labor*, 804 F. Supp. 2d 8, 21 (D.D.C. 2011) (exercising jurisdiction over the plaintiff's "broad facial and systemic challenges," which did not require prior exhaustion of administrative remedies). *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 589 (2006) (rejecting the government's argument that the Court should abstain from reviewing a Guantanamo detainee's challenge to a military commission in favor of the commission proceeding, and holding that the government "has identified no other important countervailing interest that would permit federal courts to depart from their general duty to exercise the jurisdiction that is conferred upon them by Congress").

B. Plaintiffs Are Not Required to Expose Themselves to an Enforcement Action Before Seeking Relief From the Unconstitutional Structure of CFPB

Plaintiffs are not required to expose themselves to an enforcement action before seeking relief. In a footnote, CFPB argues against the application of *Free Enterprise Fund*, arguing that the plaintiffs in that case were subject to "sanctions for their failure to comply with agency orders, and they had no other adequate avenue for judicial review of their claims." Def.'s Br. at 17 n.11. CFPB's argument implies that no plaintiff could ever challenge the constitutionality of CFPB's enabling statute unless and until CFPB sues it. Contrary to CFPB's argument, the Supreme Court's holding is not so limited. In *Free Enterprise Fund*, the government "advise[d] petitioners to raise their claims by appealing a Board sanction." 130 S. Ct. at 3150. The Court rejected this argument, holding that "the investigation . . . produced no sanction" and the plaintiffs would not be required to "*incur* a sanction" before suit. *Id.* (emphasis in original).

Case 1:13-cv-01212-CKK Document 1-20 Filed 08/13/13 Page 15 of 28

Free Enterprise Fund does not require Plaintiffs—after being placed in CFPB's crosshairs and drawing fire—to wait like sitting ducks, and to continue doing business at risk. *See also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"); *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 581 (1985) ("One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough") (quotation omitted); *cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights") (citation omitted).

Here, Plaintiffs filed suit even later in the investigatory process than did the plaintiffs in *Free Enterprise Fund*. 130 S. Ct. at 3149 ("The Board inspected the firm, released a report critical of its auditing procedures, and ***began a formal investigation***. [The plaintiffs] then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers.") (emphasis added). If anything, Plaintiffs' claims are more appropriate due to the advanced stage of CFPB's investigation, its issuance of the Notice and Opportunity to Respond and Advise (NORA) letter, and the existing harm and damage caused by the CIDs.

C. CFPB Cannot Be Permitted to Strong-Arm Plaintiffs

If adopted, CFPB's position that Plaintiffs must wait unless and until CFPB sues before raising a constitutional challenge to the agency's very existence would have the practical effect of permitting CFPB to "strong-arm[] . . . regulated parties into voluntary compliance without the opportunity for judicial review." *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012). CFPB could simply "investigate" parties out of business by sending CIDs to all of their business partners without ever facing a facial constitutional challenge. The Supreme Court rejected a similar argument in *Sackett*, and the Court should reject CFPB's argument here.

D. There Is No Congressional Restriction on Pre-Enforcement Review

Courts begin with a "'strong presumption that Congress intends judicial review of administrative action' . . . which 'may be overcome only upon a showing of clear and convincing evidence of a contrary intent.'" *Lepre v. Dept. of Labor*, 275 F.3d 59, 72 (D.C. Cir. 2001) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Traynor v. Turnage*, 485 U.S. 535, 542 (1988)). "[S]uch judicial oversight is needed to protect against 'freewheeling agencies meting out their brand of justice in a vindictive manner.'" *Id.* (quoting *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 237 (1968)). Here, CFPB has not argued that Title X of the Dodd-Frank Act restricts the historic availability of pre-enforcement review (and even if it did, that would be a separate constitutional violation).

III. THIS CASE PRESENTS A "PURELY LEGAL CLAIM" THAT IS "PRESUMPTIVELY REVIEWABLE"

"The remedy made available by the Declaratory Judgment Act . . . relieves potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while instituting suit at his leisure—or never." 10B Charles Alan Wright, Arthur R. Miller, *et al.*, *Federal Practice and Procedure* § 2751 (3d ed. 1998) (quotation omitted).

The D.C. Circuit has "held that a claim that raises purely legal questions is presumptively fit for judicial review . . . ." *Time Warner Entm't Co.*, 93 F.3d at 974. "Thus, a controversy is ripe if further administrative process will not aid in the development of facts needed by the court to decide the question it is asked to consider." *Id.* (quotation omitted). "A purely legal claim in the context of a facial challenge . . . is presumptively reviewable." *NAHB II*, 440 F.3d at 464 (quoting *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs (NAHB I)*, 417 F.3d 1272, 1282 (D.C. Cir. 2005)). This is so because the "challenged features will not change from case to case or become clearer in a concrete setting." *Id.*; *see also Venetian Casino Resort, LLC v. E.E.O.C.*, 409 F.3d 359, 364-65 (D.C. Cir. 2005) (holding that case was ripe for decision because it presented a "clear-cut legal question" that could be resolved by analyzing relevant statutes and legal authority); *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (same); *Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1039 (D.C. Cir. 2002) (same). *Cf. Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. Apr. 9, 2009) ("In the context of a facial challenge [to a statute], a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record.").

Here, Plaintiffs have brought a facial constitutional challenge to CFPB's enabling statute, a claim that is "presumptively reviewable" under the law of this circuit. The question of whether CFPB's structure is constitutional will not change from case to case or become clearer in a concrete setting. This Court does not need a developed factual record to resolve Plaintiffs' challenge.

CFPB does not argue ripeness in its moving papers, but this matter is undeniably ripe for judicial review in any event. "The framework for analyzing the ripeness of pre-enforcement agency action is well established. Under the two-part test set forth by the Supreme Court in *Abbott Laboratories,* [the court] must consider 'both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration.'" *Ciba-Geigy Corp. v. U.S.E.P.A.*, 801 F.2d 430, 434 (D.C. Cir. 1986) (quoting *Abbott Labs v. Gardner,* 387 U.S. 136, 149 (1967)). "Fitness and hardship function as independent but related variables, the former as a measure of the interests of the court and agency in postponing review and the latter as a measure of the challenging party's countervailing interest in securing immediate judicial review." *Id.*

"The judiciary's ultimate determination of ripeness in a specific setting depends on a pragmatic balancing of those two variables and the underlying interests which they represent. *Id.* (quoting *Continental Air Lines, Inc. v. CAB,* 522 F.2d 107, 125 (D.C. Cir. 1974) (en banc)).

Here, Plaintiffs satisfy both parts of the ripeness test. Plaintiffs' facial constitutional challenge is fit for judicial review because "the issue tendered is a purely legal one." *Time Warner Entm't Co.*, 93 F.3d at 972. (quotation omitted) (holding that where "any difference in the ways in which franchising authorities might actually implement the requirement does not affect the First Amendment analysis of this argument, the issue tendered is . . . fit for judicial review"). Plaintiffs face significant hardship should the Court withhold consideration, as demonstrated by affidavits submitted by Walter Ledda and Pisinski. Morgan Drexen has already spent significant moneys in attorney's fees to respond to CFPB's investigation, and has incurred increased costs with respect to accessing credit and financing. SF ¶¶ 78-82. More fundamentally, CFPB informed counsel to Morgan Drexen that it would not accept any resolution short of Morgan Drexen refusing to support attorneys engaged by clients for both bankruptcy counseling and debt settlement. SF ¶ 93. These engagements comprise a large percentage of Morgan Drexen's total business. Any requirement that Morgan Drexen stop providing these services threatens the viability of Morgan Drexen's business. SF ¶ 94.

Pisinski will also suffer significant hardship in the absence of the Court's review because she relies upon Morgan Drexen to provide her with paralegal support. SF ¶ 97. If CFPB's actions against Morgan Drexen are successful, CFPB will stop Morgan Drexen from providing services, disrupting Pisinski's practice. SF ¶ 99. CFPB has also taken the position that Morgan Drexen's business model is unlawful—which necessarily means that CFPB believes that Pisinski is acting unlawfully by partnering with Morgan Drexen to provide bankruptcy and debt resolution services. SF ¶¶ 89, 92. More fundamentally, Pisinski is a lawyer actively engaged in the practice of law, SF ¶ 95, and CFPB is effectively regulating her practice by taking action against Morgan Drexen (her paralegal), and alleging that Morgan Drexen is acting unlawfully.

IV. BOTH PLAINTIFFS HAVE STANDING TO SUE

Plaintiffs demonstrated that they have standing to maintain this suit in their memorandum in support of motion for summary judgment. *See* Mem. in Supp. of Pls.' Mot for Summ. J. ("Pls.' Br.") 4-7, Docket No. 13-2.[3] CFPB's motion does not contest Morgan Drexen's standing argument in any way. Although CFPB contests Pisinski's standing, Def.'s Br. at 22-23, "if constitutional and prudential standing can be shown for at least one plaintiff, [the court] need not consider the standing of other plaintiffs to raise that claim." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

In any event, Pisinski does have standing. To have Article III standing, a party must meet three requirements: (1) an injury-in-fact that is (a) concrete and particularized, and (b) actual or imminent; (2) the injury must be caused by or fairly traceable to the challenged act; and (3) the injury must be redressable by a favorable court decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). CFPB's argument against Pisinski's standing is limited to her interest in protecting her clients' confidential information. Def.'s Br. at 23. To be sure this is a weighty interest. It is also a straw man because CFPB's actions threaten Pisinski with far more substantial injury.

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[3] Specifically, Plaintiffs argued that Morgan Drexen had standing because: (1) Morgan Drexen is subject to CFPB's authority and incurred significant time and expense resulting therefrom, Pls.'s Br. at 4-6; (2) Morgan Drexen faces an immediate threat of further injury due to CFPB's litigation threat, *id.* at 6; (3) Morgan Drexen suffered concrete and presently existing harm from CFPB's actions in sending CIDs to Morgan Drexen's business partners, *id.* at 7; and (4) CFPB demanded privileged information that presented Morgan Drexen with a Hobson's choice of violating its ethical obligations and harming client relationships or facing CFPB retribution, *id.*

Case 1:13-cv-01112-CKK Document 11-1 Filed 09/13/13 Page 20 of 28

Pisinski meets the *Lujan* test for the same reasons that withholding consideration would cause her to suffer significant hardship. Further, CFPB's actions fly in the face of the Dodd-Frank Act's exemption for lawyers engaged in the practice of law, as well as long-standing precedent attributing the regulation of lawyers to the States under the Tenth Amendment. *See* 12 U.S.C. § 5517(e) (exempting attorneys from CFPB authority under the Consumer Financial Protection Act); *Am. Bar Ass'n v. F.T.C.*, 671 F. Supp. 2d 64 (D.D.C. 2009), *vacated as moot*, 636 F.3d 641 (D.C. Cir. 2011) (district court invalidated attempt by FTC to regulate lawyers; D.C. Circuit vacated as moot in light of subsequent legislation). *See also Moore v. Suthers*, Case No. 11CV7027, at 18 (Colo. Dist. Ct. Denver Cnty. Sept. 12, 2012) (holding that "because of the nature of the relationship between attorneys and their non-lawyer assistants, where attorneys can be held professionally responsible for their assistants' actions, the Court concludes that regulation of an attorney's non-lawyer assistant [Morgan Drexen] has direct implications on the attorney and therefore implicates the separation-of-powers doctrine.") (attached as Exhibit A hereto). Pisinski has standing to challenge the constitutionality of the agency that is threatening her client confidentiality, regulating her practice, investigating (and now suing) her paralegal, and alleging that what her paralegal (Morgan Drexen) is doing to assist her in the practice of law is somehow unlawful.

V. CFPB'S SECOND-FILED ENFORCEMENT ACTION DOES NOT REQUIRE DISMISSAL OF THIS CASE

CFPB argues that Plaintiffs' suit should be dismissed under *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987) because (a) permitting Plaintiffs' suit would "frustrate the final judgment rule," and (b) if Morgan Drexen wins on the merits in California then the court "might be able to avoid deciding the constitutional issue." Def.'s Br. at 13. CFPB's reliance on *Deaver* is misplaced because *Deaver* stands for the limited proposition that civil proceedings are stayed pending collateral ***criminal*** proceedings. 822 F.2d at 71 ("Prospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal ***criminal*** procedure") (emphasis added). Further demonstrating that the rationale of *Deaver* is limited to criminal cases, the D.C. Circuit held that: "all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved." *Id.* at 69 (citations omitted). "'Bearing the discomfiture and cost of prosecution for crime even by an innocent person is one of the painful obligations of citizenship.'" *Id.* (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)). Permitting civil suits in the context of criminal proceedings would further permit "much more extensive discovery" that Congress "hardly intended to permit criminal defendants." *Rankins v. Winzeler*, No. 02-cv-50507, 2003 WL 21058536, at *6 (N.D. Ill. May 9, 2003) (citing *Deaver*, 822 F.2d at 68-71).

The rationale of *Deaver* does not extend to civil enforcement proceedings because there are no countervailing concerns about circumventing criminal procedure. "It is well-established that a district court has discretionary authority to stay a civil proceeding pending the outcome of a parallel ***criminal*** case when the interests of justice so require . . . . Courts are afforded this discretion because the denial of a stay could impair a party's Fifth Amendment privilege against self-incrimination, extend criminal discovery beyond the limits set forth in Federal Rule of Criminal Procedure 16(b), expose the defense's theory to the prosecution in advance of trial, or otherwise prejudice the criminal case." *Estate of Gaither ex rel. Gaither v. District of Columbia*, No. 03-cv-1458, 2005 WL 3272130, at *3 (D.D.C. Dec. 02, 2005) (citations omitted and emphasis added).

Here, this is a civil case, not a criminal case. In any event, no discovery is necessary because this is a facial constitutional challenge. Thus, there is no danger that this lawsuit will impair Plaintiffs' Fifth Amendment rights or provide for criminal discovery beyond the limits of the Federal Rules of Criminal Procedure. Moreover, as demonstrated *supra*, the Supreme Court and D.C. Circuit have repeatedly entertained constitutional challenges to potential civil enforcement activity of the very type CFPB argues is barred by *Deaver*.

VI. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

CFPB argues that Plaintiffs' suit should be dismissed because "Morgan Drexen is not entitled to injunctive relief." Def.'s Br. at 11. This argument flies in the face of Supreme Court precedent which recognizes that equitable relief is the "proper means for preventing entities from acting unconstitutionally." *See Free Enterprise Fund,* 130 S. Ct. at 3151 n.2 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)); *Id.* ("It is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution") (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). CFPB's memorandum neither mentions this authority nor explains what else the Court could do if it determines that CFPB is unconstitutional.

CFPB's focus on its investigation being "now-completed" and that it has "not sought enforcement" of any CIDs mischaracterizes Plaintiffs' claim. *See* Def.'s Br. at 14, 17. Plaintiffs are not challenging CFPB's investigation or its CIDs. They are seeking an order declaring CFPB unconstitutional and enjoining it from exercising any authority. It is the fact that CFPB is purporting to exercise authority over Plaintiffs that gives rise to the harm entitling Plaintiffs to injunctive relief, not any particular action. As the Court noted in *Free Enterprise Fund*, in finding that it had jurisdiction to resolve the plaintiff's constitutional challenge to the agency's existence, "petitioners object to the Board's existence, not to any of its auditing standards. Petitioner's general challenge to the Board is 'collateral' to any Commission orders or rules from which review might be sought." 130 S. Ct. at 3150 (citation omitted).

CFPB's reliance on cases involving CIDs and subpoenas from other agencies is inapposite because those cases did not involve constitutional challenges to the agency's very existence. *See* Def.'s Br. at 16 (citing cases involving the FTC, Office of Thrift Supervision, and SEC). Here, as explained *supra*, Plaintiffs are differently situated because they raise a facial constitutional challenge to CFPB's existence.

VII. THE COURT SHOULD NOT DECLINE TO EXERCISE ITS DISCRETION TO ISSUE A DECLARATORY JUDGMENT

As a fallback, CFPB asks that this Court exercise its discretion to decline to issue declaratory relief. Def.'s Br. at 17-21. CFPB makes this request because it claims that declaratory relief would "serve no useful purpose," and Morgan Drexen can raise any constitutional challenge in the California Lawsuit. *Id.* at 18-19. CFPB's argument that declaratory relief would not be useful should be rejected out of hand because declaratory judgment would serve a useful purpose and fulfill the public interest embodied in the Constitution's core principles of separation of powers and accountability to the electorate.

CFPB's argument that this case should be dismissed in favor of the California Lawsuit should also be rejected, but for different reasons. First and most obviously, Pisinski is not a defendant in the California Lawsuit. Dismissing this case in favor of the California Lawsuit would leave Pisinski without a remedy. Second, the cases on which CFPB relies did not involve facial constitutional challenges to an agency's enabling statute. For example, *Swish Marketing, Inc. v. F.T.C.* involved a plaintiff facing investigation by the FTC who sued for declaratory judgment as to the amount of damages for which it would be liable if the agency sued him and won the case. 669 F. Supp. 2d 72, 75-76 (D.D.C. 2009). Because the plaintiff's request was limited to the quantum of damages, no ruling from the Court in that case could ever possibly resolve the underlying merits. *See Id.* at 77-78. Here, on the other hand, Plaintiffs' facial constitutional challenge is presumptively reviewable. Similarly, in *POM Wonderful LLC v. F.T.C.*, the plaintiff sought a declaratory judgment that certain statements in settlement agreements between the FTC and other parties violated the plaintiff's due process rights. 894 F. Supp. 2d 40, 42 (2012). Neither case involved a facial constitutional challenge to the enabling statute of the agency.

Moreover, even if this Court extended these cases beyond existing precedent to cover a facial constitutional challenge, dismissal in favor of the California Lawsuit would still be inappropriate. In *POM Wonderful*, the court noted that "there are no dispositive factors" in deciding whether to dismiss a first-filed case in favor of an enforcement action, but held that the "D.C. Circuit has found [the following] to be useful considerations":

> [1] Whether [declaratory relief] would finally settle the controversy between the parties; [2] whether other remedies are available or other proceedings pending; [3] the convenience of the parties; [4] the equity of the conduct of the declaratory judgment plaintiff; [5] prevention of 'procedural fencing'; [6] the state of the record; [7] the degree of adverseness between the parties; and [8] the public importance of the question to be decided.

Id. at 44 (quoting *Hanes Corp. v. Millard*, 531 F.2d 585, 592 n.4 (D.C. Cir. 1976)).

Here, almost every single factor weighs in favor of the Court's retaining jurisdiction or is otherwise neutral:

First, declaratory relief would finally settle the controversy between Plaintiffs and CFPB. This is a facial constitutional challenge to Title X of the Dodd-Frank Act creating CFPB. If Plaintiffs are successful, there will be nothing further to litigate.

Second, although other proceedings are pending, this case is more advanced, and the only remedy available for a constitutional violation is to exercise equitable relief. Here, Plaintiffs filed suit on July 22, 2013, and both parties have already submitted merits briefing. In California, meanwhile, the case has not proceeded beyond CFPB's complaint.

Third, the convenience of the parties weighs in favor of this Court. CFPB is based in Washington, D.C., and its convenience supports this forum. Although Plaintiffs are located elsewhere, the majority of CFPB's investigation took place in Washington, D.C., and Plaintiffs have availed themselves of this forum. CFPB cannot object based on Plaintiffs' convenience. Further, Pisinski is located in Connecticut, and Washington, D.C. is more convenient to her than California.

Fourth, Plaintiffs have acted with the utmost equity and integrity in bringing this action. In *POM Wonderful*, the Court was persuaded that "POM's conduct leaves the disfavored appearance that POM hastily filed the instant case, in part, to secure tactical leverage . . ." 894 F. Supp. 2d at 45. Here, by contrast, Plaintiffs brought a facial constitutional challenge to the structure of an agency purporting to exercise authority over them through the issuance of CIDs. Plaintiffs acted before—in the words of CFPB's counsel—CFPB had "determined whether or not to file an enforcement action." 7/25/2013 Tr. 6:4-5. Notwithstanding CFPB's representations to the Court, CFPB claims that Morgan Drexen attempted to "beat [CFPB] to the courthouse" (Def.'s Br. at 1), and that "the only conceivable purpose for bringing this action is an inappropriate one (Def.'s Br. at 19). To the contrary, the record reflects that CFPB was not sure about suing (so there was no race), and an equally if not more plausible "conceivable purpose" for bringing this action was to raise a constitutional challenge to the validity of CFPB, a question that has been raised by others[4] but never resolved.

[4] Law Professors (SF ¶¶ 133-34), regulated entities (SF ¶¶ 135-37), the Chamber of Commerce (Docket No. 19 at 5), and members of Congress (SF ¶ 132) have raised similar concerns. Yesterday, Financial Services Committee Chairman Jeb Hensarling stated that "CFPB is arguably the single most powerful and least accountable Federal agency in the history of America" and that "[CFPB] was designed to operate outside the usual system of checks and balances that applies to almost every government agency." Statement of J. Hensarling, (Sept. 12, 2013) (*available at* http://www.loansafe.org/statement-on-cfpb-semi-annual-report).

Fifth, the prevention of procedural fencing weighs heavily in favor of keeping this case here. As explained above, Plaintiffs filed here with the utmost equity and integrity. CFPB, on the other hand, indicated that it had not "determined whether or not to file an enforcement action." *Id.* Then, after the Court stated that "[i]t would be helpful, probably, not to have an enforcement action, which they're claiming is unconstitutional, going on at the same time," *Id.* 5:22-24, CFPB rushed to the courthouse in California and filed an enforcement action.

Sixth, the state of the record weighs in favor of this Court because merits briefing is well advanced here, and there has been no activity in the California case.

Seventh, the degree of adverseness between the parties is neutral. The parties are sufficiently adverse regardless of the forum.

Eighth, the public importance of the question to be decided—the constitutionality of a federal agency based in Washington, D.C.—weighs heavily in favor of keeping the case in this Court, which has particular expertise and experience in adjudicating constitutional questions and challenges to agency action.

CFPB's argument that Plaintiffs won the "race to the courthouse," Def.'s Br. at 21, is misguided for the reasons explained in Plaintiffs' reply in support of their motion for a temporary restraining order and preliminary injunction enjoining CFPB from prosecuting its second-filed action. *See* Pls.' Reply at 9, Docket No. 19.

VIII. THE COURT SHOULD NOT PERMIT CFPB TO WHIPSAW PLAINTIFFS SUCH THAT THEY CAN NEVER SEEK JUDICIAL REVIEW EXCEPT ON CFPB'S TERMS

Taken together, CFPB's arguments stand for the unique proposition that Plaintiffs may never bring a facial constitutional challenge absent litigation initiated by CFPB. For example, CFPB contends that Plaintiffs did not have standing during the investigation phase because its CIDs are not self-enforcing and CFPB had not yet decided whether to sue. Then, after Plaintiffs

Case 1:13-cv-01211-CKK Document 14-10 Filed 09/13/13 Page 27 of 28

sued, CFPB declared its investigation "complete" and filed the parallel California Lawsuit, now contending that this Court should decline to exercise jurisdiction in favor of California. If adopted, CFPB's argument would whipsaw Plaintiffs and eliminate the type of pre-enforcement review espoused by the Supreme Court and the D.C. Circuit. It would also give CFPB license to "strong-arm . . . regulated parties into 'voluntary compliance' without the opportunity for judicial review," the exact evil against which the Supreme Court warned in *Sackett*. 132 S. Ct. at 1374. In CFPB's view, it could threaten action against anyone, secure in the knowledge that if it were ever challenged, it could delay the result and obtain dismissal simply by filing an enforcement action in another forum. The law does not give CFPB such a trump card.

The Court could still exercise jurisdiction over this matter even if CFPB had simply concluded its investigation and never brought an enforcement action. *See Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982) (holding that when an agency withdraws an order while maintaining that the legal position of the order is justified or is likely to be reinstated, the claim should not be considered moot); *Nader v. Volpe*, 475 F.2d 916, 917 (D.C. Cir. 1973) ("Where a court is asked to adjudicate the legality of an agency order, it is not compelled to dismiss the case as moot whenever the order expires or is withdrawn"). *See also Dow Chem. Co. v. EPA*, 605 F.2d 673, 679-80 (3d Cir. 1979) (denying EPA's motion to dismiss where EPA withdrew the challenged regulation and holding that the challenged conduct "has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests" of the plaintiff) (quotation omitted).

Here, Plaintiffs challenge CFPB's existence, not its actions. Regardless of any individual CID, subpoena, or enforcement action, CFPB contends that it has the authority to regulate lawyers engaged in the practice of law. CFPB has already subjected Plaintiffs to its authority, regardless of whether its CIDs are "self-enforcing" or not. Plaintiffs are entitled to their day in court, and, for the reasons stated herein, it should be in this Court.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny CFPB's motion to dismiss.

Dated: September 13, 2013

Respectfully submitted,

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EXHIBIT N

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI, ***Plaintiffs*,** **v.** **CONSUMER FINANCIAL PROTECTION BUREAU,** ***Defendant*.**	Civil Action No. 13-01112 (CKK) **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Case 1:13-cv-01112-CKK Document 15-1 Filed 09/23/13 Page 4 of 28

Rules

PRELIMINARY STATEMENT

The opposition of the Consumer Financial Protection Bureau ("CFPB") analyzes CFPB's lack of checks (no presidential at-will removal, no congressional appropriations oversight, no internal checks though commission voting) one at a time. However, CFPB never confronts Plaintiffs' core argument—that CFPB is unconstitutionally structured and historically unique because it lacks ***any*** of these safeguards. This analytical flaw pervades every aspect of CFPB's Opposition. As explained below, evaluating all of these features together, and in conjunction with CFPB's broad power, discretion, and limited judicial review, the inescapable conclusion is that CFPB is unmoored from the Nation's history and traditions, which the Supreme Court says is the guide to evaluating the constitutionality of government power. No agency has all of these elements of autonomy, and no case supports or even considers the constitutionality of these features combined. The Court should grant Plaintiffs' Motion for Summary Judgment.

I. CFPB DOES NOT CONFRONT THE CUMULATIVE IMPACT OF ITS STRUCTURAL FEATURES IN COMBINATION

CFPB fails to join the main issue: whether CFPB's aggregate elements of autonomy render it unconstitutional. Plaintiffs' opening brief demonstrated that CFPB's structure was entirely novel in that no other comparable agency aggregated its constitutionally troubling features together: it is undisputed that the CFPB Director does not serve at the pleasure of the President; he has half a billion dollars to spend annually without being subject to Congress's appropriations power; and he does not have to build consensus for decisions through a multimember structure. Pls.' Mem. at 16. CFPB's opposition evaluates and discusses each of these features in ***isolation***; however, CFPB never confronts their ***cumulative*** impact.

As the U.S. Chamber of Commerce has stated, Congress broke new ground when it created CFPB by combining features of power and autonomy:

> [T]here is no other agency head who exercises sole decisionmaking authority with regard to rulemaking, enforcement and supervision actions, and every other matter—***and*** need not obtain the concurrence of colleagues on a multi-member commission; ***and*** who also has policy independence from the President such that he or she may be removed from office only 'for inefficiency, neglect of duty, or malfeasance in office'; ***and*** who also has plenary power to appoint every one of the agency's employees; ***and*** who also has the ability to spend more than half a billion dollars without congressional approval.

Statement of the U.S. Chamber of Commerce on "Enhanced Consumer Financial Protection After the Financial Crises," *U.S. Senate Committee on Banking, Housing, and Urban Affairs*, at 4 (July 19, 2011) (emphasis in original).[1]

This year, the D.C. Circuit held that combining legitimate structural features can result in an unconstitutional entity: "[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute." *Ass'n of American Railroads v. U.S. Dept. of Transp*., 721 F.3d 666, 673 (D.C. Cir. 2013). Here, the combination of CFPB's features of autonomy makes the agency novel and unprecedented. CFPB does not—and cannot—cite any case or any historical practice that would justify CFPB's combined lack of structural safeguards. Under *Ass'n of American Railroads*, CFPB's "novelty may . . . signal unconstitutionality." *Id.* at 673.

Instead, CFPB relies on cases like *Humphrey's Executor* (Opp'n at 25), which approved a restriction on the President's ability to remove FTC Commissioners (which supports CFPB's argument that Congress may restrict the President's ability to remove its Director); but then, CFPB denies that FTC's multimember structure was relevant to the Court's analysis. Opp'n at 27-28. Likewise, CFPB cites to agencies such as the Social Security Administration ("SSA"),

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[1] Available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=19e3efe3-0c50-47df-bb3c-b75ff93e7a5f (lasted visited Aug. 5, 2013).

which has a single head (which supports CFPB's argument that a multimember commission is not necessary), but ignores that the SSA is—unlike CFPB—subject to congressional appropriation oversight.

The uncontroverted facts of this case demonstrate that Congress entered into new territory in establishing this new "Bureau." CFPB's argument—that Plaintiffs' theory is "unmoored" from precedent (Opp'n at 3)—has it backward. It is Congress that created an agency "unmoored" from legal precedent and the Nation's history and traditions.

II. CFPB PROVIDES NEITHER JUDICIAL CRITERIA NOR A LIMITING PRINCIPLE

CFPB's brief seems to suggest that Congress has unfettered discretion to set up agencies however it wants, and CFPB does not appear to acknowledge the limits of this authority or the criteria the Court should consider. And, as explained above, CFPB's "one at a time" analysis of the structural features suggests that the Court should not consider, from a functional separation of powers perspective, the broader context of how CFPB's powers and safeguards work together. However, as Plaintiffs demonstrated in their opening brief, a constitutional challenge to agency structure should be informed by the overall context and comparing the scope of agency power to the accompanying structural protections (checks, balances, and oversight). Pls.' Mem. at 20-21. The case law provides the following foundational principles that should guide the Court's analysis:

1. The Court has the authority to review, and if necessary declare unconstitutional, an agency's structure.[2]

2. "[S]tructural protections against abuse of power [are] critical to preserving liberty."[3]

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[2] *Free Enter. Fund v. Pub. Co. Acct'ing Oversight Bd.*, 130 S. Ct. 3138, 3160 (2010).

3. Federal agencies must have constitutional "checks and balances."[4]

4. The extent of the required checks and balances depends on the scope of the agency's powers and duties.[5]

5. History and "traditional ways of conducting government give meaning to the Constitution."[6]

6. "[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute."[7]

7. An agency's "novelty may . . . signal unconstitutionality."[8]

8. "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."[9]

When applying these criteria to evaluate CFPB, it is clear that CFPB fails the constitutional test. Here, CFPB has one of the broadest delegations of power in history yet ***each*** of the most important restraints on agency power (presidential at-will removal,

[3] *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).
[4] *Ralpho v. Bell*, 569 F.2d 607, 620 (D.C. Cir. 1977) (holding that it is "daring to suggest that Congress, though subject to the checks and balances of the Constitution, may create a subordinate body free from those constraints"); *compare Fed. Mar. Comm'n v. S. C. State Ports Auth*., 535 U.S. 743, 773 (2002) (Breyer, J., dissenting) (observing that the Court permitted Congress to delegate rulemaking and adjudicative powers to agencies in part "because the Court established certain safeguards surrounding the exercise of these powers.").
[5] *Morrison v. Olson*, 487 U.S. 654, 671-73 (1988) (finding that the independent counsel had "limited jurisdiction and tenure" and "lack[ed] policymaking or significant administrative authority" and therefore was not "so central to the functioning of the Executive Branch" to require at-will presidential removal); Pls.' Mem. at 20-21.
[6] *Bauer v. Marmara*, 2013 WL 1684051, at *3 (D.D.C. 2013) (quotations and citations omitted).
[7] *Ass'n of American Railroads v. U.S. Dept. of Transp*., 721 F.3d 666, 673 (D.C. Cir. 2013).
[8] *Id.* at 673.
[9] *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (quoting The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison)).

Case 1:13-cv-01112-CKK Document 21 Filed 10/11/13 Page 9 of 28

congressional appropriations oversight, multimember commission) is absent. Accordingly, CFPB's novel structure violates the Constitution.

III. CFPB'S POSITION CONTRADICTS THE HISTORICAL USE OF MULTIMEMBER COMMISSIONS FOR COMPARABLE AGENCIES

CFPB argues that the Supreme Court has upheld restrictions on the President's removal of members of multimember Commissions. *See* Opp'n at 25 (*citing Humphrey's Executor*). However, CFPB also argues that multimember commissions have no role to play in our system of constitutional checks and balances or in preserving the democratic structure of our government. Nothing could be further from the truth.

In creating independent agencies with broad jurisdiction, Congress has traditionally balanced the need for an agency that was independent of the President's removal power through the use of a multimember, often bipartisan, commission. Such a commission structure insures that power is not held in the hands of a single individual. In addition, Congress has staggered the terms of members of such Commissions such that each newly-elected President has the ability to appoint at least some Commission members. In many instances the President also has the right to designate the Commission Chairman. Such provisions insure that these agencies, while independent of the President, are not totally divorced from the democratic process and the will of the electorate. If Congress intended to give CFPB independence from the removal power of the President akin to that of other independent multimember agencies that enjoy similarly broad authority—much of which was transferred to CFPB—then Congress should have created CFPB as a multimember commission.

In arguing against the multimember structure (Opp'n at 37-38), CFPB does not confront the Nation's 125-year history, beginning with the ICC, of using the multimember structure for independent regulatory agencies with broad delegations such as the SEC, FTC, and the CPSC.

Case 1:13-cv-01182-CKK Document 15-1 Filed 09/13/13 Page 10 of 28

However, this history is ***critical to the constitutional analysis*** because "traditional ways of conducting government give meaning to the Constitution." *Bauer v. Marmara*, 2013 WL 1684051, at *3 (D.D.C. 2013) (quoting *Mistretta v. United States*, 488 U.S. 361, 401 (1988)).

In fact, courts are obligated to evaluate traditions when determining issues of constitutional structure and power. "Long settled and established practice is a consideration of ***great weight*** in a proper interpretation of constitutional provisions" relating to the separation of powers. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (emphasis added). *See also Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003) (relying on "historical practice" in determining constitutional requirements, and noting "a page of history is worth a volume of logic"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (determining constitutional powers based on tradition and "historical gloss"); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (constitutional ruling recognizing executive claims settlement authority based on the "history" of assertion of such power and the "acquiescence" of Congress to those practices over the years). *See generally* Michael J. Glennon, The Use of Custom in Resolving Separation of Powers Disputes, 64 B.U. L. REV. 109, 115-16 (1984) (discussing that tradition and custom has "been a source of decisional authority that has been relied upon frequently by the Court").

Here, in analyzing the question of whether CFPB is unconstitutional, the Court can, and should, consider the tradition of using bipartisan multimember commissions for agencies possessing broad enforcement, adjudicatory, and rulemaking authority. Comparable (albeit more limited) agencies such as FTC, SEC, CFTC, FCC, FERC, and CPSC use the multimember structure. *See* Pls.' Mem. at 17-18.

For example, FTC—an agency cited by CFPB and the subject of *Humphrey's Executor*—has a multimember structure. Its statute states: "A commission is created and established, to be

Case 1:13-cv-01221-CKK Document 15-1 Filed 09/13/13 Page 21 of 28

known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party." 15 U.S.C. § 41.

Likewise, the PCAOB—an agency cited by CFPB and the subject of *Free Enterprise Fund*—has a multimember structure. Its statute states: "The Board shall have 5 members, appointed from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public, and an understanding of the responsibilities for and nature of the financial disclosures required of issuers, brokers, and dealers under the securities laws and the obligations of accountants with respect to the preparation and issuance of audit reports with respect to such disclosures." 15 U.S.C. § 7211(e)(1).

It is not surprising in light of the prevalence of the multimember structure for this type of agency that when CFPB was conceived (by Professor, now Senator, Elizabeth Warren) it was based on an agency (the CPSC) that used a multimember structure.[10] And when the administration proposed the new "Consumer Protection Financial *Agency*," it was a multimember agency whose decisions would have the benefit of the "diverse" views of a "Board." The Administration's White Paper stated: "The CFPA will have a Director and a Board. The Board should represent a ***diverse set of viewpoints and experiences***." U.S. Department of the Treasury, Financial Regulatory Reform: A New Foundation (2009) at 58

[10] "Clearly, it is time for a new model of financial regulation, one focused primarily on consumer safety rather than corporate profitability . . . The model for such safety regulation is the U.S. Consumer Product Safety Commission (CPSC), an independent health and safety regulatory agency. . . ." Elizabeth Warren, *Unsafe at Any Rate*, Democracy Journal at 16 (2007), *available at* http://www.democracyjournal.org/pdf/5/Warren.pdf.

(emphasis added).[11] When the House enacted the bill, it adopted the Administration's proposed multimember structure. See H.R. 4173, 111th Cong. § 4103 (2009) (enacted) ("The Commission shall be composed of 5 members who shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who— (A) are citizens of the United States; and (B) have strong competencies and experiences related to consumer financial protection.").[12] SF ¶¶ 2-4. The enacted version of the bill changed CFPB to a "Bureau" to be located in the Federal Reserve rather than an "Agency," and dropped the multimember structure in favor of a single director. SF ¶ 5.

The originally proposed and House-enacted multimember structure could have potentially avoided the constitutional infirmities that now characterize the agency. Congress could have achieved its goal of having an agency head independent of the President's at-will removal authority without violating a core constitutional principle that too much unchecked power may not be concentrated in the hands of a single person: the CFPB Director. As the Supreme Court has held: "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (quoting The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison)). A multimember structure would impose internal checks and balances on the Director. Multimember decisionmaking guards against the prospect that a single individual is or will become biased, blinded, or captured.[13] A multimember structure accommodates "diverse or

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[11] Available at http://online.wsj.com/public/resources/documents/finregfinal06172009.pdf.

[12] Available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr4173eh/pdf/BILLS-111hr4173eh.pdf.

[13] "One justification for placing decisionmaking authority in corporate boards, rather than a single CEO, is that collective governance is more effective than vesting power in an individual. To be sure, individual control of a corporation promotes swifter and more decisive action. But collective corporate governance permits the board to collect, process, store, discuss, and retrieve

Case 1:12-cv-01121-CKK Document 31 Filed 10/31/13 Page 14 of 29

extreme views through the compromise inherent in the process of collegial decisionmaking," and "dilute[s] the effect of transitory political events on agency policy."[14] Here, this internal restraint afforded by a traditional structure is constitutionally necessary because the CFPB Director is not subject to the most important external checks—presidential removal and congressional appropriations—a concept that CFPB's Opposition does not confront.

A multimember structure also strengthens judicial review, which CFPB touts as an available safeguard (Opp'n 34-35). When commissioners debate and disagree, there is an opportunity to capture the expressions of minority viewpoints, which facilitate such review. *See Radio-Television News Directors Ass'n v. F.C.C.*, 184 F.3d 872, 878 (D.C. Cir. 1999) (noting that those FCC "commissioners voting against [the agency's action] were obliged to submit a statement of reasons to the court in order to facilitate judicial review"). With a lone and unchecked CFPB director, there will be insufficient recordation of competing considerations (or worse, no consideration of competing considerations), impairing the impartiality of the initial decision and undermining judicial review. This problem is compounded in light of the provision of Dodd-Frank obligating courts to defer to CFPB's judgment over inconsistent views of other federal agencies, even where those agencies have overlapping functions.[15]

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information more thoroughly and accurately than one person acting alone. Also, collective governance can constrain overconfidence or cognitive errors by providing critical assessments and viewpoints of proposals. Collective governance can also constrain shirking, self-dealing, and capture by providing multilateral monitoring and raising the number of people who need to be corrupted for improper action to occur." Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 897-98 (2013).

[14] Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1113 (2000).

[15] "[T]he deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." 12 U.S.C. § 5512(b)(4)(B).

By contrast, the deliberations of multimember agencies are open to the public under the Sunshine Act. As the D.C. Circuit observed, the requirement of public meetings facilitates democratic control of government: Congress "believed that increased openness would enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make government more fully accountable to the people." *Common Cause v. Nuclear Regulatory Commission*, 674 F.2d 921, 928 (D.C. Cir. 1982). None of this applies to CFPB.

The Supreme Court has recognized that the multimember structure facilitates "expert" decisions as distinguished from raw political (and potential tyrannical) decisions. In *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), a crucial decision at the very moment when the modern administrative state was exploding, and when many in government were expressing serious concerns about this "headless fourth branch of government" of unchecked bureaucrats wielding power,[16] the Supreme Court accepted Congress's decision to insulate an agency (the FTC) from the President's at-will removal power only after taking comfort in the structural protections afforded by the multimember structure—the "body of experts." *See id*. at 624 (emphasizing that FTC members were "called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'"); *see also Mistretta v. United States*, 488 U.S. 361, 379, (1989) (approving of Congress "delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines").

[16] President's Comm. on Admin. Mgmt., Report of the Committee With Studies of Administrative Management in the Federal Government 39-40 (1937) ("They are in reality miniature independent governments . . . . They constitute a headless 'fourth branch' of the Government . . . ."); *see also FTC v. Ruberoid Co*., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (describing administrative agencies as "a veritable fourth branch of the Government, which has deranged our three-branch legal theories").

Case 1:13-cv-01154-CKK Document 15-1 Filed 09/13/13 Page 16 of 28

In its section on presidential removal, CFPB asserts that the decision in *Humphrey's Executor* had nothing to do with FTC's "body of experts." Opp'n at 28. However, CFPB does not deny that the Court carefully evaluated the existence of FTC's multimember structure before approving its constitutionality. The Court in *Humphrey's* did not state expressly that if the multimember commission were not present, the result would be different. But that is the most logical reading of the case, and history has confirmed this gloss. Moreover, CFPB cannot cite to any case where a court has tolerated the vesting by Congress of broad authority (such as that conferred on the FTC)—in conjunction with restrictions on presidential removal and congressional appropriations oversight—in the absence of a multimember structure.

CFPB relies on *Mistretta* for the principle that "separation of powers [is] not violated . . . by mere anomaly or innovation." Opp'n at 39. But *Mistretta* involved the United States Sentencing Commission—a 7 member multimember commission.[17] This is typical of CFPB's Opposition. For example, CFPB states:

> . . . Plaintiffs complain that the Bureau has "rulemaking, adjudicatory, and enforcement powers." . . . But those powers are common among regulatory agencies. As the Supreme Court has observed, "[u]nder most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) (citing the ***FTC, Securities and Exchange Commission, and Federal Communications Commission*** as examples).

Opp'n at 36 (emphasis added). The examples cited in this portion of the Opposition (FTC, SEC, and FCC) are multimember commissions.

[17] The Court in Mistretta described the Sentencing Commission at 488 U.S. at 368-69: "The [Sentencing] Commission is established 'as an independent commission in the judicial branch of the United States.' . . . . It has seven voting members (one of whom is the Chairman) appointed by the President . . . . No more than four members of the Commission shall be members of the same political party."

Single director agencies mentioned by CFPB—such as SSA, FHFA, and the Office of Special Counsel (Opp'n at 39)—all have other safeguards and are not comparable in the scope of function or degree of discretion entrusted to CFPB. SSA and the Office of Special Counsel are subject to the appropriations power and have limited functions (SSA administrates benefits and the Office of Special Counsel protects federal employees and applicants from prohibited personnel practices). FHFA, like the independent counsel in *Morrison*, has a more narrow scope of power: whereas CFPB has open-ended jurisdiction over all consumer lending practices by private companies, FHFA's jurisdiction pertains to government-sponsored entities: Fannie, Freddie, and the Federal Home Loan Banks. *See* 12 U.S.C. §§ 4511 (jurisdiction over Fannie, Freddie, and the Office of Finance); 4513 (jurisdiction over "Federal Home Loan Banks"); 1423 (same). Each of these entities pays fees to FHFA. 12 U.S.C. 4516(a)-(b).[18]

When one looks at similar agencies that approach the power (even if they fall short) delegated to CFPB, courts have only tolerated the incursion on the President's removal power and Congress's appropriations power where there is a multimember commission. This history is the most important guide to the Court's constitutional decisions based on the authorities above.

Ultimately, Senator Warren, the Obama Administration, and the House of Representatives may have gotten it right the first time by selecting the traditional model of a multimember commission. Having decided to curtail two of the most powerful "checks" (presidential removal and congressional appropriations), and given CFPB's broad scope of enforcement, rulemaking and adjudicatory power, the multimember structure is the historical

[18] For this reason, a decision by this Court granting Plaintiffs' Motion does not impugn the constitutionality of any other federal agency. As the Supreme Court noted in *Free Enterprise* when confronted with a similar concern, the decision invalidating PCAOB's structure did not impact other agencies because each agencies' scope of power versus structural protection requires a unique analysis. *Free Enter. Fund*, 130 S. Ct. at 3160.

practice, which is given "***great weight***," *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (emphasis added), in determining whether CFPB is constitutional. Here, in this case of first impression, the Constitution mandates a multimember commission.

The chorus of concerns about the lack of a commission structure continue from Congress, industry, scholars, and organizations such as the Chamber of Commerce. On September 12, 2013, the Chairman of the House Financial Services Committee stated: "CFPB is uniquely unaccountable even to itself since there is fundamentally no 'it,' no 'they' only a 'he.' There is no commission, only one omnipotent director fundamentally accountable to no one." (Statement attached as **Exhibit 1**).

A multimember structure would fulfill Madison's promise that government power would not be concentrated in the hands of a single individual such as a king or despot. If CFPB's lone Director were the CFPB Chairman overseeing a commission, he would have to go through the important processes of debate and deliberation, forging a consensus, and persuading fellow other commissioners. As a recent FTC Chairman said shortly after assuming that position, "[e]very Chairman has to get a majority and that means in practice that the Commission largely moves forward in a bipartisan way."[19] As CFPB suggests, deliberating sometimes can slow down action. *See* Opp'n at 39 (arguing that the benefits of a multimember commission are "debatable"). Indeed, democracy itself has sometimes been criticized for this reason. But such built in structural inefficiency is the genius—and mandate—of the Constitution. This is consistent with decisions by Congresses for more than 125 years beginning with the ICC to the present, where the federal agencies that not only execute—but which also possess broad enforcement and adjudicatory power—have a multimember structure.

[19] http://ftc.gov/speeches/leibowitz/090924fordhamspeech.pdf.

IV. CFPB'S STRUCTURE VIOLATES THE CONSTITUTIONAL REQUIREMENT OF DEMOCRATIC CONTROL OF GOVERNMENT

Before CFPB, Congress had never legislated, nor had any Court condoned the consolidation of sweeping regulatory, supervisory, and enforcement power in the hands of a single individual shielded from removal by the President except for good cause. Doing so violates the democratic principles that underlie our system of government, and places that single individual too far outside the control of the people's elected representatives.

As CFPB concedes in its opposition (Opp'n at 27), the "character," "function," and scope of agency authority is key to the constitutional analysis. For example, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court addressed whether the independent counsel provisions of the Ethics in Government Act were constitutional because, among other things, the independent counsel could be removed only for "good cause." The Supreme Court found that the independent counsel had "limited jurisdiction and tenure" and "lack[ed] policymaking or significant administrative authority." *Id.* at 691. As a result, the Court held that the authority of the independent counsel was not "so central to the functioning of the Executive Branch" so as to require Presidential control. *Id.* at 691-92.

Here, unlike the independent counsel in *Morrison*, Congress consolidated supervisory, regulatory, and enforcement authority from seven different agencies into CFPB, and CFPB has authority over virtually every consumer financial transaction and every business that engages in such transactions. CFPB confirms the breadth of its authority in its opposition. *See* Opp'n at 3-6 (confirming that CFPB has broad and "exclusive" "rulemaking," "supervision," and "enforcement" authority, power to implement "18 pre-existing statutes," transferred authority from "seven different federal regulators," power to declare what constitutes an "abusive act or practice," and current year funding (from outside the appropriations process) of "$597.6

million."). Thus, the parties agree that CFPB has Herculean authority over the United States economy. Notwithstanding this broad delegation, CFPB receives funding independently of the appropriations process and is not answerable to Congress (even if the composition of Congress changes after an election) through its power of the purse. And no President, not even a newly-elected President, can replace CFPB's Director due to policy disagreements.

A. Power of the Purse

CFPB sets up yet another straw man when it characterizes Plaintiffs as arguing that CFPB is unconstitutionally structured because it does not receive funds through the appropriations process. Opp'n at 30-32. This is incorrect because the constitutionality of an agency's structure does not turn on the presence or absence of any particular check or balance but rather on the scope of that agency's authority and appropriate checks and balances in the aggregate.

The D.C. Circuit recently noted that "[t]he Appropriations Clause is thus a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, 'the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.'" *U.S. Dept. of Navy v. FLRA*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2012) (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1342, at 213-14 (1833)). Here, Congress has done exactly what the D.C. Circuit and Justice Story warned against. While Congress retains its power of the purse over the Executive Branch as a whole, it has taken the unprecedented step of creating an agency with a half billion dollar budget that is outside the scope of Congress' power of the purse restraint ***and*** unaccountable to the President given the absence of traditional checks and balances such as at-will removal or the ability to appoint one or more members to a multimember Commission. In

Case 1:13-cv-01510-CKK Document 15-1 Filed 09/23/13 Page 20 of 28

creating CFPB, Congress endowed a single individual with vast spending power who "might apply all [CFPB's] monied resources at his pleasure."[20]

While Congress, as CFPB argues, has the constitutional authority to create agencies outside of the appropriations process, what it cannot do—and has never done—is create one that also lacks any of the other traditional checks and balances that restrain the exercise of power by independent executive agencies.[21] None of the cases cited by CFPB in its opposition suggest otherwise. Two of them, *Cincinnati Soap* and *Aiken County*, have nothing to do with how Congress allocates funds to agencies. In *Cincinnati Soap*, petitioners unsuccessfully challenged Congress' decision to permit the Philippines treasury to keep a 3 cent per pound tax imposed on the production of coconut oil in the Philippines. *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937). In *Aiken County*, the D.C. Circuit upheld a challenge to the Nuclear Regulatory Commission's refusal to abide by Congress' mandate that it approve or disapprove within a set period of time a request by the Department of Energy to store nuclear waste at Yucca Mountain. *In re Aiken Cnty.*, -- F.3d --, 2013 WL 4054877 (D.C. Cir. 2013)

In two other cases the Court simply considered whether the funds at issue were appropriated or non-appropriated funds. In *American Federation of Government Employees*, a

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[20] CFPB's unbridled control over its own funding has already led to allegations of excess. For example, according to publicly available information, more than 60 percent of CFPB's 1,204 employees make six figures. Fifty six CFPB employees make more than $199,700, the salary of the Federal Reserve Chairman Ben Bernanke, and 37 make more than Supreme Court justices, who earn $213,500. Richard Pollock, *Fat Paychecks for CFPB Officials, Hundreds Paid More Than Fed Chairman, Congressmen, Supreme Court Justices*, Washington Examiner, *available at* http://washingtonexaminer.com/fat-paychecks-for-cfpb-officials-hundreds-paid-more-than-fed-chairman-congressmen-supreme-court-justices/article/2533189.

[21] CFPB argues that it is still subject to the power of the purse because it must submit reports to Congress. (Opp. at 30) However, this is no way restrains the CFPB's use of its non-appropriated funds. Indeed, Congress specifically mandated that the funding of CFPB "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497(a)(2)(C).

union representing Defense Department employees argued that although the employees could not lawfully be reimbursed for personal expenses incurred as a result of cancelled leave through appropriated funds, another revenue source allegedly consisting of non-appropriated funds could be used for that purpose. *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Labor Relations Auth.* 388 F.3d 405, 408 (3d Cir. 2004). The Third Circuit disagreed, finding that all the funds in question were appropriated. *Id.* at 413. In *AINS*, the Court held that a contractor could not sue the U.S. Mint for breach of contract because the Mint did not receive its funding through appropriations and allowing the case to proceed would violate longstanding precedent that the Court of Claims cannot award judgments out of non-appropriated funds. Finally, in *U.S. Dept of Navy* the Court considered whether appropriated funds could be used to purchase bottled water as a "necessary expense" at a particular Naval facility. *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1342 (D.C. Cir. 2012).

None of the cited cases raises any of the constitutional issues present here. CFPB suggests that exempting CFPB from the appropriations process is simply business as usual. Yet, CFPB has identified no other person like its Director, who is responsible for regulating private sector activity and who has sole power to determine whether and how to spend hundreds of millions of dollars outside of the appropriations process.

Not only may CFPB spend a half a billion dollars without Congress's authorization, the Dodd-Frank Act goes further and prohibits Congress from reviewing CFPB's use of these funds. The Act states "the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497(a)(2)(C). Dodd-Frank thus disables the most important check that the people's representatives have on CFPB.[22] "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) (quoted in *U.S. Dep't of* Navy, 665 F.3d at 1346-47). *See also Laird v. Tatum*, 408 U.S. 1, 15 (1972) (describing Congress's power of the purse as particularly well suited to monitor the "wisdom and soundness of Executive action"); Kate Stith, Congress' Power of the Purse, 97 YALE L.J. 1343, 1356 (1988) ("[A]ppropriations do not merely set aside particular amounts of money; they define the character, extent, and scope of authorized activities."); 3 The Founders' Constitution 377 (Philip B. Kurland & Ralph Lerner eds., 1987) (debate of Mar. 1, 1793) (reporting comment made by James Madison shortly after ratification of the Constitution that "appropriations of money [are] of a high and sacred character; [they are] the great bulwark which our Constitution [has] carefully and jealously established against Executive usurpations").[23]

B. Presidential Removal

CFPB's argument about restricting presidential removal—like its other arguments—evaluates this feature in isolation from the broad powers and absence of other checks and balances. Because of this flaw, CFPB fails to acknowledge dispositive distinguishing factors in

[22] Congressional discipline of agencies through appropriations can ultimately strengthen the agency. In the 1980s, Congress shut down the FTC until FTC could better articulate its unfairness policy; FTC responded by developing a now-revered policy statement on unfairness, which gave FTC its persuasive authority and legitimacy. *See* J. Howard Beales III, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (June 2003), available at http://www.ftc.gov/speeches/beales/unfair0603.shtm.

[23] CFPB argues that it must submit reports to Congress (Opp'n at 34), but this is a toothless check. CFPB is not dependent on annual appropriations, and can obtain its guaranteed funding from the Federal Reserve regardless of how much supporting material it provides to Congress.

Case 1:13-cv-01124-CKK Document 15-21 Filed 09/16/13 Page 23 of 28

its legal authority. Plaintiffs explained in their opening brief that there is a compelling constitutional interest in the President being able to remove the CFPB Director for policy differences, and that this ability facilitates the President's Article II powers and obligation to take care that the laws be faithfully executed. Pls.' Mem. at 16. CFPB cites no contrary authority.

CFPB cites *Morrison v. Olson* which upheld tenure protection for independent counsel, but there the Supreme Court sustained tenure protection only because the independent counsel—in stark contrast to the CFPB Director—are "inferior" officers with "limited" duties and jurisdiction. CFPB cites *Humphrey's Executor*, which approved tenure protection for FTC commissioners, but as noted above, FTC commissioners are internally checked by FTC's multimember structure. CFPB cites *Free Enterprise Fund*, but that goes the wrong way for CFPB. There, the Supreme Court rejected the double layer of insulation from presidential removal. There is simply no case that justifies the constitutionality of CFPB's structure.

In *Myers v. United States*, 272 U.S. 52 (1926), which was limited but not overruled by *Humphrey's Executor*, the Court invalidated the limitation on the President's power to remove a postmaster from office on the grounds that the statute invaded the Constitution's vesting of executive power to the President. Plaintiffs cited *Myers* in their opening brief (Pls.' Mem. at 12), but CFPB does not address it. In the absence of a multimember commission or some other justifying feature in this case, CFPB's structure runs afoul of *Myers*. Indeed, the Supreme Court in *Free Enterprise Fund* cited *Myers* as controlling authority for the general rule that presidents may dismiss agency officials "at will", and then noting that the power could be restricted "under certain circumstances." *Free Enterprise Fund,* 130 S.Ct. at 3146-46 (*citing, inter alia, Humphreys Executor*). CFPB does nothing to respond to this controlling authority or to explain "circumstances" that would justify departing from the general rule in *Myers*.

Case 1:13-cv-01124-CKK Document 15-21 Filed 10/16/13 Page 24 of 28

V. CONTRARY TO CFPB'S OPPOSITION BRIEF, CFPB IS NOT SUBJECT TO ORDINARY JUDICIAL REVIEW BECAUSE DODD-FRANK DECLARES CFPB THE WINNER IN ADVANCE OF AGENCY DISPUTES

Plaintiffs' opening brief demonstrated that Dodd-Frank limits judicial review of CFPB. Pls.' Mem. at 13 (citing 12 U.S.C. § 5512(b)(4)(B) as requiring courts to grant the same deference to CFPB's interpretation of federal consumer financial laws that they would "if [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.") Plaintiffs explained that this requires courts to grant CFPB *Chevron* deference when it interprets statutes transferred to CFPB—which essentially unwinds decades of precedent created by other agencies and courts reviewing those agencies. It also insulates CFPB from future conflicting determinations by other agencies that continue to share jurisdiction over certain aspects or entities under federal consumer financial law.

CFPB's only answer to this is to argue that this provision "merely clarifies that courts should review [CFPB] interpretations under well-established principles of agency deference" and that this is not a "separation-of-powers problem." Opp'n at 34-35. CFPB is mistaken. First, the statute does not say "should" but instead "shall" ("the deference that a court affords to the [CFPB] with respect to a determination . . . shall be applied . . ."). 12 U.S.C. 5512(b)(4)(B). Second, this is a separation-of-powers "problem" because Dodd-Frank mandates that Courts treat any CFPB interpretation as displacing all previous agency interpretations (including judicially-reviewed ones). This prevents the Court from following its usual process of analyzing prior regulatory interpretations, and, as CFPB admits in a footnote, changes the analysis that would otherwise occur. Opp'n at 35 n.17. Thus, Congress converted discretionary rules of deference to statutory, mandatory rules of obeisance. Such mandatory deference is particularly significant given that CFPB is empowered to enforce open-ended and new statutory concepts such as determining what constitutes an "abusive act or practice." Opp'n at 4.

Aggregating the power of seven agencies into a single agency (CFPB) and then insulating that agency from any prior statutory interpretation further demonstrates that CFPB possesses unprecedented power.

VI. THE RISK OF CFPB OVERREACH IS REAL AND NOT THEORETICAL

Plaintiffs' opening brief demonstrated that the absence of sufficient checks, balances, and oversight creates a real rather than theoretical risk of CFPB overreach. Pls.' Mem. at 26-27.

In recent days, a new concern has emerged: there have been reports that CFPB improperly enlisted the U.S. Trustee Program ("USTP") to collect personal financial data from approximately five million American citizens without their consent, raising both privacy concerns and threats to the independence and impartiality of the USTP (which is not supposed to be an investigation arm of CFPB). *See* Richard Pollock, *Consumer Agency Threatens Independence of Bankruptcy Office*, Washington Examiner, *available at* http://washingtonexaminer.com/article/2535482. *See also* Exhibits 1 (Rachel Witkowski, Lawmakers Fume Over Unanswered Questions to CFPB, American Banker, Consumer Finance Vol. 178 No. 177 (Sept. 13, 2013)) and 2 (Opening Statement of Rep. Jeb Hensarling, Chairman of the House Financial Services Committee, House Financial Services Committee Hearing (Sept. 12, 2013)).

Of particular relevance here, at a hearing before the House Committee on Financial Services on September 12, 2013, the CFPB Director refused to respond substantively to these reports.[24] The CFPB Director also testified that he would not respond to questions that related to enforcement proceedings (despite the fact that CFPB issued a press release after it sued Morgan

[24] The relevant portion of the hearing which took place before the House Committee on Financial Services on September 12, 2013 is available at https://www.youtube.com/watch?v=r8WiIOFmT3c.

Drexen in California and accused it and its supported lawyers (like Plaintiff Pisinski) of using their law practice as a front for improper debt settlement services). Given that CFPB's funding is not subject to the appropriations process, there is no monetary incentive for its Director to answer questions at such hearings.

CFPB attempts to justify the absence of appropriations oversight by arguing that Congress has "other" tools and can hold "oversight hearings" to "check" CFPB and ensure that CFPB "remains accountable to Congress." Opp'n at 34. The CFPB Director's testimony on September 12, 2013—in which he refuses to answer Congress's questions and faces no real consequences—demonstrates that such hearings cannot save CFPB's flawed constitutional status.

CFPB also gamely cites other supposed limitations on CFPB's authority. For example, Congress can change CFPB through the "ordinary legislative process" and other "tools" (Opp'n at 31, 33-34). Of course, the President and Congress can always pass new legislation. The Act in *Free Enterprise Fund* could have been amended or repealed—but no Court has ever held that the possibility of amendment or repeal is a sufficient check on an unconstitutional agency.

Ultimately, CFPB cannot escape the conclusion that it stands outside the democratic transfer of power that has historically occurred every four years when the people elect a President and Congress. Historically, after such elections, with respect to all the far-reaching functions of government, the President, whether newly elected or re-elected, could nominate or remove certain single agency heads and Cabinet officials or alternatively fill vacancies as they occurred on multimember commissions. And while the structure and make-up of these commissions may have varied over time, the principle that to act they must form at least a limited consensus did not change. At the same time Congress largely retained the power of the purse. This democratic process still occurs in every significant corner of our government except one: the regulation, supervision and enforcement of the numerous laws and entities that relate to consumer financial transactions.

A CFPB Director confirmed by Congress to a 5-year term shortly before an election cannot be removed without cause by the President, cannot be controlled through the appropriations process by Congress, and cannot be checked by judicial deference to the decisions of more accountable agencies that enjoy overlapping authority. Whatever winds of change may have been stirred by the electorate will pass by CFPB. However well-intentioned Congress or CFPB may be, such a structure is incompatible with our constitutional form of government.

VII. CFPB'S REFERENCES TO VOLUMINOUS MATERIALS SHOULD BE DISREGARDED

Finally, CFPB responds to many of Plaintiffs' facts by "refer[ing]" the Court to voluminous materials for a "full and accurate statement of its contents" (Docket No. 17-2 at 2). This is not helpful to the Court, which should not have to "sift through" voluminous materials to determine whether a dispute exists. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151 (D.C. Cir. 1996). The court may consider treating facts with this type of response as admitted under LCvR 7(h)(1). *See Whiting v. Labat-Anderson, Inc.*, 926 F. Supp. 2d 106, 2013 WL 75391, *1 n.1 (D.D.C. 2013).

Case 1:13-cv-01112-CKK Document 1-21 Filed 07/23/13 Page 28 of 28

CONCLUSION

Plaintiffs request that the Court grant the pending Motion for Summary Judgment.

Dated: September 13, 2013

Respectfully submitted,

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EXHIBIT O

TO THE DECLARATION OF R. GABRIEL D. O'MALLEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and
KIMBERLY A. PISINSKI,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Defendant.

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

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

The Plaintiffs in this action, Morgan Drexen, Inc. and Kimberly Pisinksi, have presented this Court with an extraordinary request: adopt a novel and unprecedented limitation on Congress's legislative authority to create independent agencies and enjoin a proceeding that the Consumer Financial Protection Bureau (Bureau) has brought in another federal district court to enforce laws designed to protect vulnerable consumers. They have failed, however, to offer this Court any legitimate basis for granting their request. Plaintiffs are not entitled to a ruling from this Court on the merits of their constitutional claim, let alone a ruling in their favor.

Morgan Drexen does not dispute that it may raise its constitutional argument as a defense to the Bureau's enforcement action in the United States District Court for the Central District of California, nor does it offer any reason to believe that it would suffer irreparable harm if it were required to do so. That alone is sufficient to defeat Morgan Drexen's request for injunctive relief from this Court. Likewise, Morgan Drexen has not demonstrated that a declaratory judgment here would serve any of the legitimate purposes for which the Declaratory Judgment Act was designed. In particular, Morgan Drexen is not seeking to understand whether it is acting lawfully so that it can, if necessary, conform its conduct to the law. To the contrary, the transparent purpose of this lawsuit is to prevent another court from even considering the Bureau's allegations that Morgan Drexen is violating the law. The Court should not exercise its discretion to serve such ends. Because Morgan Drexen is not entitled to the only relief it seeks—and because Pisinski has not demonstrated that she has standing to maintain this action on her own—the Court should dismiss the complaint without reaching the merits of Plaintiffs' constitutional claim.

Case 1:13-cv-01174-CKK Document 22 Filed 09/25/13 Page 7 of 30

If the Court does reach the merits, it should find that the Bureau's structure is constitutional. Plaintiffs appear to recognize that the Constitution permits each of the Bureau's features, *see* Plaintiffs' Reply in Support of Mot. for Summary Judgment, Dckt. #21 (Pl. Reply), at 1, and now rest their challenge solely on the claim that the Bureau's "combination" of features violates the separation of powers. But the Bureau is constitutional regardless of how you look at it. Plaintiffs have failed to show that any of the Bureau's features—alone or in combination—aggrandizes the power of any branch of government or violates the basic separation-of-powers principle that one branch of government may not intrude on the prerogatives of another. Absent that basic showing, Plaintiffs' vague invocations of "tradition," "democratic control of government," or their own policy preferences for a commission structure provide no basis for their request that this Court strip the Bureau of its ability to implement and enforce the consumer protection provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Congress stayed well within constitutional bounds when it created the Bureau. If the Court reaches the merits, it should reject Plaintiffs' attempt to find some "combination" of features that would undo Congress's work.

ARGUMENT

I. This Case Should Be Dismissed Without a Ruling on the Merits

The Court should dismiss Plaintiffs' complaint without reaching the merits because Morgan Drexen has failed to establish that it is entitled to injunctive or declaratory relief, and because Pisinski has failed to establish that she has standing to challenge the constitutionality of the Bureau's structure.

A. Morgan Drexen Is Not Entitled to an Injunction Barring the Bureau's Pending Enforcement Action

The Court should deny Morgan Drexen's request for injunctive relief because "'courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)) (internal alteration omitted); *see also Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010).

Here, Morgan Drexen has an adequate remedy at law and will not suffer irreparable harm in the absence of equitable relief. *See* Mem. of Points and Authorities in Support of Defendant's Mot. to Dismiss or, in the Alternative, for Summary Judgment and in Opposition to Plaintiffs' Mot. for Summary Judgment, Dckt. #17-1 (Def. Mem.), at 12. Morgan Drexen may raise its constitutional claim as a defense to the Bureau's pending enforcement action, and, as binding precedent establishes, requiring Morgan Drexen to do so does not cause the company any irreparable harm. *See, e.g., Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1265 (D.C. Cir. 2012) (same). Indeed, Morgan Drexen does not argue that having to raise its constitutional claims in the Central District of California would constitute irreparable harm; it in fact expressly disclaims that it faces harm from "any particular action" of the Bureau. Pl. Opp. at 17. Morgan Drexen instead argues that it is harmed by the Bureau's "very existence." Pl. Opp. at 17-18. Such a philosophical objection—in the absence of any demonstration of irreparable harm—does not entitle Morgan Drexen to the injunctive relief it seeks.

In its opening brief, the Bureau relied upon the D.C. Circuit's decision in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987). In that case, the court refused to permit Deaver, who feared prosecution for violations of the Ethics in Government Act, to pursue his separation-of-powers challenge to that Act "in an independent civil suit." *Id.* at 71. The court reasoned that because Deaver would have an adequate opportunity to raise his constitutional defense in the criminal proceeding itself, he had "no right to an injunction restraining a pending indictment in a federal court." *Id*. at 68. As the Bureau explained in its opening brief, because Morgan Drexen can raise its constitutional defense in the civil enforcement action currently pending in the Central District of California, its claim for injunctive relief should be dismissed for the same reason. *See* Def. Mem. at 12-14.

Morgan Drexen attempts to distinguish *Deaver* by arguing that it applies only to attempts to enjoin criminal prosecutions. Pl. Opp. at 15-16. But the equitable considerations underlying that decision apply equally in the context of attempts to enjoin civil enforcement proceedings. Federal Rule of Civil Procedure 12(b) provides just as adequate a remedy as Federal Rule of Criminal Procedure 12(b) for raising a constitutional separation-of-powers defense, and the D.C. Circuit's concerns for both the final judgment rule and the principle of constitutional avoidance are no less applicable in the civil context than in the criminal context. *Deaver*, 822 F.2d at 70-71. Furthermore, while the D.C. Circuit noted that requiring one accused of violating the Ethics in Government Act to submit to a criminal prosecution serves "larger societal interests," there is no basis to conclude that those interests are not also served by requiring those accused of engaging in a predatory debt-relief scheme to raise their defenses in the civil enforcement proceeding itself, and not in some "ancillary equitable proceeding." *Id.* at 69, 71.

Deaver is simply an application of the "basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 71 (Ginsburg, D.H., concurring) (quoting *Younger v. Harris*, 401 U.S. 37, 43-44 (1971)). This principle applies equally when the proceeding sought to be enjoined is civil in nature.[1] Indeed, "[i]t is well-established that it is improper for a district court to entertain a request for injunctive relief that would have the effect of enjoining an ongoing enforcement action. Any challenges to the propriety of agency action should be addressed in the enforcement action itself." *Direct Mktg. Concepts, Inc. v. FTC*, 581 F. Supp. 2d 115, 117 (D. Mass. 2008); *see also Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1132 (11th Cir. 2005) ("Generally, if a party will have [an] opportunity to raise its claims in the concurrent federal proceeding sought to be enjoined, that concurrent proceeding is deemed to provide an adequate remedy at law." (citing *Porto Rico Tel. Co. v. Puerto Rico Commc'n Auth.*, 189 F.2d 39, 41 (1st Cir. 1951), and 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2942)). In short, because Morgan Drexen has failed to show that it will suffer irreparable harm if required to raise its constitutional claim in the Bureau's pending enforcement action, its request for injunctive relief should be denied.

B. Morgan Drexen Is Not Entitled to Declaratory Relief

Morgan Drexen similarly fails to demonstrate why the Court should exercise its "unique and substantial" discretion under the Declaratory Judgment Act to entertain Morgan Drexen's constitutional claim. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007). As the Bureau showed in its opening brief (Def. Mem. at 18-20), declaratory relief will "serve no useful purpose" in this case. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). Morgan Drexen is not seeking to determine whether it "may legally pursue a particular course of conduct," and therefore "[t]he classic and most persuasive reason for granting a declaration [is] absent from this

[1] Although *Younger* involved an attempt to enjoin a state criminal proceeding, the principles underlying it have long been held to apply in the context of attempts to restrain state civil enforcement proceedings. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

Case 1:13-cv-01112-CKK Document 16-1 Filed 10/25/13 Page 21 of 30

case." *Hanes Corp. v. Millard*, 531 F.2d 585, 592 (D.C. Cir. 1976). Further, although Morgan Drexen asserts that this Court has "particular expertise and experience in adjudicating constitutional questions and challenges to agency action" (Pl. Opp. at 21), it provides no basis for concluding that the Central District of California is not fully capable of resolving Morgan Drexen's constitutional claim, if necessary, in the context of the Bureau's enforcement action.

Instead, Morgan Drexen appears to argue that the Court should exercise its discretion to decide Morgan Drexen's claim solely because it is "a facial constitutional challenge to the [Bureau's] enabling statute." Pl. Opp. at 18. But Morgan Drexen provides no support for the novel proposition that federal courts should exercise their discretion to grant declaratory relief to resolve constitutional challenges to federal statutes when doing so is not necessary. Pl. Opp. at 18-19. Nor does it address the legions of cases that hold the opposite. *See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204-06 (2009) (declining to grant a declaratory judgment regarding a constitutional issue that it did not need to reach); *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 471 (1945) ("In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions."); *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1020 (D.C. Cir. 1991) ("Where it is uncertain that declaratory relief will benefit the party alleging injury, the court will normally refrain from exercising its equitable powers. This is especially true where the court can avoid the premature adjudication of constitutional issues." (citations omitted)). Morgan Drexen's failure to identify any sound basis for the court's exercise of its discretion under the Declaratory Judgment Act is reason alone to deny its request for declaratory relief.

Nonetheless, the other factors relevant to the Court's exercise of discretion also support dismissal. *See* Def. Mem. at 19-21. First, unlike the typical declaratory judgment action, in which the parties' entire dispute hinges on the resolution of a single legal issue (*e.g.*, whether the declaratory judgment plaintiff is infringing the defendant's patent), a declaratory judgment here will not necessarily "settle the controversy between the parties." *Hanes*, 531 F.2d at 592 & n.4. As the Bureau explained in its opening brief, the court cannot assume, in applying this factor, "'that it will resolve the merits of [Morgan Drexen's] complaint in the company's favor'"; and if the Court were to rule for the Bureau on the merits, the parties would still have to litigate all of the remaining issues relating to Morgan Drexen's liability in another court. *See* Def. Mem. at 20 (quoting *Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72, 77 (D.D.C. 2009)).

Second, Morgan Drexen has other remedies available to it. Because it can raise its constitutional claim as a defense in the Bureau's enforcement action, providing declaratory relief here would be "unjustified." *Id.* (quoting *Swish Mktg.*, 669 F. Supp. 2d at 80).

Third, the convenience of the parties counsels in favor of litigating the parties' dispute in a single forum (not two), and the most convenient forum is the Central District of California, where Morgan Drexen, its employees, and its records are located.

Finally, the equity of Morgan Drexen's conduct in bringing its declaratory judgment action counsels for dismissal. Though Morgan Drexen asserts that it has acted with "the utmost equity and integrity," and has not engaged in "procedural fencing" (Pl. Opp. at 20-21), the facts show otherwise. In early 2012, the Bureau began investigating Morgan Drexen and its Chief Executive Officer, Walter Ledda, to determine whether they were engaged in unlawful acts and practices in connection with the provision of debt relief services. *See* Declaration of Randall M. Shaheen, Dckt. #3-5 (Shaheen Decl.), Ex. 1. Morgan Drexen never questioned the Bureau's authority to conduct the investigation on the ground that the Bureau's "very existence" offended the "Constitution's core principles of separation of powers and accountability to the electorate." Pl. Opp. at 18. Nor did it refuse to comply with the Bureau's civil investigative demands on this basis.

Indeed, even after the Bureau's Office of Enforcement informed Morgan Drexen that it was "considering recommending that the Bureau take legal action" and specifically asked the company to provide "any reasons of law or policy why . . . the Bureau should not take legal action[,]" Shaheen Decl. Ex. 32, Morgan Drexen did not raise any constitutional separation-of-powers arguments. *Id.* at Ex. 33. Instead, it expressed its desire "to work cooperatively with staff to reasonably amend its practices and advertising to address staff's concerns" and to resolve those concerns "through settlement." *Id.* It was only after the Bureau refused to accept settlement on Morgan Drexen's terms, *see id.* at Ex. 35, that Morgan Drexen filed the instant complaint, asking the Court to decide a single novel constitutional question, but *none* of the questions relating to the legality of its conduct. Indeed, by asking the Court to enjoin the Bureau's enforcement efforts, Morgan Drexen is seeking to ensure that *no* court will decide whether it is acting unlawfully. "'The Declaratory Judgment Act is not a tactical device.'" *Swish*, 669 F. Supp. 2d at 78 (quoting *Gov't Emps. Ins. Co. v. Rivas*, 573 F. Supp. 2d 12, 15 (D.D.C. 2008)). Morgan Drexen's request for a declaratory judgment should be denied.

C. Pisinski Lacks Standing To Challenge the Bureau's Constitutionality

It is well-established that "[t]he party invoking federal jurisdiction bears the burden of establishing [the standing] elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In the context of cross-motions for summary judgment, a plaintiff cannot demonstrate standing with "mere allegations, but must set forth by affidavit or other evidence specific facts." *Id.*

Case 1:13-cv-01112-CKK Document 22 Filed 10/25/13 Page 15 of 30

(internal quotations omitted). In addition, when, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else," standing is "'substantially more difficult' to establish." *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). And because (as demonstrated above) Morgan Drexen's claims should be dismissed on other grounds, Pisinski cannot rely on the proposition that where "constitutional and prudential standing can be shown for at least one plaintiff, [the court] need not consider the standing of other plaintiffs to raise that claim." *See* Pl. Opp. at 14 (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)).

As the Bureau pointed out in its opening brief, Pisinski's only asserted injury is the alleged harm that would occur if the Bureau were to compel Morgan Drexen to produce privileged communications between her and her clients. *See* Def. Mem. at 23 (citing Declaration of Kimberly A. Pisinski, Dckt. #3-3, ¶¶ 4, 10). But because the Bureau never sought Pisinski's privileged communications, *see* Shaheen Decl. Ex 2 at 2, and because the Bureau could not have compelled Morgan Drexen to provide *any* of Pisinski's information without a district court order, the harm asserted in Pisinksi's declaration was always speculative. *See* Def. Mem. at 23. The prospect of such harm is even more remote now that the Bureau's investigation is complete. The Bureau has not sought discovery in its pending enforcement action. If and when it does, Pisinski will have all the tools available under the Federal Rules of Civil Procedure to protect her interests should she believe that the Bureau's discovery requests affect them.

Pisinski fails to rebut the Bureau's argument that her declaration is not sufficient to demonstrate standing. *See* Pl. Opp. at 14. Rather, she simply asserts—without any evidentiary support—that "the CFPB's actions threaten [her] with far more substantial injury." *Id.* Pisinski contends that she "has standing to challenge the constitutionality of the agency that is threatening her client confidentiality, regulating her practice, investigating (and now suing) her paralegal, and alleging that what her paralegal (Morgan Drexen) is doing to assist her in the practice of law is somehow unlawful." *Id.* at 15. But she fails to support these assertions (including the characterization of her relationship with Morgan Drexen, which the Bureau disputes) with citations to the record, *see* Fed. R. Civ. P. 56(c), or to provide any legal support for the astonishingly broad proposition that a government agency's enforcement of the law against one company gives all of that company's contractual counterparties standing to challenge the agency's constitutionality. Pisinski's conclusory assertions of harm are clearly insufficient, and she therefore lacks standing to challenge the Bureau's constitutionality.[2]

D. The Cases Cited by Plaintiffs Concerning the Scope of Specific Statutory Review Mechanisms or the Ripeness Doctrine Are Irrelevant

Rather than contest the Bureau's actual arguments for why the Court should dismiss the case without reaching the merits, Plaintiffs cite cases that concern jurisdictional issues that are not before the Court and therefore are wholly irrelevant to this matter. *See* Pl. Opp. at 7-14. For example, Plaintiffs cite cases that have held, in the context of specific statutes, that a plaintiff bringing a constitutional challenge in federal district court need not have exhausted some

[2] Even if the Court were to find that Pisinski had met her burden of demonstrating standing, it should deny her request for declaratory and injunctive relief for the same reasons that it should deny Morgan Drexen's. Pisinski has failed to demonstrate irreparable harm and can protect any interest she might have that is implicated by the Bureau's enforcement action against Morgan Drexen by seeking to intervene in that case. *See SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 748 (1984).

Case 1:13-cv-01112-CKK Document 14-2 Filed 10/15/13 Page 17 of 30

statutory scheme for administrative or judicial review.[3] In these cases, courts must ask whether "the 'statutory scheme' [at issue] displays a 'fairly discernable' intent to limit jurisdiction, and [whether] the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enter. Fund*, 130 S. Ct. at 3150 (quoting *Thunder Basin Coal v. Reich*, 510 U.S. 200, 207 (1994)).

That inquiry is beside the point here. Whether Morgan Drexen is entitled to declaratory or injunctive relief in this case is governed not by the scope of some unidentified "statutory scheme of administrative or judicial review," *Elgin*, 132 S. Ct. at 2132, but by the well-established equitable considerations that govern federal courts' discretion to grant such relief. *See, e.g., Monsanto*, 130 S. Ct. at 2756 (listing the factors that plaintiffs seeking a permanent injunction must satisfy); *Hanes*, 531 F.2d at 591 & n.4 (listing the "factors relevant to the propriety of granting a declaratory judgment"). Similarly, whether Pisinski has standing does not depend on the nature of her claim, but on whether she has proven the familiar elements of injury, causation, and redressability. *Lujan*, 504 U.S. at 560-61.

Plaintiffs also cite cases where courts considered whether a controversy is sufficiently ripe to permit pre-enforcement review. *See* Pl. Opp. at 11-14. As Plaintiffs candidly admit,

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[3] *See* Pl. Opp. at 7-9 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150-51 (2010) (holding that Congress did not intend to require plaintiffs to pursue their claims through the Securities and Exchange Act's statutory review mechanism, 15 U.S.C. § 78y, before pursuing their claims in federal court); *Hettinga v. United States*, 560 F.3d 498, 503-06 (D.C. Cir. 2009) (holding that mandatory administrative exhaustion requirement of the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c(15)(A), did not apply to a constitutional challenge to the Milk Regulatory Equity Act of 2005); *Elk Run Coal, Inc. v. U.S. Dep't of Labor*, 804 F. Supp. 2d 8, 16-19 (D.D.C. 2011) (holding that the Mine Act's provision requiring administrative exhaustion of any citation or order of the Mine Health Safety Administration, 30 U.S.C. §§ 815, 816, 823, did not apply to a constitutional challenge to the Mine Act)). *But see Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2131-47 (2012) (holding that Congress intended the plaintiffs to channel their constitutional challenge to 5 U.S.C. § 3328 through the special statutory review mechanisms of the Civil Service Reform Act, 5 U.S.C. §§ 7511-14, 7701-03).

however, the Bureau "does not argue ripeness in its moving papers." *Id.* at 12. And while the fact that a claim is "purely legal" may be relevant to whether that claim is ripe (*id.* at 11-13 (citing cases)), it has no bearing on whether Plaintiffs are entitled to declaratory or injunctive relief. As discussed above, Plaintiffs have failed to demonstrate that they are entitled to declaratory or injunctive relief. This case should be dismissed on that ground alone.

II. The Bureau's Structure Is Constitutional[4]

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

As the Bureau's opening brief demonstrates, each of the Bureau features to which Plaintiffs object—a single Director removable only for cause, funding outside of the annual appropriations process, and judicial deference to agency interpretations[5]—is wholly consistent with the separation of powers. Def. Mem. at 24-35. Plaintiffs appear to acknowledge that none of these features alone violates the separation of powers and instead posit that the "cumulative impact" of the "combination" of these features makes the Bureau unconstitutional. *See* Pl. Reply at 1.

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[4] The Bureau sought dismissal or summary judgment based on Plaintiffs' lack of entitlement to injunctive or declaratory relief or, if the Court reached the merits, based on their failure to state a valid constitutional claim. *See* Def. Mem. at 24. In response, Plaintiffs filed an opposition (which ignored the constitutional claim) to the Bureau's motion to dismiss, *see* Pl. Opp. at 7-23, and a reply (which addressed only the constitutional claim) in support of their own motion for summary judgment, *see* Plaintiffs' Reply in Support of Mot. for Summary Judgment, Dckt. #21 (Pl. Reply). To avoid any confusion caused by Plaintiffs' bifurcated response, the Bureau clarifies that the following discussion of the constitutional claim is a reply in support of the Bureau's motion to dismiss or for summary judgment.

[5] Plaintiffs no longer press their claim that the Bureau's insulation from "accountability to . . . the Federal Reserve" presents a separation-of-powers problem. Plaintiffs' Mem. of Points and Authorities in Support of Mot. for Summary Judgment, Dckt. #13-2 (Pl. Mem.), at 15; *see also* Def. Mem. at 30 n.14.

Plaintiffs' argument fails. As explained in the Bureau's opening brief, whether viewed one-by-one or in combination, the Bureau's features do not impair the constitutional prerogatives of any of the three branches of government. Def. Mem. at 25-35. Plaintiffs ignore this basic fact and instead argue that the Bureau's structure undercuts "democratic control of government" and runs afoul of a supposed constitutional requirement for a multimember commission. These arguments have no basis in separation-of-powers principles and fall far short of demonstrating any constitutional infirmity in the Bureau's structure.

A. The Bureau's Features Do Not Impede Any Branch of Government in the Exercise of its Functions

The Supreme Court has made clear that separation of powers' "basic principle" is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). A branch may not "arrogate power to itself" or "impair another in the performance of its constitutional duties." *Id.* Conversely, it poses no separation-of-powers problem to "commingle the functions of the Branches" to some degree, so long as there is "no danger of either aggrandizement or encroachment." *Mistretta v. United States*, 488 U.S. 361, 382 (1989). The Bureau's structure complies with these basic principles. Nothing about the Bureau's combination of features impairs the President, Congress, or the courts in the performance of their duties.[6]

1. The Bureau's features do not impede the President's ability to perform his constitutional functions

The Constitution vests the executive power in the President and assigns him the duty to "take care that the laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. As the Bureau discussed in its opening brief, well-established precedent confirms that the President's power to

[6] Plaintiffs do not even attempt to argue that Congress has arrogated power to itself or otherwise aggrandized another branch's powers in creating the Bureau.

Case 1:13-cv-01112-CKK Document 12 Filed 09/25/13 Page 19 of 30

remove the Bureau Director for cause is consistent with the vesting of the executive power in the President and protects the President's ability to faithfully execute the laws. Def. Mem. at 25-30 (citing *Free Enter. Fund*, 130 S. Ct. 3138; *Morrison v. Olson*, 487 U.S. 654 (1988); and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). Plaintiffs attempt to brush aside this precedent, claiming that the Bureau has a unique combination of features that requires the President to have the authority to remove the Director at will. *See* Pl. Reply at 1-3, 19. Plaintiffs fail, however, to explain how features unrelated to presidential control—*i.e.*, the Bureau's funding mechanism or the deference it receives on judicial review—in any way diminishes the President's ability to faithfully execute the laws. At best, Plaintiffs might be understood to contend that for-cause removal does not adequately protect the President's ability to perform his constitutional duty given Plaintiffs' views about the scope of the Bureau's powers and its lack of a multimember commission. Neither argument has merit.

Precedent forecloses Plaintiffs' suggestion that the scope of the Bureau's powers renders the for-cause removal restriction constitutionally invalid. Although *Morrison* makes clear that for-cause removal does not deprive the President of the "substantial ability to ensure that the laws are 'faithfully executed,'" *Morrison*, 487 U.S. at 696, Plaintiffs contend that *Morrison* is inapposite because it involved for-cause protection for an inferior officer with only "'limited' duties and jurisdiction," Pl. Reply at 19. But *Morrison* in no way suggested that for-cause removal protections were permissible only for officers with limited powers. On the contrary, it reaffirmed *Humphrey's Executor*, an earlier case upholding for-cause removal protections for the Federal Trade Commission (FTC), an agency with powers similar to the Bureau's. *See Morrison*, 487 U.S. at 689-91 (discussing *Humphrey's Executor*, 295 U.S. 602); *see also* Def. Mem. at 36-37. And more recently, the Supreme Court in *Free Enterprise Fund* made clear that it was permissible to protect members of the Public Company Accounting Oversight Board with "a single level of good-cause tenure," even though that agency had "expansive powers to govern an entire industry." 130 S. Ct. at 3147, 3161.

Plaintiffs' contention that for-cause removal is constitutionally compatible only with multimember commissions is equally unavailing. First, Plaintiffs' contention that *Humphrey's Executor* approved for-cause removal protections only for multimember bodies (Pl. Reply at 10-11, 19) finds no support in that case's reasoning. The Court in that case considered two questions: (1) the statutory interpretation question whether the law in fact protected commissioners from removal except for cause, and (2) the constitutional question whether that for-cause removal protection was consistent with the separation of powers. *Humphrey's Executor*, 295 U.S. at 619. Although the Court noted that the FTC was a "body of experts" in evaluating the statutory interpretation question, that feature had no bearing on its resolution of the constitutional question. *See id.* at 624-25, 626-32. Instead, the Court upheld the removal restriction's constitutionality on the ground that the FTC exercised "quasi legislative and quasi judicial" functions.[7] *Id.* at 629; *see* Def. Mem. at 25-28.

Second, Plaintiffs contend that for-cause removal gives the President adequate control over an agency only if that agency is headed by a multimember body. In particular, Plaintiffs claim that the President "[i]n many instances" has the power to designate a commission's chairperson and that, because commissioners' terms are staggered, he usually will have an opportunity to appoint "at least some" commission members during his time in office. Pl. Reply

[7] Contrary to Plaintiffs' contention, *see* Pl. Reply at 19, *Myers v. United States*, 272 U.S. 52 (1926), does not require the President to have the ability to remove the Bureau Director at will. The Supreme Court has "disapproved" *Myers* to the extent that it was "out of harmony" with the decision in *Humphrey's Executor*. *Humphrey's Executor*, 295 U.S. at 626. For the reasons discussed above and in the Bureau's opening brief (Def. Mem. at 27-28), *Humphrey's Executor* and the cases following it control here.

at 5. This argument finds no support in the case law. On the contrary, it is in part foreclosed by *Humphrey's Executor*, which upheld for-cause removal protections for the FTC even though the President lacked authority to appoint the FTC chair. *See Humphrey's Executor*, 295 U.S. at 620 (citing statutory provision providing that "[t]he commission shall choose a chairman from its own membership").

Moreover, even if a President has the opportunity to appoint "at least some" commissioners, he would not necessarily have that opportunity at the start of his presidency, but only after sitting commissioners' terms expire. Whatever influence appointing "at least some" commissioners might give the President, the President would not gain that influence until he made his appointments. Plaintiffs do not explain their apparent view that the Constitution requires the President to have this influence at some point during his term, but not at the beginning. In any event, the for-cause removal power adequately protects the President's ability to faithfully execute the laws by empowering him to "hold the [agency] to account for everything . . . it does." *Free Enter. Fund*, 130 S. Ct. at 3154. As the Bureau noted in its opening brief, the for-cause removal power gives the President just as effective a tool for holding a single Director accountable as for holding commissioners accountable. Def. Mem. at 28.

As *Humphrey's Executor*, *Morrison*, and *Free Enterprise Fund* demonstrate, the power to remove an official for cause gives the President "ample authority to assure that the [official] is competently performing his or her statutory responsibilities in a manner that comports with [the statute]" and "to ensure the faithful execution of the laws." *Morrison*, 487 U.S. at 692-93. Neither the Bureau's scope of powers nor its single-Director leadership—nor any other feature—changes that.

2. *The Bureau's features do not impair Congress's legislative or appropriations powers*

As the Bureau's opening brief demonstrates, Congress retains its constitutional powers to oversee the Bureau, both through its power of the purse and through other traditional legislative and oversight authorities. Def. Mem. at 30-34. Plaintiffs no longer press their claim that Congress unconstitutionally relinquished its legislative power by delegating legislative authority to the Bureau, a claim that the Bureau explained was wholly without merit. *See* Pl. Mem. at 11; Plaintiffs' Complaint, Dckt. #1 (Compl.), ¶ 120; Def. Mem. at 33 n.16. Moreover, Plaintiffs now concede that "Congress, as CFPB argues, has the constitutional authority to create agencies outside of the appropriations process." Pl. Reply at 16; *see also* Def. Mem. at 30-32.

Plaintiffs' sole remaining objection to the Bureau's funding mechanism is that the Constitution precludes Congress from funding an agency outside of annual appropriations *only if* the agency is headed by a single Director whom the President can remove only for cause. Pl. Reply at 15. Plaintiffs, however, fail to identify any constitutional principle to support such an idiosyncratic limitation on Congress's legislative prerogative. Plaintiffs suggest that, without annual appropriations, the Dodd-Frank Act enables the Director to spend the Bureau's "monied resources at his pleasure."[8] Pl. Reply at 15, 16 (quoting *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2012)). But the Constitution requires only that federal officials not spend the nation's "monied resources" without the approval of Congress. *See U.S. Dep't of*

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[8] Plaintiffs also suggest that Congress unconstitutionally abdicated its appropriations power by providing that the Bureau's primary funding "shall not be subject to review by" the House and Senate Appropriations Committees. Pl. Reply at 17 (quoting 12 U.S.C. § 5497(a)(2)(C)). But, as the Bureau explained in its opening brief, this is constitutionally irrelevant. Def. Mem. at 32 n.15. The Constitution does not assign the power of the purse to congressional appropriations committees (which in any event are creatures of Congress, not the Constitution), but to Congress as a whole. U.S. Const. art. I, § 9, cl. 7. Congress retains that power: It established, and retains full legislative authority over, the Bureau's funding mechanism. *See* Def. Mem. at 30-32.

Navy, 665 F.3d at 1347. Congress gave its approval here in § 1017 of the Dodd-Frank Act. 12 U.S.C. § 5497.

Plaintiffs simply have not explained how the Bureau's funding mechanism—though otherwise permissible—becomes unconstitutional when combined with the Bureau's single-Director leadership, for-cause removal protection, or regulatory authority. Pl. Reply at 15-17. Indeed, those other features have no impact on Congress's ability to exercise its power of the purse or any other power—and the combination of those features thus does not impair congressional prerogatives.

3. The Bureau's features do not interfere with the judiciary's powers

Finally, the Bureau's features do not interfere with the judiciary's powers. As the Bureau explained in its opening brief, the Bureau's final actions are subject to ordinary judicial review under the Administrative Procedure Act. Def. Mem. at 34-35.

Plaintiffs do not suggest that the Bureau's for-cause removal provision, single-Director leadership, funding mechanism, or scope of authority interferes with the judiciary's powers. Rather, Plaintiffs object to a Dodd-Frank Act provision that "requires courts to grant . . . *Chevron* deference" to the Bureau's interpretations of Federal consumer financial law as if the Bureau "'were the only agency authorized to apply, enforce, interpret, or administer'" that law. Pl. Reply at 20 (quoting 12 U.S.C. § 5512(b)(4)(B)). As the Bureau explained in its opening brief, this provision simply expresses Congress's intent for the Bureau's interpretations to receive deference even if other agencies share authority to administer the laws that the Bureau has interpreted. Def. Mem. at 34-35 & n.17.

In contending that this provision presents a "separation-of-powers 'problem'" (Pl. Reply at 20), Plaintiffs turn separation-of-powers principles on their head. Plaintiffs argue that this provision impermissibly "mandates that Courts treat any CFPB interpretation as displacing all previous agency interpretations" and "future conflicting determinations by other agencies" and "convert[s] discretionary rules of deference to statutory, mandatory rules of obeisance." Pl. Reply at 20. At bottom, Plaintiffs' arguments suggest that courts should be able to overrule Congress's determination on which agency deserves deference on questions of statutory interpretation—or whether to apply deference at all. But that is backwards. The premise of *Chevron* is that *Congress* controls who has authority to interpret a statute: "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). In enacting the judicial-review provision to which Plaintiffs object, Congress simply made clear its intent to delegate interpretive authority over Federal consumer financial laws to the Bureau. This was well within Congress's authority and in no way impinges on the courts' prerogatives.

B. Plaintiffs' Arguments that the Bureau's Combination of Features Violates the Constitution Find No Support in Separation-of-Powers Principles

In objecting to the combination of features that Congress gave the Bureau, Plaintiffs never confront the basic fact that the Bureau's structure does not impede the President, Congress, or the courts in the exercise of their respective functions. Instead, Plaintiffs emphasize that "[j]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute." Pl. Reply at 2 (citing *Ass'n of Am. R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013)). But the fact that a combination of two otherwise-permissible features *can be* unconstitutional does not mean that such a combination *is* unconstitutional—or that precedent approving those features in isolation does not apply. In *American Railroads*, for example, the statute in question was not unconstitutional merely because it combined "two structural features [that] raise no constitutional concern independently," but because the statute gave a private entity (Amtrak) the right to "jointly exercise regulatory power on equal footing with an administrative agency," thereby "vitiat[ing] the principle that private parties must be limited to an advisory or subordinate role in the regulatory process." 721 F.3d at 673. Likewise, combining features will raise a separation-of-powers concern only if those features, when joined together, violate an actual separation-of-powers principle that neither feature violates independently.

Plaintiffs here have failed to take the next step of demonstrating a separation-of-powers principle that the Bureau's combination of features actually violates. Tellingly, although Plaintiffs cite several constitutional provisions in passing in their complaint and opening brief (Compl. ¶¶ 117-119; Pl. Mem. at 11), they never tie their arguments to those provisions, and do not refer in their reply brief to any constitutional provision at all. Lacking any concrete basis for their challenge, Plaintiffs instead argue that the Bureau's combination of features undercuts "democratic control of government" and runs afoul of a previously undiscovered constitutional requirement for a multimember commission that applies uniquely to the Bureau. Pl. Reply at 13, 14. These arguments find no support in separation-of-powers principles.

1. The Bureau's structure does not undercut "democratic control of government"

Plaintiffs claim that the Bureau's structure "violates the democratic principles that underlie our system of government." Pl. Reply at 14. They, however, offer no explanation for this claim that is distinct from their general separation-of-powers argument. Nor could they. As explained, the Dodd-Frank Act preserves "democratic control of government" by ensuring that

Case 1:13-cv-01021-CKK Document 32 Filed 10/25/13 Page 26 of 30

the political branches retain constitutionally sufficient control over the Bureau. Indeed, the only threat to democratic principles presented here arises from Plaintiffs' meritless constitutional challenge to the Dodd-Frank Act. "When [the court] is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." *Mistretta*, 488 U.S. at 384 (internal quotation marks omitted). Plaintiffs' bald invocation of "democratic control" does not clear this high hurdle.

2. The Constitution does not impose a multimember commission requirement

Plaintiffs next argue that, in the Bureau's unique case, "the Constitution mandates a multimember commission." Pl. Reply at 13. In advocating for this new constitutional requirement, Plaintiffs make various claims about the policy benefits of multimember commissions and invoke "the Nation's history and traditions" and the Bureau's supposed "novelty." Pl. Reply at 1, 2, 3. None of these arguments has any basis in constitutional principles.

a. Plaintiffs' arguments about the benefits of multimember commissions have no basis in constitutional principles

Plaintiffs throw out various arguments about the benefits of a commission structure to see what sticks. Nothing does. None of Plaintiffs' arguments finds any support in separation-of-powers principles.

Plaintiffs first complain that the Bureau's leadership structure concentrates "too much unchecked power . . . in the hands of a single person." Pl. Reply at 8. According to Plaintiffs, Congress has unconstitutionally accumulated "all powers legislative, executive and judicia[l] in the same hands," which is "the very definition of tyranny." *Id.* But, as explained above and in the Bureau's opening brief (Def. Mem. at 38), the legislative, executive, and judicial powers are dispersed among the three branches, not concentrated in the hands of the Bureau Director. The President, Congress, and the courts all exercise checks on the Bureau—and the Bureau Director—through the constitutional powers that remain at their disposal. Moreover, as the Bureau's opening brief explained (Def. Mem. at 36-37), and as Plaintiffs fail to refute, the scope of the Bureau's authority does not somehow make these checks constitutionally inadequate. In short, Plaintiffs' contention that the Bureau Director exercises unchecked power is wholly without merit.

In a related vein, Plaintiffs contend that the Constitution requires a multimember structure to supply "internal checks and balances" as a substitute for the "external checks"—"presidential removal and congressional appropriations"—that the Bureau supposedly lacks. Pl. Reply at 8-9. As the Bureau has already explained, however, the "external checks" on the Bureau are constitutionally adequate, so no internal check would be necessary even under Plaintiffs' theory. More fundamentally, Plaintiffs' argument flies in the face of separation-of-powers principles. If missing "external checks" on an agency left a branch of government unable to perform its constitutional duties—for example, if the President lacked any authority to remove the agency head—that would violate the separation of powers. The "internal check" of a commission structure could not restore that branch's impaired authority, and thus could not cure the violation. In short, the number of people that Congress has decided should head up an agency has no bearing on any separation-of-powers inquiry.

Plaintiffs next contend that a commission structure makes an agency more democratically accountable because, by statute, commission meetings are open to the public. Pl. Reply at 10. But Plaintiffs concede that open meetings are a statutory requirement, not a constitutional one. *Id.* And Plaintiffs' related contention, that commissions also promote democratic accountability by allowing the President to appoint "some" commissioners and possibly a chairman, is meritless for the reasons discussed above. *See supra* pages 15-16.

Plaintiffs next (somewhat contradictorily) laud multimember commissions for "dilut[ing] the effect of transitory political events on agency policy" and enabling "'expert decisions as distinguished from raw political . . . decisions." Pl. Reply at 9, 10. But even if Plaintiffs' views on the optimal policy for agency decisionmaking were correct, Plaintiffs do not attempt to tie their views to any constitutional principle.

Finally, Plaintiffs contend for the first time in their reply that the absence of a commission structure "undermin[es] judicial review" because "there will be insufficient recordation of competing considerations" offered by commissioners with "minority viewpoints." Pl. Reply at 9. That argument is baseless. Federal courts are fully capable of reviewing—and routinely do review—actions by agencies with single heads just as they review the actions of multimember commissions.

At bottom, all of Plaintiffs' arguments are untethered from separation-of-powers principles and simply tout the perceived policy benefits of multimember commissions. But as the Bureau has explained (Def. Mem. at 39), the policy benefits (and drawbacks) of a commission structure are quintessentially questions for Congress to consider. Here, Congress decided that the Bureau should be headed by a single Director. Nothing in the Constitution compelled Congress to make a different choice.

b. Neither "tradition" nor "novelty" supports creating a new constitutional requirement for a multimember commission

Finally, Plaintiffs contend that the Bureau's structure is "unmoored" from history because Congress has "traditionally" structured independent agencies to be led by multimember commissions.[9] Pl. Reply at 3, 5. But, as the Bureau explained in its opening brief (Def. Mem. at 39), Congress broke no new ground in giving the Bureau a single Director removable only for cause. Plaintiffs respond that it is "the combination of CFPB's features of autonomy that makes the agency novel and unprecedented," which in Plaintiffs' view "*may* . . . signal unconstitutionality." Pl. Reply at 2 (quoting *Ass'n of Am. R.R.*, 721 F.3d at 673 (emphasis added)). The Supreme Court has made clear, however, that "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta*, 488 U.S. at 385. To prevail, Plaintiffs must show that the alleged novelty of the Bureau's structure actually violates separation-of-powers principles. Plaintiffs have failed to make that showing for the reasons explained above and in the Bureau's opening brief. Plaintiffs' constitutional challenge to the Bureau's existence therefore must be rejected.

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9 Plaintiffs contend that history and tradition must be given "great weight' in assessing the constitutionality of the Bureau's structure, but the cases they cite to support that contention do not apply to this case. *See* Pl. Reply at 6. Rather, those cases give "great weight" to the existence of a longstanding practice—particularly one in which the branches of government have acquiesced—in upholding the practice as constitutional. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (upholding practice "[g]iven the fact that [it] goes back over 200 years and has received congressional acquiescence throughout its history"); *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (upholding statute that followed history of an "unbroken congressional practice" of enacting similar statutes); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (approving President's actions in part because "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952))); *The Pocket Veto Case*, 279 U.S. 655, 688-89 (1929) (giving "great weight" to "the practical construction that has been given to [a constitutional provision] by the Presidents through a long course of years, in which Congress has acquiesced"); *Bauer v. Marmara*, -- F. Supp. 2d --, 2013 WL 1684051, at *3 (D.D.C. 2013) ("[T]he rich history of informer statutes is well nigh conclusive as to their constitutionality." (quotations omitted)). These cases do not hold that Congress's practice of doing something one way deserves "great weight" whenever a party raises a constitutional challenge to Congress's decision to depart from that practice. Thus, Congress's past decisions to structure many (though not all, *see* Def. Mem. at 39) independent agencies as multimember commissions says nothing about the constitutionality of independent agencies headed by a single leader.

CONCLUSION

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

Respectfully submitted,

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