RANDALL K. MILLER (admitted *pro hac vice*)
NICHOLAS M. DEPALMA (admitted *pro hac vice*)
RANDAL M. SHAHEEN (subject to admission *pro hac vice*)
VENABLE LLP
8010 Towers Crescent Drive
Suite 300
Tysons Corner, VA 22182
(Phone) 703.905.1449
(Fax) 703.821.8949
Email: kmiller@venable.com
nmdepalma@venable.com

CELESTE M. BRECHT (SBN 238604)
VENABLE LLP
2049 Century Park East
Suite 2100
Los Angeles, CA 90067
(Phone) 310-229-9900
(Fax) 310-229-9901
Email: cmbrecht@venable.com

Attorneys for MORGAN DREXEN and WALTER LEDDA

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)

Hon. Josephine L. Staton
Courtroom: 10A (Santa Ana)

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS

DATE: December 13, 2013
TIME: 2:30 p.m.
CTRM: 10A

Action Filed: August 20, 2013
Trial Date: Not set

TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on December 13, 2013 at 2:30 p.m., before the Honorable Josephine L. Staton, in Courtroom 10A of the United States District Court for the Central District of California, located at 411 West Fourth Street, Santa Ana, CA 92701-4516, Defendants Morgan Drexen, Inc. and Walter Ledda, will and hereby do move the Court to dismiss the Complaint because CFPB is unconstitutional and the Complaint otherwise fails to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6).

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on Friday, October 18, 2013. Counsel were unable to reach a resolution other than to the date for hearing of the motion.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Nicholas M. DePalma, all pleadings, records, and papers filed in this action, the argument of counsel, any supplemental memoranda that may be filed by the parties, and such further evidence as the Court may consider at or before the hearing of this Motion.

Dated: October _25, 2013

VENABLE LLP

By: /s/ Celeste M. Brecht
Celeste M. Brecht
Attorneys for Defendants
MORGAN DREXEN and
WALTER LEDDA

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

RANDALL K. MILLER (admitted *pro hac vice*)
NICHOLAS M. DEPALMA (admitted *pro hac vice*)
RANDAL M. SHAHEEN (subject to admission *pro hac vice*)
VENABLE LLP
8010 Towers Crescent Drive
Suite 300
Tysons Corner, VA 22182
(Phone) 703.905.1449
(Fax) 703.821.8949
Email: rkmiller@venable.com
nmdepalma@venable.com
rmshaheen@venable.com

CELESTE M. BRECHT (SBN 238604)
VENABLE LLP
2049 Century Park East
Suite 2100
Los Angeles, CA 90067
(Phone) 310-229-9900
(Fax) 310-229-9901
Email: cmbrecht@venable.com

Attorneys for MORGAN DREXEN and WALTER LEDDA

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)

Hon. Josephine L. Staton
Courtroom: 10A (Santa Ana)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

DATE: December 13, 2013
TIME: 2:30 p.m.
CTRM: 10A

Action Filed: August 20, 2013
Trial Date: Not set

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

TABLE OF CONTENTS

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

TABLE OF AUTHORITES

Cases

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

Statutes

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

Rules

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

PRELIMINARY STATEMENT

Plaintiff Consumer Financial Protection Bureau ("CFPB"), a super agency uniquely insulated from political accountability, is suing Morgan Drexen, Inc., a small business providing high quality outsourced paralegal services, and its CEO, Walter Ledda (together, "Morgan Drexen"). CFPB alleges that the support services that Morgan Drexen provides to lawyers across the country violate the Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310.4(a)(5)(i) and constitutes an "unfair," "deceptive," or "abuse act or practice" ("UDAAP") under the Consumer Financial Protection Act, 12 U.S.C. § 5531(a), because customers pay up-front fees for bankruptcy counseling services.

As explained herein, this action should be dismissed in its entirety because CFPB's structure violates the Constitution given: (1) the extraordinary scope of power delegated to CFPB under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), 12 U.S.C. §§ 5481 *et seq.* and (2) the lack of constitutionally-required political oversight and checks and balances.

In the alternative, Counts I, III, IV, V, and VI should be dismissed because CFPB cannot state a claim for relief based on fees charged for bankruptcy counseling services performed by or under the direction and supervision of lawyers for clients of the lawyers. First, CFPB cannot bring a claim under the TSR if no up-front fees are charged for debt settlement services (Counts I and III). Here, as conceded in the Complaint, Morgan Drexen performs debt settlement services pursuant to a separate attorney/client retainer agreement which does not require the payment of up-front fees (and therefore does not implicate the TSR). Because there is no up-front fee charged for debt settlement, the vast majority of CFPB's case falls away. Second, CFPB cannot alternatively rely on its UDAAP authority because there is a statutory "exclusion" for the practice of law (Counts I, III, IV, V, and VI). *See* 12 U.S.C. § 5517(e). As an outsourced legal support company acting at the direction of lawyers, Morgan Drexen falls within this exclusion.

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

FACTUAL BACKGROUND

I. DODD-FRANK AND CFPB

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."[1]

The resulting statute created a new super agency unmoored from historical precedent and insulated from political accountability. Title X creates CFPB as a new "Executive agency" that is an "independent bureau" "established in the Federal Reserve System." 12 U.S.C. § 5491(a). CFPB's Director receives a five-year term in office and does not serve at the pleasure of the President but instead may only be removed by the President for cause, i.e., "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(b)(2) and (c).

CFPB is authorized to fund itself by unilaterally claiming up to 12% of the Federal Reserve System's funds, 12 U.S.C. § 5497(a)(2)(iii) , i.e., $597,600,000 in 2013.[2] Title X also transferred to CFPB authority from seven different agencies, *see* 12 U.S.C. § 5581(a)(2)(A), and empowers it take several actions, including enforcement, to prevent a covered person from engaging in conduct that implicates CFPB's UDAAP authority. 12 U.S.C. § 5531(a).

As a result, CFPB has authority over virtually every consumer financial transaction and every business that engages in such transactions.

---

[1] 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] *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).

II. ALLEGATIONS AGAINST MORGAN DREXEN

CFPB purports to sue Morgan Drexen for supposed violations of the TSR and under its UDAAP authority. CFPB alleges that consumers "contract[] directly with attorneys affiliated with Morgan Drexen" and that Morgan Drexen provides debt relief services. Compl. ¶ 8. CFPB alleges that consumers can enter into two contracts: (1) a Debt Relief Contract; and (2) a Bankruptcy Contract. "[T]he Debt Relief Contract the consumer signs does not require the payment of up-front fees." *Id*. ¶ 41. Under the Debt Relief Contract, the consumer contracts with a "Network Attorney" to "represent [the] consumer with respect to the attempted negotiation and settlement of the consumer's debts." *Id*. ¶ 42. The Network Attorney is not paid under the Debt Relief Contract until debt is settled. *Id*. ¶ 42.

Consumers may also enter into a separate Bankruptcy Contract. *Id*. ¶ 48. Under the Bankruptcy Contract, CFPB alleges that consumers are charged an engagement fee, a bankruptcy filing fee, and a flat monthly servicing fee. *Id.* CFPB speculates that "[b]y the bankruptcy contract's own limited scope, little to no bankruptcy work is performed for consumers." *Id*. ¶ 49. Instead, CFPB alleges that the Network Attorney's engagement is limited to "counseling the consumer 'with respect to preparation for possibly filing a bankruptcy petition' and 'with respect to pre- and post-filing claims by creditors.'" *Id*. ¶ 50.

CFPB does not allege that the contracts are tied together. *Id*. ¶ 37 (alleging "[t]he vast majority of consumers seeking Morgan Drexen's debt relief services sign both contracts"). If consumers sign the Debt Relief Contract, then Network Attorneys do "not require the payment of up-front fees." *Id*. ¶ 41. If consumers sign the Bankruptcy Contract, then they do pay fees for legal counseling.

ARGUMENT

I. MOTION TO DISMISS STANDARD

A prerequisite for this lawsuit is that CFPB is a constitutional entity with authority to commence this action. Because CFPB is not constitutional, this case

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

must be dismissed. In the alternative, the Complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A complaint must (1) contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively, and (2) plausibly suggest an entitlement to relief." *Pro Search Plus, LLC v. VFM Leanardo, Inc.*, No. SACV12-2102-JST, 2013 WL 3936394, at *4 (C.D. Cal. July 2013) (citation omitted).

II. LEGAL CRITERIA FOR EVALUATING CFPB'S CONSTITUTIONALITY

A. Immutable Principles

A constitutional challenge to agency structure should be informed by the overall context and comparison of the scope of agency power to accompanying structural protections (checks, balances, and oversight). Congress's power to create federal agencies is not mentioned in the Constitution, but is discussed in Supreme Court cases, which provide principles to guide the Court's analysis:

1. The Court has the authority to review, and if necessary declare unconstitutional, an agency's structure.[3]

2. "[S]tructural protections against abuse of power [are] critical to preserving liberty."[4]

3. Federal agencies must have constitutional "checks and balances."[5]

---

[3] *Free Enter. Fund v. Pub. Co. Acct'ing Oversight Bd.*, 130 S. Ct. 3138, 3160 (2010).

[4] *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

[5] *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").

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

4. The extent of the required checks and balances depends on the scope of the agency's powers and duties.[6]

5. History and "traditional ways of conducting government give meaning to the Constitution."[7]

6. "[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute."[8]

7. An agency's "novelty may . . . signal unconstitutionality."[9]

8. "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."[10]

B. Warnings About The Increasingly Expansive And Unchecked Power Of The Administrative State

The Court also should evaluate this case in light of judicial concerns that have been expressed over the 75 years of virtually unchecked growth in administrative power. In this year's *City of Arlington* decision, Chief Justice Roberts—writing for himself and Justices Kennedy and Alito—noted that the "danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1879 (2013) (Roberts, J., dissenting). Justice Roberts urged courts to ask "whether the authority of administrative agencies should be augmented even further" in light of the increasing concerns an ever expanding fourth branch of government. *Id*.

---

[6] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *Morrison v. Olson*, 487 U.S. 654, 671-73, 695-97 (1988) (less protection is necessary where the agency has a targeted and narrow scope of delegated power exercised by inferior officers).

[7] *Bauer v. Marmara*, 2013 WL 1684051, at *9 (D.D.C. Apr. 18, 2013).

[8] *Ass'n of Am. Railroads v. U.S. Dept. of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013).

[9] *Id.* at 673.

[10] *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (quoting The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison)).

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

III. CFPB'S UNPRECEDENTED LACK OF CHECKS, BALANCES AND OVERSIGHT RENDERS IT UNCONSTITUTIONAL

When applying the criteria summarized in Section II, CFPB fails the test. CFPB has one of the broadest delegations of power in history yet ***each*** of the critical restraints on agency power (especially presidential at-will removal, congressional appropriations oversight, multimember commission) is absent.

CFPB's structure is unique. No other comparable agency aggregates CFPB's constitutionally troubling features together. CFPB's 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.

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).[11]

The Court must evaluate these features—not in isolation—but in terms of accumulated impact. "[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single

[11] Available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=19e3efe3-0c50-47df-bb3c-b75ff93e7a5f.

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

statute." *Ass'n of Am. Railroads*, 721 F.3d at 673. Here, CFPB is unprecedented given the combination of its features of autonomy. There is simply no historical precedent that can justify CFPB's combined lack of structural safeguards. CFPB's "novelty. . . signal[s] unconstitutionality." *Id.* "Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent." *Free Enter. Fund*, 130 S. Ct. at 3159 (internal quotation marks omitted).

A. CFPB Does Not Have Constitutionally-Required Political Accountability Though Presidential Removal And Congressional Appropriations

To pass constitutional muster and maintain democratic accountability, CFPB must be subject to political oversight. However, Dodd-Frank Act stripped away core powers necessary to ensure CFPB's responsiveness to the electorate: the President's removal power and Congress's power of the purse. In other cases, courts have grappled with which political institution—Congress or the President—had the power to oversee an agency, a classic separation of powers dispute between two branches. Here, however, by disabling removal and insulating CFPB from the appropriations process, Congress has eviscerated CFPB's political accountability to both itself and the President, and left the electorate unprotected. This question is not limited to a turf battle between Congress and the President but instead is a problem of over-insulation and insufficient political accountability.

1. No Presidential Oversight Through At-Will Removal

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, and that he "shall appoint" all "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. The Dodd Frank Act calls CFPB an executive agency and gives CFPB executive authority. 12 U.S.C. § 5491(a). Here, however, CFPB's Director is protected from at-will removal, which interferes with the democratically-elected President's ability to supervise his Article II power and—through him—the electorate's ability to check CFPB.

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

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." *Mistretta v. United States*, 488 U.S. 361, 382 (1988). By preventing the President from removing the Director, 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.

In *Myers v. United States*, 272 U.S. 52 (1926), 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. 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 Enter. Fund*, 130 S.Ct. at 3146. Here, no such circumstance justifies departing from *Myers*.[12]

---

[12] This restriction on presidential removal is consistent with other provisions of the Dodd-Frank Act that undermine presidential control of executive agencies. For example, CFPB's Director can simply delegate all of his massive power to anyone he chooses. *See* Section 1012(b) of Title X: "The Director of the Bureau may delegate to any duly authorized employee, representative, or agent any power vested in the Bureau by law.") This undermines the President's power to appoint and remove executive officials. *See Buckley v. Valeo*, 424 U.S. 1, 136 (1976) (confirming the Presidential power to make appointments to federal agencies and

(continued…)

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

2. No Congressional Oversight Through Appropriations

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.

Not only may CFPB spend half a billion dollars without Congress's authorization, Congress is actually ***prohibited*** from reviewing CFPB's use of these funds. The Dodd-Frank 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) (emphasis added).

Thus, Congress's "ultimate weapon of enforcement"—the power of the purse—which essentially gives voice to the electorate, *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974) – is unavailable.[13] "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.,

---

(continued)

invalidating Congress's attempt to appoint members of the Federal Election Committee). Additionally, the Dodd-Frank Act establishes membership on the Financial Stability Oversight Council of existing executive branch officials such as the Chair of the FDIC (12 USC § 5321(b)(1)) without requiring reappointment by the President. *See Weiss v. United States*, 510 U.S. 163, 174 (1994) ("[W]hile Congress may create an office, it cannot appoint the officer. By looking to whether the additional duties assigned to the offices were 'germane,' the Court sought to ensure that Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office) (citing *Shoemaker v. United States*, 147 U.S. 282, 300-301 (1893)).

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

1961) (quoted in *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2007)). *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").

CFPB can identify no other agency head like its Director, who is responsible for regulating private sector activity and who has sole power to determine whether and how to spend half a billion dollars outside of the appropriations process. As an example, during the recent government shutdown, where other regulatory agencies like the FTC were postponing judicial actions, CFPB was entirely unaffected.

B. CFPB Does Not Have A Multimember Commission

The absence of Presidential removal power and Congressional appropriation's power might be constitutionally permissible if CFPB was headed by a multimember commission. Here, however, the entirety of CFPB's authority (over all regulatory and enforcement decisions) is aggregated in a single tenure-protected Director serving a five-year term, with no check on that Director's judgment or decision. The Director need not confer with anyone. No deliberation or expression of minority viewpoints need occur prior to the exercise of power.

1. History of Multimember Commission Structure for Regulatory Agencies and Constitutional Significance

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

CFPB's lone director 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 exercise broad rulemaking and enforcement powers. For example, the FTC, SEC, Commodity Futures Trading Commission ("CFTC"), Federal Communications Commission ("FCC"), Federal Energy Regulatory Commission ("FERC"), and the Consumer Products Safety Commission ("CPSC")[14], as well as other agencies, use a multimember commission structure. Even the Federal Reserve operates under the authority of a Board of Governors. 12 U.S.C. § 241.

"[T]raditional ways of conducting government give meaning to the Constitution." *Bauer v. Marmara*, 2013 WL 1684051, at *3 (D.D.C. Apr. 18, 2013) (quoting *Mistretta v. United States*, 488 U.S. 361, 401 (1988)). "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, 200, 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

[14] 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)); and CPSC (15 U.S.C. § 2053(a)).

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

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 should consider the tradition of using bipartisan multimember commissions for agencies possessing broad enforcement, adjudicatory, and rulemaking authority. The FTC has a multimember structure. Its statute states: "A commission is created and established, to be 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, 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).

The SEC is another example—it 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. "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

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

467, 473 (7th Cir. 1980) (citation omitted). Former SEC Chairman Arthur Levitt, recognized 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."[15]

2. CFPB Was Conceived, Proposed And House Enacted As a Multimember Commission

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.[16] The administration proposed CFPB as 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 (emphasis added).[17]

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

---

[15] *Hearings on Securities Reform and H.R. 2131, the Capital Markets Deregulation and Liberalization Act of 1995 Before the Subcomm. on Telecomm. & Fin., House Comm. on Commerce*, 104th Cong. (1995). 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).

[16] "The model … is the U.S. Consumer Product Safety Commission (CPSC). . . ." Elizabeth Warren, *Unsafe at Any Rate*, Democracy Journal at 16 (2007), *available at* http://www.democracyjournal.org/pdf/5/Warren.pdf.

[17] Available at http://online.wsj.com/public/resources/documents /finregfinal06172009.pdf.

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

individuals who— (A) are citizens of the United States; and (B) have strong competencies and experiences related to consumer financial protection.").[18]

This all ended in the Senate—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. This last minute change does nothing to cure CFPB's constitutional infirmities because the Fed's Board of Governors has no power to stop any enforcement decision. The decision to make CFPB a bureau was discussed in the Senate and appears to be premised on the FTC's Consumer Protection "Bureau." *See* 156 Cong. Rec. S3319 (daily ed. May 6, 2010). The power is analogous—the Bureau of Consumer Protection for the FTC "investigates unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act." 16 C.F.R. § 0.17 (2013). There, however, the "***commission itself*** … must authorize any formal action, such as the issuance of a complaint." Stephanie W. Kanwit, 1 Fed. Trade Comm'n § 2:15 (2013) (emphasis added).

3. The Loss Of The Original Multimember Structure Has Constitutional Impact

The originally proposed and House-enacted multimember structure could have potentially avoided the constitutional infirmities that now characterize CFPB. Congress could have achieved its goal of having an agency 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: CFPB's 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*,

[18] Available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr4173eh/pdf/BILLS-111hr4173eh.pdf.

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

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.[19] A multimember structure accommodates "diverse or extreme views through the compromise inherent in the process of collegial decisionmaking," and "dilute[s] the effect of transitory political events on agency policy."[20] Here, this internal restraint is constitutionally necessary because CFPB is not subject to the most important checks of presidential removal and congressional appropriations.

A multimember structure also enables judicial review. 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. FCC*, 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 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 because the Dodd-Frank Act obligates courts to defer to CFPB's judgment over

---

[19] "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 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).

[20] Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1137 (2000).

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

inconsistent views of other federal agencies, even where those agencies have overlapping functions. 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).

The Supreme Court has also recognized that the multimember structure facilitates "expert" decisions as distinguished from raw political (and potentially 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,[21] the Supreme Court accepted Congress's decision to insulate an agency (the FTC) from the President's at-will removal power after noting that the agency was composed of a "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.*

---

[21] 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").

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

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").[22] Unlike these agencies, CFPB does not have an "expert body" with its moderating influence.

We are aware of no 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. 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.

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 practice -- to be 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

---

[22] The Supreme Court recognized in *Free Enterprise Fund* that the decision in *Humphrey's Executor* marks the outer bounds of permissible restrictions on the President's ability to oversee Executive Branch officials and hold them accountable. Like the additional restrictions at issue in *Free Enterprise Fund*, the restrictions on oversight here go beyond those in *Humphrey's Executor*.

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

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." *See* **Exhibit 1**.

A multimember structure would fulfill Madison's promise that power not be concentrated in the hands of a single individual such as a king or despot. If CFPB's lone Director were a chairman overseeing a commission, he would have to go through the important processes of debate and deliberation, forge a consensus, and persuade 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."[23]

Deliberating sometimes slows down action; 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.

C. Dodd-Frank Intrudes On The Power Of The Court By Prescribing An Impermissible "Rule Of Decision" That Declares CFPB The Winner In Advance Of Inter-Agency Disputes

The Dodd-Frank Act also 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—essentially unwinding decades of precedent created by other agencies and courts reviewing those

[23] http://ftc.gov/speeches/leibowitz/090924fordhamspeech.pdf.

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

agencies. It also insulates CFPB from future conflicting determinations by other agencies that continue to share jurisdiction over federal consumer financial laws.

An agency's interpretation of a statute is not entitled to *Chevron* deference—a judge-made standard—whenever it "shares responsibility for the administration of the statute" with another agency. *Rapaport v. United States Dept. of Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995). In such a circumstances, courts "proceed de novo." *Id.* at 217; *accord Grant Thornton, LLP v. Office of the Comptroller of the Currency*, 514 F.3d 1328, 1331 (D.C. Cir. 2008) ("We review the OCC's interpretation of FIRREA and related statutory provisions *de novo* because multiple agencies besides the Comptroller administer the act . . .").

The Supreme Court has long held that Congress may not dictate a "rule of decision" to the Court. *See United States v. Klein*, 80 U.S. 128, 146 (1871). By doing so, Congress "inadvertently pass[e]s the limit which separates the legislative from the judicial power." *Id.* at 147. Here, requiring that Courts give CFPB *Chevron* deference is another factor—that, when combined with the other facts—renders CFPB unconstitutional.

D. The Broad Power and Discretion Given to CFPB Implicates the Non-Delegation Doctrine and Underscores the Need for Protections

CFPB also raises questions regarding whether Congress established an "intelligible principle" to guide agency decisions. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001). CFPB's authority to go after whatever it considers "abusive" bestows unprecedented power, especially given Director Cordray testimony that "abusive" is "a little bit of a puzzle" that cannot be defined. *How Will the CFPB Function Under Richard Cordray, Hearing Before the Subcomm. on TARP, Fin. Servs., and Bailouts of Pub. and Private Programs*, 112th Cong., 112-107, at 69 (2012).

The Supreme Court has not actually invalidated a statutory delegation as granting excessive decisionmaking authority since the 1930s. *See A.L.A. Schechter*

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

Poultry Corp. v. United States, 295 U.S. 495 (1935) and *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935). However, the concerns that underlie the doctrine have great force here because CFPB is a novel agency of unprecedented power and insulation unmoored from historical precedent. As noted, Justice Roberts recently warned about the "danger posed by the growing power of the administrative state." *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1879 (2013) (Roberts, J., dissenting). 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, free from other commissioners, who does not serve at the pleasure of the President, and whose agency is subject to curtailed judicial review—is all extreme isolation. CFPB's lack of structural protection cannot be reconciled with its broad delegation of power.

E. Dodd-Frank Transfers Authority To CFPB From Agencies That Have Constitutionally Compliant Checks And Balances

Congress created CFPB 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 – the Fed, OCC, former OTS, FDIC, National Credit Union Administration ("NCUA"), FTC, and HUD. 12 U.S.C. § 5581. Thus, Congress transferred authority from agencies that have appropriate checks, balances, and oversight to one that does not.

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

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

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 are set forth in the chart at **Exhibit 2**. 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. In addition, in its federal register notice, CFPB left itself 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.

The supervision, interpretation, promulgation of regulations, and the enforcement of the consumer financial laws was previously under the auspices of agencies subject to checks and balances and accountability. Each of the transferee agencies had at least one of the following: Presidential removal power, multimember commissions, and/or congressional budgetary appropriation. By transferring authority to CFPB, the Dodd-Frank Act put an end to these checks and balances. The chart attached as **Exhibit 3**, submitted to the Senate by the U.S. Chamber of Commerce, demonstrates that these features are not aggregated in any other comparable agency.

IV. IN THE ALTERNATIVE, CFPB CANNOT STATE A CLAIM FOR RELIEF UNDER RULE 12(B)(6)

A. Defendants Did Not Violate The Telemarketing Sales Rule (Counts I And III) Because The Complaint Does Not Plausibly Establish Up-Front Fees For Debt Settlement Occured

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

CFPB's counts involving alleged up-front fees charged for debt settlement services must be dismissed because—from the face of the Complaint—the Debt Relief Contract does not require the payment of up-front fees. Compl. ¶ 41.

The TSR, 16 C.F.R. § 310.4(a)(5)(i) provides that a seller or telemarketer may not request or receive payment of any fee or consideration for any debt relief service until and unless, among other things, "the seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer" and "the customer has made at least one payment" pursuant to an agreement or plan. *Id.*

Here, CFPB fails to allege facts that plausibly show a violation of the TSR. CFPB alleges in conclusory fashion that Defendants have "requested or received fees from consumers for debt relief services before renegotiating, settling, reducing, or otherwise altering the terms of at least one of such consumers' debts." Compl. ¶ 75 (Count I); *see also id.* ¶ 82 ("In fact, consumers are charged advanced fees for Defendants' debt relief services"). However, these conclusory allegations are belied by other alleged facts: "the Debt Relief Contract the consumer signs does not require the payment of up-front fees." Compl. ¶ 41. Although consumers pay for services under the Bankruptcy Contract, this does not change this result because CFPB alleges that the engagement under the Bankruptcy Contract is limited to "counseling" regarding filing bankruptcy and pre- and post-filing claims by creditors. Compl. ¶ 50. Although CFPB claims that the Debt Relief Contract and the Bankruptcy Services Contract are "designed to disguise up-front payments for debt relief services," CFPB fails to allege facts alleged to support this legal conclusion. This conclusion is belied in any event because CFPB does not allege that consumers are required to execute both contracts. *See* Compl. ¶ 37 (alleging that the "vast majority" execute both contracts, but not alleging that the two contracts must be executed together, or that

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

a law firm client is prohibited from terminating the bankruptcy agreement without also terminating the debt relief agreement).

CFPB might believe (against allegations to the contrary) that attorneys supported by Morgan Drexen are entering into bankruptcy retainer agreements with their clients, charging for bankruptcy work but in most cases not doing the work they are charging. If true, these serious allegations would violate lawyers' Rules of Professional Conduct; however, it could not violate the TSR because these are not fees for debt settlement. As noted below, the reason why CFPB is trying to transform what would otherwise be a garden variety ethics issue into a violation of the TSR is because the attorney exemption discussed below does not apply to the TSR.

B. Defendants Are Exempt From CFPB's UDAAP Authority (Counts I, III, IV, V, VI) Under The Exclusion For The Practice Of Law

CFPB's counts for violation of the CFPA depend on its UDAAP authority. These counts must be dismissed for the same reasons that the up-front fee claims must be dismissed (no up-front fees are charged for debt settlement) and because CFPB does not have the ability to regulate Morgan Drexen—an attorney support professional—under the CFPA.

Section 1027(e) of the Dodd-Frank Act contains an exception from the authority of CFPB for attorneys engaged in the practice of law. It provides under "exclusion for the practice of law," that, with certain exceptions, "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." 12 U.S.C. § 5517(e). Because the exceptions include CFPB's ability to enforce the consumer laws or authorities transferred to it, Morgan Drexen does not rely on this exclusion for causes of action brought under the TSR. However, Counts I, III, IV, V, and VI, rely on

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

CFPB's UDAAP authority and must be dismissed because Morgan Drexen is an attorney paralegal for lawyers engaged in the practice of law.

Other jurisdictions recognize that outsourced paralegal services companies like Morgan Drexen qualify for the attorney exclusion under Section 1027(e) of the Dodd-Frank Act. For example, in *Moore v. Struthers*, Case No. 11CV7027—a case involving Morgan Drexen—the Denver County District Court held that "because of the nature of the relationship between attorneys and their non-lawyer assistants, where attorneys can be held professional responsible for their assistants' actions, the Court concludes that regulation of an attorney's non-lawyer assistant has direct implications on the attorney and therefore implicates the separation-of-powers doctrine." *Moore v. Suthers*, Case No. 11CV7027, at 18 (Colo. Dist. Ct. Denver County Sept. 12, 2012) (attached as **Exhibit 4**). That case involved the Colorado Debt-Management Services Act, which contained a provision similar to Section 1027(e) of the Dodd-Frank Act. The court noted that "the services provided by Morgan Drexen were ***legal services*** under the original [exclusion]." *Id.* at 9 (emphasis added). The court held that the Colorado Rules of Professional Conduct "explicitly permit attorneys to contract with nonemployee non-lawyer assistants to assist them in providing legal services and such assistants may act for the lawyer in rendition of the lawyer's professional services." *Id.* at 9. The court recognized that Morgan Drexen's services are provided in an attorney-client relationship, and are provided by an attorney licensed or otherwise authorized to practice law in Colorado. *Id.* at 9-10.

Notably, the Morgan Drexen business model is expressly authorized by the Rules of Professional Conduct for lawyers, which are administered by the States—not federal agents. CFPB has no authority to change these rules or expose Defendants to inconsistent obligations. *See* ABA Model Rule of Professional Conduct 5.3 (permitting lawyers to use nonlawyer assistants); and Comment 3 ("A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

services to the client. Examples include the retention of . . . a paraprofessional service").

Here, Morgan Drexen falls within Section 1027(e)'s exclusion for lawyers engaged in the practice of law, thus, CFPB cannot exercise its UDAAP authority over Morgan Drexen. To the extent consumers have complaints about the legal services with which Morgan Drexen is assisting various attorneys, consumers may make such complaints to the respective State bars. This is consistent with the reservation of rights to regulate the practice of law to the States under the Tenth Amendment. *See ABA v. FTC*, 671 F. Sup. 2d 64 (D.D.C. 2009), *vacated on grounds of mootness*, 636 F.3d 641 (D.C. Cir. 2011) (invalidating an attempt by FTC to regulate lawyers). *See also ABA v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005) (holding that the FTC did not have authority to regulate the practice of law under the Gramm-Leach-Bliley Act and noting that federal law "may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion") (citation omitted).

CONCLUSION

WHEREFORE, Defendants respectfully request that their motion to dismiss be granted.

Dated: October 25, 2013

VENABLE LLP

By: /s/ Celeste M. Brecht
Celeste M. Brecht
Attorneys for Defendants
MORGAN DREXEN and
WALTER LEDDA

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

RANDALL K. MILLER (admitted *pro hac vice*)
NICHOLAS M. DEPALMA (admitted *pro hac vice*)
RANDAL M. SHAHEEN (subject to admission *pro hac vice*)
VENABLE LLP
8010 Towers Crescent Drive
Suite 300
Tysons Corner, VA 22182
(Phone) 703.905.1449
(Fax) 703.821.8949
Email: kmiller@venable.com
nmdepalma@venable.com

CELESTE M. BRECHT (SBN 238604)
VENABLE LLP
2049 Century Park East
Suite 2100
Los Angeles, CA 90067
(Phone) 310-229-9900
(Fax) 310-229-9901
Email: cmbrecht@venable.com

Attorneys for MORGAN DREXEN and WALTER LEDDA

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)

Hon. Josephine L. Staton
Courtroom: 10A (Santa Ana)

DECLARATION OF NICHOLAS M. DEPALMA

Action Filed: August 20, 2013
Trial Date: Not set

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

DECLARATION OF NICHOLAS M. DEPALMA

1. I am an attorney associated with the law firm of Venable LLP.

2. I have been admitted pro hac vice in this case, under the supervision of Celeste M. Brecht. I, along with Ms. Brecht and Randall K. Miller (also admitted pro hac vice) am counsel to Defendants Morgan Drexen, Inc. and Walter Ledda in this matter.

3. I submit this Declaration in support of Defendants' motion to dismiss.

4. Attached as Exhibit 1 is a true and correct copy of the Opening Statement of Rep. Jeb Hensarling, Chairman of the House Financial Services Committee, House Financial Services Committee Hearing (Sept. 12, 2013).

5. Attached as Exhibit 2 is a true and correct copy of a chart of agencies from whom authority was transferred to CFPB under 12 U.S.C. § 5581(a)(2)(A), prepared for ease of the Court's reference.

6. Attached as Exhibit 3 is a true and correct copy of a chart submitted by 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).

7. Attached as Exhibit 4 is a decision in *Donald Drew Moore, Esq. et al. v. John W. Suthers, et al.*, No. 11CV7027, from the District Court, Denver County, State of Colorado, issued on September 12, 2012.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 15th day of October, 2013, at Los Angeles, C

Nicholas M. DePalma

EXHIBIT 1

To Morgan Drexen's Motion to Dismiss CFPB's Complaint

(Opening Statement of Rep. Jeb Hensarling, Chairman of the House Financial Services Committee, House Financial Services Committee Hearing (Sept. 12, 2013))

CQ CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
Sept. 12, 2013 - Final

House Financial Services Committee Holds Hearing on the Consumer Financial Protection Bureau's Semi-Annual Report

LIST OF PANEL MEMBERS AND WITNESSES

HENSARLING:

The committee will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any time. For members who are arriving and seeing our hearing room for the first time since our last hearing, yes, it did receive a coat of paint. For those of you who are wondering when Chairman Frank's portrait would make its appearance, it is here now and as I said to him and at the unveiling ceremony of his portrait as a conservative Republican, I have long since looked forward to the day to where Barney could be seen but not heard.

(LAUGHTER)

That day has arrived. If I could say, it did seem too illicit a chuckle from our former chairman. I don't know how Chairman Frank got to my right, I don't know. That disturbs us both.

Recognizing the time constraints this morning, we are expecting first votes at somewhere between 10:15 and 10:30. The Ranking Member and I have agreed to limit opening statements to eight minutes per side, without objection, so ordered.

At this time I will recognize myself for five minutes for an opening statement.

This morning, we welcome Director Richard Cordray, Director of the CFPB to deliver the bureau's latest semiannual report. Mr. Cordray, we recognize that the bureau's latest semiannual report may be a little bit dated due to the legal controversy that previously surrounded your appointment and thus, delayed your timely appearance. Nonetheless, we welcome you today and congratulate you on your recent Senate confirmation.

The CFPB is arguably the single most powerful and least accountable federal agency in the history of America. Thus, it is an agency that demands rigorous oversight and consequently will undoubtedly demand numerous congressional hearings and inquiries. So again, not only do we welcome the director today, but we look forward to welcoming you to our hearing room for many further appearances before us.

As all of us know, the CFPB was designed to operate outside the usual system of checks and balances that applies to almost every other government agency.

Number one, the CFPB is effectively unaccountable to Congress; it is exempted from congressional budgetary and appropriations process. Unlike many other agencies, there is thus, no check to ensure that the CFPB director is spending the peoples' money effectively to promote consumer protection much less effectively in a time of runaway debt and deficits.

Not even the agency from which the CFPB obtains its funding, the Federal Reserve, has oversight over the CFPB director's spending.

The CFPB is unaccountable to the Executive Branch; the director once appointed and confirmed can only be removed by the president for cause. Neither can the nation's chief executive enforce spending discipline on the bureau because it is not subject to the Office of Management and Budget nor does CFPB have their own Inspector General.

I also find it fascinating that as Syria has dominated our national consciousness, that it merely takes a majority vote of Congress to launch military action or to go to war, but it takes a super majority vote to the Executive Branch Financial Stability Oversight Council to overturn a ruling of the CFPB and then only if that ruling can be shown to threaten the safety and soundness of the entire U.S. financial system.

Next, the CFPB is uniquely unaccountable to the courts since Section 1022 of the Dodd-Frank Act provides that where the bureau disagrees with any other agency, that the meeting of a provision of federal consumer financial law, the reviewing court must give deference to the bureau's view under the Chevron Doctrine.

Finally, in many respects the 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.

Combined with this breathtaking lack of accountability is a grant of power under Dodd-Frank to the CFPB director that is unilateral, unbridled and unparalleled. The director can unilaterally declare virtually any financial product or service as unfair or abusive at which point Americans will be denied that product or service even if they need it, understand it and want it. Be he our credit czar national nanny or benevolent financial product dictator, Mr. Richard Cordray is now empowered fundamentally to decide what types of credit cards Americans are allowed to have, what types of mortgages they may have, whether or not they can access a payday lender.

All of this does beg the question who will protect consumers from the Consumer Financial Protection Bureau?

True consumer protection requires access to competitive, transparent and innovative markets vigorously policed for force, fraud and deception.

True consumer protection empowers consumers and respects their economic freedoms to make informed choices free from government interference and FOIA.

Consumer protection is not a zero sum game where for consumers to win, producers must lose or where borrowers can only win when lenders lose.

And consumer protection is not having powerful government agencies quote, unquote, nudge consumers to make correct choices and they believe that they are incapable of making rational decisions for themselves.

When it comes to true consumer protection and when it comes to the Consumer Financial Protect Bureau, this committee will do everything we can to demand the highest levels of accountability, transparency and answers.

I now will recognize the Ranking Member for four minutes.

WATERS:

Thank you very much, Mr. Chairman.

Director Cordray, congratulations again on your confirmation. I'm so pleased that you're here today. Your presence before this committee is long overdue, particularly after the nearly six months of Republican obstruction that has threatened consumer protection in order to score certain political points.

As you know, the Wall Street Reform Law requires the director of the Consumer Financial Protection Bureau to appear before this committee every six months to discuss the agency's semiannual report. The report that you are here to discuss today was released back in March. Unfortunately at that time, we were denied the benefit of your perspective.

The timing of this hearing turns out to be somewhat appropriate, however, this month, we must observe the five year anniversary of the Lehman bankruptcy rooted in the risky and irresponsible lending and financial practices that brought the economy to the brink of collapse, wiped out the life savings of many of our constituents and set off a foreclosure epidemic that has left many states still struggling.

The Consumer Financial Protection Bureau was born from that crisis as one of the cornerstones of the Dodd-Frank Act. CFPB is now on the front lines of protecting consumers from bad actors in the financial system and ensuring nothing like what happened five years ago ever happens again.

Mr. Director, I would like to commend you on how well you have worked with a wide array of stakeholders during your tenure, for your careful leadership of this young agency. You have consistently earned praise from both consumer advocates and industry leaders. Those of us in Congress know that's not an easy task. Your leadership has resulted in achievements at the bureau that cannot be understated. In just two short years, the CFPB's enforcement actions have resulted in $432 million being directly refunded to over 6 million consumers victimized by unscrupulous actors in the financial system.

Importantly, the CFPB has ensured for the first time that someone is monitoring a number of industries that have a history of problematic interactions with consumers. These include the hundreds of millions of consumers interacting with consumer reporting agencies, debt collectors, collectors and payday lenders just to name a few.

EXHIBIT 2

To Morgan Drexen's Motion to Dismiss CFPB's Complaint

(Chart of Agencies from whom authority was transferred to CFPB)

EXHIBIT 2

CHART SHOWING STRUCTURAL PROTECTIONS OF AGENCIES FROM WHICH POWER WAS TRANSFERRED TO CFPB UNDER 12 U.S.C. § 5581(a)(2)(A)

Agency	Relevant Statute/Reg.	Multimember commission, Presidential removal power, Congressional appropriations power
Federal Reserve	12 U.S.C. § 242	Governed by a seven member board, including a Chair and Vice-Chair, who each serve 4 year terms. Board members serve 14 year staggered terms, with the term of a board member expiring every 2 years.
Office of the Comptroller of the Currency ("OCC")	12 U.S.C. §§ 2-4	Governed by a single director who serves a 5 year term at the pleasure of the President and can be removed for any reason, provided that the President communicates the reasons for removal to the Senate. The Comptroller must carry out his duties under the "general direction" of the Secretary of the Treasury, and cannot appoint immediate subordinates. The Secretary of the Treasury appoints Deputy Comptrollers.
Office of Thrift Supervision ("OTS") (eliminated by Title III of Dodd-Frank 12 U.S.C. § 5412)	12 C.F.R. § 500.10 12 USC § 1462a(a)-(c) (prior to 2010 amendment)	Before its elimination, OTS was governed by a single director who served a 5 year term at the pleasure of the President. 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 under the statute here") (http://www.justice.gov/olc/2001/otspost2.pdf). The Director is under the general oversight of the Secretary of the Treasury and the Secretary was authorized to appoint the OTS Deputy Directors.
Federal Deposit Insurance Corporation ("FDIC")	12 U.S.C. § 1812(a)(1)-(2). 12 U.S.C. §§ 5491, 5493(a).	Governed by a 5 person Board of Directors, appointed by the President and confirmed by the Senate. No more than 3 may be from the same political party.
National Credit Union Administration ("NCUA")	12 U.S.C. § 1752a(a)-(c)	Governed by a 3 member Board that serves staggered 6ix year terms. Each member is appointed by the President and confirmed by the Senate. *Id.* No more than 2 can be from the same political party
Federal Trade Commission ("FTC")	12 U.S.C. § 41 15 U.S.C. § 57c.	Governed by a 5 person Commission that serves staggered 5 year terms. Each Commissioner is appointed by the President and confirmed by the Senate. *Id.* The President designates the Chairperson from among the Commissioners. Budget is appropriated by Congress.
Housing and Urban Development Agency ("HUD")	42 U.S.C. § 3532(a) 42 U.S.C. § 3535(s)	Secretary is appointed by the President and confirmed by the Senate and serves at the pleasure of the President. Budget is appropriated by Congress.

EXHIBIT 3

To Morgan Drexen's Motion to Dismiss CFPB's Complaint

Chart submitted by Andrew Pincus on behalf of the U.S. Chamber of Commerce

	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	✓	✓				✓	✓

EXHIBIT 4

To Morgan Drexen's Motion to Dismiss CFPB's Complaint

Decision in Donald Drew Moore, Esq. et al. v. John W. Suthers, et al.

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO City and County Building 1437 Bannock, Denver, CO 80202	▲ **COURT USE ONLY** ▲
Plaintiffs: DONALD DREW MOORE, ESQ., LAWRENCE W. WILLIAMSON, JR., ESQ., and MORGAN DREXEN, INC., a California corporation **v.** **Defendants/Counterclaimants:** JOHN W. SUTHERS, in his capacity as Attorney General of the State of Colorado; and LAURA E. UDIS, in her capacity as the Administrator, Uniform Debt-Management Services Act v. **Additional Defendant on Counterclaim:** WALTER JOSEPH LEDDA	Case Number: 11CV7027 Courtroom: 259
ORDER	

THIS MATTER is before the Court on Cross Motions for Determination of Questions of Law Pursuant to C.R.C.P. 56(h). Defendants/Counterclaimants John W. Suthers ("Suthers") and Laura E. Udis ("Administrator Udis") (collectively the "State") filed their Motion for Determination of Questions of Law Pursuant to C.R.C.P. 56(h) on January 18, 2012. Plaintiff/Counterclaim Defendant Morgan Drexen ("Morgan Drexen") filed its Response on February 22, 2012. The State filed its Reply on March 30, 2012.

The pleadings in this case have been extensive and continuous. Plaintiffs Donald Drew Moore ("Moore") and Lawrence W. Williamson, Jr. ("Williamson") (collectively the "Attorney Plaintiffs") filed their Cross Motion for Determination of Questions of Law Pursuant to C.R.C.P. 56(h) on February 22, 2012. The State filed its Response on April 13, 2012. The Attorney

Plaintiffs filed their Reply on April 20, 2012. On June 19, 2012, the Court ordered the parties to fully brief the United States constitutional issues raised in the Attorney Plaintiffs' Cross Motion. The State filed its Response on July 3, 2012. The Attorney Plaintiffs filed their Reply on July 10, 2012.

The State subsequently filed a Notice of Supplemental Authority in support of its Motion for Determination of Questions of Law on August 22, 2012 and Morgan Drexen filed its Response on September 5, 2012. The parties' Cross Motions for Determination of Questions of Law have now been fully briefed and are now ripe for the Court's review.

The Court has reviewed the Motions, the pleadings, the case file, and the relevant authority, and being fully informed finds and orders as follows:

BACKGROUND & UNDISPUTED FACTS

A. Identification of Parties

Morgan Drexen is a legal support and software company that provides paraprofessional and administrative support services to attorneys. Moore is an attorney who is licensed to practice law in Colorado, and who has a principal office in Grand Junction, Colorado. Williamson is an attorney who is domiciled in Kansas and who practices law in Colorado as an out-of-state attorney under C.R.C.P 220. Both Moore and Williamson have engaged Morgan Drexen as a non-lawyer assistant. Suthers is the Attorney General for the State of Colorado. Administrator Udis is the current Administrator of Colorado's Debt-Management Services Act, C.R.S. § 12-14.5-201 *et seq*. (the "DMSA").

B. Morgan Drexen's Business

Many of the attorneys with whom Morgan Drexen contracts, including the Attorney Plaintiffs, represent clients attempting to resolve unsecured debts. For these attorneys, Morgan

Drexen employees act as non-lawyer assistants, acquiring and screening prospective clients, and conducting initial intake to determine if prospective clients meet a particular attorney's predetermined criteria. If the prospective client meets the criteria, the intake information is forwarded to the attorney for approval. If the attorney determines that representation is appropriate, the attorney and client enter into a fee agreement, which provides that the client is engaging the attorney for representation and will pay all fees to the attorney. Further, the fee agreement grants the attorney certain settlement authority. The fee agreement mentions Morgan Drexen, but only to acknowledge that the attorney may use the services of Morgan Drexen, an outside company. Morgan Drexen is not a party to the fee agreement, and does not enter into any contracts with the clients it screens for the attorney, or any other Colorado consumers.

After representation has commenced, Morgan Drexen collects information about clients, and enters the information into a database. Throughout the representation, Morgan Drexen acts as the first line of communication with clients and client creditors. Morgan Drexen notifies the clients' creditors of the attorneys' representation, and initiates monthly automatic check handling between clients' bank accounts and attorneys' trust accounts. After sufficient funds have been deposited into an attorney's trust account on behalf of a particular client, Morgan Drexen solicits settlement offers from that client's creditors on behalf of the attorney. If a creditor makes an offer of settlement, the offer is forwarded to the attorney for approval. The attorney then reviews the offer and decides whether to accept or reject the offer on behalf of the client. If the attorney accepts the offer, Morgan Drexen processes the settlement by sending a check to the creditor along with an acceptance letter on a form, pre-approved by the attorney. No settlements occur without the attorney's approval.

C. General Overview of The DMSA

In 2008, Colorado enacted its Debt-Management Services Act (the "Original DMSA"). The Original DMSA was modeled after the Uniform Debt-Management Services Act (the "Uniform DMSA") developed by the National Conference of Commissioners on Uniform State Laws. The DMSA regulates all debt-management services in Colorado, and subjects providers of debt-management services to extensive regulatory oversight. Under the act, prospective debt-management services providers must apply for registration with the Administrator created by the DMSA (the "Administrator"). As part of the application process, prospective providers must answer several questions, and provide financial statements, templates for evaluating clients, copies of form agreements, and a schedule of fees and charges. Additionally, providers must submit a fee, a bond, an identification of trust accounts, an irrevocable consent authorizing the Administrator to examine the provider's trust accounts, evidence of insurance, and proof of compliance with Colorado statutory business requirements. Under the DMSA, the Administrator has discretion to accept or deny the application. If providers are approved, they are subjected to numerous rules under the DMSA that control nearly every aspect of the debt-management services relationship, including the fees to be charged by providers and circumstances under which a provider may terminate representation of a client. Finally, the DMSA provides the Administrator with extensive regulatory oversight, rights, and remedies, including the right to examine accounts and books, the right to suspend, revoke or refuse to renew a registration, and the right to impose fees against providers who violate the DMSA.

D. The Legal Services Exception

The DMSA contains an exception for legal services, which exempts attorneys practicing debt-management law from regulation under the DMSA. The Original DMSA's Legal Services

Exemption stated that "Debt-management services . . . do[] not include . . . legal services provided in an attorney-client relationship by an attorney licensed or otherwise authorized to practice law in [Colorado]." In 2011, the DMSA was amended (the "Amended DMSA"), to limit the Legal Services Exemption to apply to services "provided in an attorney-client relationship by an attorney licensed in Colorado," excluding out-of-state attorneys who are "otherwise authorized to practice" in Colorado. Further, the amended exemption does "not apply to any person who directly or indirectly provides any debt-management services on behalf of a licensed attorney . . . if that person is not an employee of the licensed attorney." The 2011 Amendment has two main effects that are salient in this case. First, debt-management services performed by independent non-lawyer assistants like Morgan Drexen, on behalf of Colorado attorneys, like Moore, are now subject to the DMSA, while similar services performed by in-house paraprofessionals employed by Colorado law firms are exempt from the act. Second, debt-management services provided by out-of-state attorneys who are licensed in another state, but who are authorized to practice law in Colorado, like Williamson, are now subject to the DMSA, while debt-management services provided by attorneys who are licensed to practice law in Colorado are exempt from the act.

STANDARD OF REVIEW

Under C.R.C.P. 56(h), at any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, a court may enter an order deciding the question. *See id.* Based upon the undisputed facts above, the question before the Court is ripe for determination.

ANALYSIS

Because the Cross Motions for Determination of Questions of Law are similar in both law and fact, the Court now addresses each, in turn, below.

I. The State's Motion for Determination of Questions of Law

The State seeks this Court's determination that: (1) Morgan Drexen was a provider of debt-management services, and thus not exempt, under the Original DMSA because it was not explicitly excluded by the language of the Original DMSA; and, (2) the Amended DMSA does not violate the separation-of-powers doctrine by requiring non-lawyers, who are not employees of attorneys, along with, lawyers not licensed to practice law in Colorado, to comply with its provisions.

Conversely, Morgan Drexen asserts that it was exempt from regulation under the Original DMSA pursuant to the Original DMSA's Legal Services Exemption. Additionally, Morgan Drexen asserts that the Amended DMSA violates the separation-of-powers provision of Article III of the Colorado Constitution.

A. Morgan Drexen's Status as a Debt-Management Services Provider Under The Original DMSA

The first issue for the Court's consideration is whether Morgan Drexen was a provider of debt-management services under the Original DMSA.

Pursuant to both the Original and Amended DMSA "provider" is defined as "a person that provides, offers to provide, or agrees to provide debt-management services directly or through others." C.R.S. § 12-14.5-202(16). The Original DMSA defined "debt-management services" as "service as an intermediary between an individual and one or more creditors of the individual for the purpose of obtaining concessions." C.R.S. § 12-14.5-202(10) (2010).

Morgan Drexen asserts that it is not a provider of debt-management services because it merely negotiates with creditors to settle debt on behalf of attorneys, rather than directly on behalf of debtors. Specifically, Morgan Drexen alleges that because the debtors in question are the attorneys' clients, the attorneys are providing the debt-management services on their clients' behalf.

Here, it is uncontested that Morgan Drexen acts as an intermediary between creditors and attorneys through solicitation of settlement offers. Further, the services provided by Morgan Drexen are on behalf of the attorneys' clients, as expressly authorized in the attorney-client agreement. As such, Morgan Drexen cannot avail itself of "provider" status on the basis that the debtors are clients of the attorneys, rather than the direct clients of Morgan Drexen.

Therefore, the Court concludes that, based on the plain language of the Original DMSA, Morgan Drexen was a provider of debt-management services.

B. Morgan Drexen Was Not Exempt From Regulation Under the Original DMSA pursuant to C.R.S. § 12-14.5-203(b)(2).

The next issue for the Court's consideration is whether Morgan Drexen was exempt from regulation under the Original DMSA pursuant to C.R.S. § 12-14.5-203(b)(2).

Morgan Drexen asserts that even if it is a provider of debt-management services under the DMSA, it is exempt from DMSA regulation pursuant to § 12-14.5-203(b)(2). Specifically, Morgan Drexen asserts that because it does not receive compensation from the individual debtors or creditors, but rather only from the debtors' attorneys, it is exempt from DMSA regulation pursuant to § 12-14.5-203(b)(2).

The DMSA "does not apply to a provider to the extent that the provider . . . [r]eceives no compensation for debt-management services from or on behalf of the individuals to whom it provides the services or from their creditors." § 12-14.5-203(b)(2). However, pursuant to

Section 3 of the Uniform DMSA, which mirrors § 12-14.5-203(b)(2) of Colorado's DMSA, § 12-14.5-203(b)(2), merely exempts:

> those persons, e.g., social workers, who may provide debt-management services *at no cost* as part of their overall services to clients. It also exempts individuals who assist family members or friends if they do not receive compensation for helping their relatives or friends to manage their money. It does not, however, exempt a provider that recovers its operating expenses from creditors, even if the provider does not impose any cost on the individuals it serves.

(emphasis added).

Here, Morgan Drexen's interpretation of § 12-14.5-203(b)(2) is inconsistent with the Colorado General Assembly's demonstrated legislative intent in exempting those who offer debt-management assistance "at no cost." While Morgan Drexen does not receive compensation from individual creditors, it does receive compensation from the attorneys in both hourly rates and per-transaction rates for the services it provides on behalf of the attorneys' clients. Therefore, Morgan Drexen's compensation for its services must be construed as deriving "from or on behalf" of debtors receiving debt-management services.

Accordingly, because Morgan Drexen's services are provided on behalf of debtors and because its services are not provided "at no cost," as contemplated by the General Assembly when providing DMSA exemption under § 12-14.5-203(b)(2), Morgan Drexen cannot be exempt from DMSA regulation pursuant to § 12-14.5-203(b)(2).

C. Morgan Drexen Was Exempt from DMSA Regulation Prior to the 2011 Amendment Pursuant to the Language of the Original DMSA's Legal Services Exemption.

The next issue for the Court's consideration is whether Morgan Drexen was exempt from DMSA regulation prior to the 2011 Amendment pursuant to the Original DMSA's Legal Services Exemption.

Morgan Drexen contends that it is expressly covered by the language of the Original DMSA's Legal Services Exemption.

Under the Original DMSA, "[l]egal services provided in an attorney-client relationship by an attorney licensed or otherwise authorized to practice in [Colorado]" were excluded from the definition of debt-management services. C.R.S. § 12-14.5-202(10)(2010). In order to fall within the Legal Services Exemption, Morgan Drexen's services rendered must have qualified as: (1) legal services; (2) provided in an attorney-client relationship; and, (3) provided by an attorney, licensed or otherwise authorized to practice law in Colorado. *Id*.

1. The Services Provided by Morgan Drexen Were Legal Services Under the Original DMSA.

First, the Court must determine whether the services rendered by Morgan Drexen constitute legal services pursuant to the Original DMSA.

When performed by attorneys, the negotiation of settlements and resolution of claims on behalf of clients constitutes the practice of law, and therefore constitutes legal services. *See In re Boyer*, 988 P.2d 625, 627 (Colo. 1999) (citing *In re Petition for Disciplinary Action Against Ray,* 452 N.W.2d 689, 693 (Minn. 1990)). Further, the Colorado Rules of Professional conduct explicitly permit attorneys to contract with nonemployee non-lawyer assistants to assist them in providing legal services and such assistants may act for the lawyer in rendition of the lawyer's professional services. *See* Colo. R. Prof'l Conduct 5.3. In fact, the use of these assistants is encouraged to effectuate cost-effective delivery of legal services. *See Cf. Missouri v. Jenkins by Agyei*, 491 U.S. 274, 288, n. 10 (1989).

Here, Morgan Drexen is a nonemployee non-lawyer assistant retained by attorneys to aid in providing legal services to the attorneys' debtor clients. Further, Morgan Drexen solicits

settlement offers on behalf of its partner attorneys and their clients, while also performing other administrative tasks and accounting.

Accordingly, because Morgan Drexen is soliciting settlement offers on behalf of attorneys' clients in rendition of the attorneys' services, and in conformity with the Colorado Rules of Professional Conduct, the Court concludes that the services provided by Morgan Drexen constitute "legal services" within the meaning of the DMSA.

2. The Services Are Provided in an Attorney-Client Relationship

Next, the Court must assess whether Morgan Drexen's services were provided in an attorney-client relationship.

The attorney-client relationship forms when a client "employs or retains an attorney" and "seeks and receives the advice of the lawyer on the legal consequences of the client's [] actions." *People v. Gabriesheski*, 262 P.3d 653, 659 (Colo. 2011).

Here, the uncontroverted evidence is that the attorneys enter into fee agreements with their debtor clients, and the fee agreements specifically reference Morgan Drexen as an intermediary and that Morgan Drexen performs services on behalf of those attorneys and their clients.

Accordingly, the Court concludes that the legal services provided by Morgan Drexen are within the attorney-client relationship between the attorneys and their clients.

3. The Services Are Provided by an Attorney Licensed or Otherwise Authorized to Practice Law in Colorado.

The Court must also determine whether Morgan Drexen's services are provided by an attorney, licensed or otherwise authorized to practice law in Colorado.

While, it is undisputed that Morgan Drexen is not providing services as "an attorney, licensed or otherwise authorized to practice law in Colorado," Morgan Drexen asserts that

because it provides services as a "non-lawyer assistant" under the supervision of attorneys, its services are necessarily provided in rendition of the attorneys' services and are therefore excluded from regulation pursuant to the Legal Services Exemption.

As stated above, the Colorado Rules of Professional Conduct permit attorneys to associate with and retain nonemployee non-lawyer assistants to "act for the lawyer in rendition of the lawyer's professional services." Colo. R. Prof'l Conduct 5.3, cmt. 1. Further, a lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, and should be responsible for their work product. *Id*; *see also People v. Smith*, P.3d 566, 572 (Colo. OPDJ 2003) (providing that "[t]he work of lay personnel is done by them as agents of the lawyer employing them . . . [and][t]he lawyer must supervise that work and stand responsible for its product").

Morgan Drexen is an independent contractor acting as an intermediary between creditors and the attorneys providing legal services to their debtor clients. So long as Morgan Drexen is acting under the supervision of attorneys, as contemplated by the Colorado Rules of Professional Conduct, it is providing legal services in rendition of the attorneys' professional services. *See* Colo. R. Prof'l Conduct 5.3.

Here, Morgan Drexen has provided sufficient evidence, as supported by affidavits, that the attorneys provide Morgan Drexen with adequate supervision to ensure that their services comport with the legal and ethical standards to which the attorneys are held. For example, Williamson's affidavit establishes that he supervises and directs all of the actions taken by Morgan Drexen, including communications with creditors. Additionally, Williamson reviews and either approves or rejects all offers of settlement on his clients' behalf. Further, Williamson states that he retains ultimate responsibility and liability for representing his clients. The State

has presented no evidence refuting or contradicting Williamson's affidavit. On this record, the Court concludes that the attorneys adequately supervise Morgan Drexen as contemplated by the Colorado Rules of Professional Conduct. Therefore, Morgan Drexen's services on behalf of the attorneys' clients constitute services performed by an attorney licensed or otherwise authorized to practice law in Colorado.

Accordingly, because Morgan Drexen provides legal services in support of its partner attorneys who have established attorney-client relationships with their clients, Morgan Drexen is expressly covered by the Original DMSA's Legal Services Exemption.

4. The DMSA's Legal Service Exemption Is Distinguishable from the FDCPA's Government Officers Exemption

The State asserts that because the Original DMSA did not explicitly exclude companies that were contracting with licensed attorneys to provide debt-management services on their behalf, Morgan Drexen was not covered under the Legal Services Exemption. In support of its claim, the State directs the Court to a similar provision (the "Government Officers Exemption"), exempting government officers from debt collection regulation under the Fair Debt Collection Practices Act (the "FDCPA").

Conversely, Morgan Drexen asserts that the Legal Services Exemption in the DMSA is factually dissimilar to the Government Officer Exemption in the FDCPA. Specifically, Morgan Drexen asserts that the language of the Original DMSA is distinguishable from the FDCPA because the FDCPA's Government Officer Exemption is framed solely by the identity of the individuals performing the acts, while the Original DMSA defines the exemption in terms of the services being provided. As such, Morgan Drexen asserts that because it is providing legal services on behalf of its partner attorneys, it is a constitutional necessity that Morgan Drexen be exempt from regulation under the Original DMSA.

The FDCPA imposes various requirements on individuals and entities who are "debt collectors" as provided in 15 U.S.C. § 1692a(6). Akin to the Legal Services Exemption provided in the Original DMSA, the FDCPA's Governmental Officers Exemption excludes "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). The State provides the Court with a litany of cases from other jurisdictions, interpreting the FDCPA's Government Officer Exemption to exclude those debt collection services not explicitly named in the plain language of the FDCPA. *See e.g. Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) (holding that U.S.A. Funds was not exempt from coverage under the FDCPA, holding "where a statute names parties which come within its provisions, other unnamed parties are excluded")(citing *Foxgorg v. Hischemoeller*, 820 F.2d 1030 (9th Cir. 1987)); *see also Pollice v. Nat'l Tax Funding*, 225 F.3d 379, 406 (3rd Cir. 2000) (holding that the Government Officer Exemption applies only to governmental officers or employees and "does not extend to those who are merely in a contractual relationship with the government"); *Albanese v. Portnoff Law Assocs.*, 301 F. Supp. 2d 389,399 (E.D. Pa. 2004); *Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681, 688 (E.D. Pa. 2003) (holding that a law firm, contractually bound to collect debts on behalf of the governmental municipality did not fall within the FDCPA's Governmental Officers Exemption); *Gradisher v. Check Enforcement Unit, Inc.*, 113 F. Supp. 2d 988, 992 (W.D. Mich. 2001) (following the holdings in *Brannan* and *Pollice* to hold that an independent contractor is not covered under the FDCPA's Government Officer Exemption); *Knight v. Schulman*, 102 F. Supp. 2d 867, 876 (S.D. Ohio 1999) (holding that "[s]ince the Defendant was an attorney in private practice, rather than an officer or employee of the United

States, he is not excluded from the definition of debt collector, regardless of whether the Defendant was acting as an agent of the United States at the time the letters . . . were written").

Here, however, unlike those independent contractors acting on behalf of the government in the aforementioned cases, Morgan Drexen is acting on behalf of the attorneys with whom it contracts, as explicitly contemplated by Rule 5.3 of the Colorado Rule of Professional Conduct. Further, those attorneys who contract with Morgan Drexen and other nonemployee non-lawyer assistants are professionally responsible for the services provided by those non-lawyer assistants pursuant to the Colorado Rules of Professional Conduct. The legal and professional implications surrounding the relationships between attorneys and their non-lawyer assistants, as contemplated by the Colorado Rules of Professional Conduct, are simply not present in the relationships between the government and its independent contractors as described in the cases cited by the State.

Accordingly, because of the nature of the relationship between attorneys and their non-lawyer assistants, the Legal Services Exception of the Original DMSA necessarily applies to Morgan Drexen. Therefore, the Court concludes that the circumstances implicating the FDCPA's Government Employee Exemption, as described in the cases cited by the State, are factually and legally dissimilar from the circumstances prevalent in the DMSA's Legal Services Exemption.

5. The State's Interpretation of the Original DMSA is Inconsistent with the Legislative Intent Surrounding the 2011 Amendment.

Finally, Morgan Drexen asserts that the State's interpretation of the Original DMSA as excluding Morgan Drexen from the Legal Services Exemption is inconsistent with the purpose of the 2011 Amendment, which expressly made non-lawyer assistants who are "not an employee of the licensed attorney " subject to regulation under the DMSA. Specifically, Morgan Drexen

asserts that the purpose of the 2011 Amendment was to change the DMSA by narrowing the DMSA's Legal Services Exemption, not to clarify law.

In support of its position, Morgan Drexen directs the Court to the February 17, 2011 House Committee Hearing on the 2011 Amendment, where Administrator Udis stated that the "goal [of the 2011 Amendment] was to try to *narrow* that attorney and accountant exception so that it applies only to licensed attorneys and certified CPAs that are really truly providing attorney's services . . . ." DMSA: Hearings on HB11-1206 before the H.R. Comm. on Econ. and Bus. Dev., February 17, 2011 at 15:8-12 (emphasis added).

Conversely, the State directs the Court to the March 21, 2011 Senate Committee Hearing, where Administrator Udis stated that an "important part" of the 2011 Amendment was to "tighten up the exemption . . . to make it very clear that the exemption applies only to attorneys . . . but not to third parties that may be involved in the process but are not themselves attorneys . . . ." DMSA: Hearings on HB11-1206 before the Sen. Judiciary Comm., March 21, 2011 at 7:4-11. In further support of its assertion that the General Assembly intended the Original DMSA's Legal Services Exemption to apply only to attorneys and their employees, the State directs the Court to lawsuits brought by the State against independent companies, like Morgan Drexen, contracting with attorneys to provide debt-management services without registering under the DMSA prior to the 2011 Amendment.

Here, as discussed above, due to Morgan Drexen's status as a non-lawyer assistant, and because the Colorado Rules of Professional Conduct explicitly allow attorneys to contract with non-lawyer assistants to act on behalf of the attorney providing legal services, Colo. R. Prof'l Conduct 5.3, Morgan Drexen was necessarily covered by the Original DMSA's Legal Services Exemption. The State misses the critical distinction that Morgan Drexen and other non-lawyer

assistants are not mere "third parties," but rather are extensions of the attorneys and the services the attorneys offer. So long as it is a qualified non-lawyer assistant acting in rendition of the attorneys' services, the fact that Morgan Drexen it is not classified as an attorney does not subject it to DMSA regulation.

Further, the Court concludes that Administrator Udis' comments at both the February 17, 2011 House Committee Hearing and the March 21, 2011 Senate Committee Hearing evince the Legislature's intent to narrow the scope of the exemption rather than to simply clarify the law. Had the Legislature intended to exclude independent contractors in 2008, when the Original DMSA was enacted, it could have. However, it did not, and as a result, attorneys and their nonemployee non-lawyer assistants, relying on the Rules of Professional Conduct, entered into agreements to provide legal and debt-management services to debtors.

Accordingly, the Court concludes that the State's construction of the Original DMSA, as excluding independent contractors from the Legal Services Exemption, is inconsistent with the General Assembly's purpose in enacting the 2011 Amendment to the DMSA.

D. The Separation-of-Powers Doctrine

The Court next considers whether the Amended DMSA violates the separation-of-powers doctrine, as described in Article III of the Colorado Constitution.

The 2011 Amendment limits the Legal Services Exemption to apply to services "provided in an attorney-client relationship by an attorney licensed in Colorado," excluding those who are "otherwise authorized to practice" in Colorado. C.R.S. § 12-14.5-202(10)(A)(i). Further, the amended exemption does "not apply to any person who directly or indirectly provides any debt-management services on behalf of a licensed attorney . . . if that person is not an employee of the licensed attorney." C.R.S. § 12-14.5-202(10)(B).

The State urges the Court to find, as a matter of law, that the Amended DMSA does not violate the separation-of-powers doctrine even though it requires nonemployee non-lawyer assistants, as well as out-of-state attorney, not licensed, but otherwise authorized to practice law in Colorado, to comply with its provisions. Conversely, Morgan Drexen asserts that applying the Amended DMSA to attorneys' non-lawyer assistants, as well as out-of-state attorneys, disrupts the Colorado Supreme Court's exclusive authority to regulate the practice of law and creates inconsistencies with attorneys' professional responsibilities.[1]

Article III of the Colorado Constitution provides that "no person . . . charged with the exercise of power belonging to one of [the legislative, executive, or judicial branch] shall exercise any power properly belonging to either of the others . . . ." Colo. Const. art. III. The separation-of-powers doctrine prevents one branch of government from exercising any power that is constitutionally in the exclusive domain of another branch. *Crowe v. Tull*, 126 P.3d 196, 205-06 (Colo. 2006); *Firelock Inc. v. Dist. Court*, 776 P.2d 1090, 1094 (Colo. 1989). In Colorado, "[t]he judicial power of the state shall be vested in a supreme court . . . and such other courts . . . as the general assembly may, from time to time establish." Colo. Const. art. IV, Section 1. The Colorado Supreme Court has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado in order to protect the public and "there is no authority in these respects in the legislative or executive departments." *Denver Bar Ass'n v. Pub. Utils.* Comm'n, 391 P.2d 467, 470 (Colo. 1964). Generally, "[l]egislation tending to limit the scope of that which constitutes the practice of law [is] abortive." *Id.*

[1] On August 22, 2012, the State filed a Notice of Supplemental Authority with the Court, to which, Morgan Drexen filed its Response on September 5, 2012. However, having reviewed the supplemental authority, the Court concludes that the cases provided by the State are factually distinguishable to the scope of the issues before the Court today.

The Colorado Supreme Court has recognized that some overlap between judicial rulemaking and legislative policy is constitutionally permissible. However, such overlap is impermissible where it creates a "substantial conflict" or where there is a "manifest inconsistency" between two statutes attempting to regulate the same conduct. *Crowe*, 123 P.3d at 206. In determining whether there is such a substantial conflict, the Court's role is to attempt to construe the statutes harmoniously, giving effect to all of their parts. *Id*.

1. The Amended DMSA's Regulation of Nonemployee Non-lawyer Assistants Implicates the Separation-of-Powers Doctrine

First, the Court must determine whether the Amended DMSA as applied to nonemployee non-lawyer assistants implicates the separation-of-powers doctrine.

The State maintains that the Amended DMSA's regulation of nonemployee non-lawyer assistants does not implicate the separation-of-powers doctrine because non-lawyer assistants are not attorneys, and thus are not subject to the Rules of Professional Conduct.

However, as discussed above, pursuant to the Colorado Supreme Court's regulation of attorneys under the Rules of Professional Conduct, attorneys are expressly permitted to employ or retain non-lawyer assistants, including independent contractors, and "must give [non-lawyer] assistants appropriate instruction and supervision concerning the ethical aspects of their employment . . . and should be responsible for their work product." Colo. R. Prof'l Conduct 5.3, cmt. 1.

Accordingly, 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 has direct implications on the attorney and therefore implicates the separation-of-powers doctrine.

2. The Amended DMSA's Regulation of Nonemployee Non-lawyer Assistants Violates the Separation-of-Powers Doctrine

Having concluded that the Amended DMSA's application to nonemployee non-lawyer assistants implicates the separation-of-powers doctrine, the Court now turns to the question of whether the Amended DMSA's regulation of such non-lawyer assistants violates the separation-of-powers doctrine.

Morgan Drexen claims that under the Amended DMSA, attorneys practicing debt-management law are no longer free to associate with nonemployee non-lawyer assistants because the DMSA's regulation of nonemployee non-lawyer assistants creates manifest inconsistencies in attorneys' compliance with the Colorado Rules of Professional Conduct. Conversely, the State maintains that any such regulation is not manifestly inconsistent with the Colorado Rules of Professional Conduct, and therefore not in violation of the separation-of-powers doctrine, as described in Article III of the Colorado Constitution.

a. C.R.S. §§ 12-14.5-204 – 209's Regulation of Nonemployee Non-lawyer Assistants is Manifestly Inconsistent with the Colorado Rules of Professional Conduct.

C.R.S. §§ 12-14.5-204 – 209 require that any provider under the DMSA register with the state and places the issuance or denial of any certificate of registration in the complete discretion of the Administrator.

However, if an attorney's nonemployee non-lawyer assistant is subject to regulation and denied a certificate of registration under the DMSA, it necessarily follows that the attorney will no longer be able to associate with that non-lawyer assistant to provide debt-management services. The natural result is a direct limitation on the attorney's right to associate with

nonemployee non-lawyer assistants, even though the Colorado Rules of Professional Conduct explicitly permit such an association.[2]

Accordingly, the Court concludes that the DMSA's registration requirement for nonemployee non-lawyer assistants, coupled with the Administrator's discretion to deny such non-lawyer assistants the ability to provide debt-management services on behalf of attorneys, necessarily conflicts with attorneys' right to freely associate with nonemployee non-lawyer assistants pursuant to Colo. R. Prof'l Conduct 5.3. Therefore, the Court finds manifest inconsistencies in the Colorado Rules of Professional Conduct and the application of §§ 12-14.5-204 – 209 to attorneys' nonemployee non-lawyer assistants, in violation of the separation-of-powers doctrine.

b. C.R.S. §§ 12-14.5-233 – 234's Regulation of Nonemployee Non-lawyer Assistants is Manifestly Inconsistent with the Colorado Rules of Professional Conduct

Similarly, C.R.S. §§ 12-14.5-233 – 234 give the Administrator the authority to revoke a provider's registration for violating the DMSA.

However, if nonemployee non-lawyer assistants are subject to the DMSA and have their certification revoked by the Administrator, attorneys would not only face the unavoidable limitations on their right to freely associate with such non-lawyer assistants, but also would necessarily be hindered in their ability to provide adequate debt-management services all together, due to the abrupt termination of their non-lawyer assistants' ability to assist them. Just as the Administrator's discretion to issue or deny certificates of registration to providers necessarily limits an attorney's ability to freely contract with nonemployee non-lawyer

[2] Colo. R. Prof'l Conduct 5.3, cmt. 1, expressly provides that "[l]awyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, *whether employees or independent contractors*, act for the lawyer in rendition of the lawyer's professional services." (emphasis added).

assistants, the Administrator's ability to revoke registration for providers would create the same limitations in direct conflict with Colo. R. Prof'l Conduct 5.3.

Accordingly, the Court finds that the Administrator's authority to revoke registration from an attorney's nonemployee non-lawyer assistants pursuant to §§ 12-14.5-233 – 234, creates manifest inconsistencies with the Colorado Rules of Professional Conduct in violation the separation-of-powers doctrine.

c. C.R.S. § 12-14.5-226's Regulation of Nonemployee Non-lawyer Assistants is Manifestly Inconsistent with the Colorado Rules of Professional Conduct.

Pursuant to C.R.S. § 12-14.5-226 a provider may terminate an agreement if "an individual . . . fails for sixty days to make payments required by the agreement." The statute makes no reference to any other circumstances under which a provider may terminate representation of a client. Conversely, Colo. R. Prof'l Conduct 1.16 provides a number of circumstances, beyond nonpayment, that permit and in some instances require an attorney, including the attorney's non-lawyer assistants, to terminate client representation. For example, under the Colorado Rules of Professional Conduct, an attorney must terminate representation of a client where the representation would result in a violation of the law or Rules of Professional Conduct. Colo. R. Prof'l Conduct 1.16(a). Further, an attorney is expressly permitted to terminate representation of a client where the client secures the attorney's services to perpetuate a fraud, where the client and attorney have a fundamental disagreement, or where other good cause exists. *Id*. at 1.16(b).

Because the DMSA only permits termination of representation in the limited circumstance of a debtor's failure to make payments pursuant to a fee agreement, the DMSA's application to an attorney's nonemployee non-lawyer assistants creates the untenable scenario

where attorneys, through their non-lawyer assistants, are either required to continue representing a client in violation of the Rules of Professional Conduct or are prevented from terminating representation of a client as permitted by the Rules of Professional Conduct.

For the reasons stated above, the Court concludes that § 12-14.5-226, as applied to attorneys through their nonemployee non-lawyer assistants, creates manifest inconsistencies with the Colorado Rules of Professional Conduct by placing unconstitutional limitations on an attorney's ability to terminate representation of a client as provided in Colo. R. Prof'l Conduct 1.16.[3]

d. C.R.S. § 12-14.5-232(b) is not Manifestly Inconsistent with the Colorado Rules of Professional Conduct

Pursuant to C.R.S. § 12-14.5-232(b) the Administrator may require providers, including an attorney's nonemployee non-lawyer assistants, to produce client records for review. Conversely, Colo. R. Prof'l Conduct 6.1 provides that attorneys must keep communications with it clients confidential. Further, "[a] lawyer must give [non-lawyer] assistants appropriate instruction and supervision concerning the ethical aspects of their employment, *particularly regarding the obligation not to disclose information relating to representation of the client*" Colo. R. Prof'l Conduct 5.3, cmt. 1 (emphasis added). As such, the Administrator's review of client records in the hands of an attorney's nonemployee non-lawyer assistant would seemingly bring about direct conflicts and manifest inconsistencies with the Colorado Rules of Professional Conduct.

However, there are certain situations in which a lawyer may be allowed or even required to produce confidential communications without violating the duty of confidentiality. For

[3] The Court also concludes that C.R.S. § 12-14.5-226 is inconsistent with the Rules of Professional Conduct as applied to attorneys not licensed, but otherwise authorized to practice law in Colorado, for the same reasons as stated above, as such attorneys are governed by the Colorado rules of Professional Conduct when practicing in Colorado, which is discussed in greater detail below.

example, Colo. R. Prof'l Conduct 5.7(a)(2) provides that the protections of the attorney-client relationship do not extend to "law related services" being provided by non-lawyer entities where the attorney makes it clear to the client that the law related services are not legal services and that the protections of the attorney-client relationship do not exist. However, in this case while the fee agreement includes a statement that Morgan Drexen will be providing "non-legal services," it does not clearly convey to prospective clients that the protections of the attorney-client relationship would not extend to Morgan Drexen. To the contrary, the agreement explicitly states that Morgan Drexen will necessarily be privy to such confidential communications.[4] Thus, it is foreseeable that client files in Morgan Drexen's possession will contain confidential communications between the attorney and the client. Further, because of the nature of the assistance provided by Morgan Drexen on behalf of the attorneys' clients and the relationship between attorneys and their non-lawyer assistants, the Court concludes that the services are sufficiently entwined to require attorneys to take responsibility to ensure that Morgan Drexen complies with the Rules of Professional Conduct, or potentially be subject to professional discipline. *See* Colo. R. Prof'l Conduct 5.7, cmt. 8.

Additionally, the State contends that even if such confidential communications are within the non-lawyer assistants' files, attorneys would nonetheless not be required to violate their duty of confidentiality. In support of its contention, the State directs the Court to Colo. R. Prof'l. Conduct 1.6(b)(7) which recognizes that attorneys may reveal confidential information without violating their duty of confidentiality when ordered by the court or to comply with other law. To that end, the State asserts that, should the Administrator request information pursuant to the

[4] The fee agreement provides: "[y]ou understand and agree that Attorneys may utilize the services of Morgan Drexen, Inc., an outside company, to assist Attorneys in performing non-legal services under this Agreement, including communication with your creditors. Although Morgan Drexen Inc. is not a party to this contract, you hereby consent to Our utilization of its services including any necessary disclosure of confidential information to Morgan Drexen, Inc."

DMSA, an attorney should assert, on behalf of its client, that the information is protected by the attorney-client privilege.

Morgan Drexen maintains that requiring attorneys to challenge the Administrator's request that their non-lawyer assistants produce clients' records would inherently create a substantial increase in time and expense for the attorney and client. However, this increased burden to the attorney-client relationship is not insurmountable. The Colorado Rules of Professional Conduct explicitly provide that an attorney may be required to submit to such request in order to comply with another law, such as the DMSA, and explicitly urge such attorneys to assert protections for their clients' records when such occasion arises. *See* Colo. R. Prof'l Conduct 6.1, cmt. 13.

Accordingly, given its obligation to construe the statutes harmoniously whenever possible, *Crowe*, 123 P.3d at 206, the Court finds that the DMSA's production of records requirement, while burdensome, is neither in direct conflict nor manifestly inconsistent with the Colorado Rules of Professional Conduct.

e. C.R.S. § 12-14.5-202(21)(B)(ii) is not Manifestly Inconsistent with the Colorado Rules of Professional Conduct

C.R.S. § 12-14.5-202(21)(B)(ii) provides that individual debtors under the DMSA own the funds held in the providers trust account and that debtor clients must be "paid accrued interest on the account, if any." Similarly, Colo. R. Prof'l Conduct 1.15(h)(1) provides that "interest earned on accounts in which the funds are deposited . . . shall belong to the clients . . . ." However, Morgan Drexen maintains that § 12-14.5-202(21)(B)(ii) violates the separation-of-powers doctrine because Colo. R. Prof'l Conduct 1.15(e)(1) provides that attorneys may establish a Colorado Lawyer Trust Account Foundation ("COLTAF") account and may remit nominal interest gained in trust accounts to that account. Colo. R. Prof'l Conduct 1.15(h)(2).

Here, while Colo. R. Prof'l Conduct 1.15(h)(2) permits an attorney to remit nominal interest to a COLTAF account, the rule does not require it. As such, a provider working for an attorney can remit all interest gained on a client's trust account back to the client, as required by the DMSA, and still be in compliance with the Rules of Professional Conduct.

Accordingly, the Court concludes that § 12-14.5-202(21)(B)(ii) neither directly conflicts with nor creates manifest inconsistencies with the Colorado Rules of Professional Conduct.

In conclusion, due to the relationship between attorneys and their nonemployee non-lawyer assistants, as contemplated in the Colorado Rules of Professional Conduct, the Court finds that regulation of those assistants as "providers of debt-management services" implicates the separation-of-powers doctrine. The Court further finds that portions of the DMSA as applied to nonemployee non-lawyer assistants, as discussed above, are inconsistent with the Colorado Rules of Professional Conduct and are therefore contrary to Colorado constitutional law. Because "[l]egislation tending to limit the scope of that which constitutes the practice of law [is] abortive," *Denver Bar Ass'n*, 391 P.2d at 470, the Amended DMSA's regulation of nonemployee non-lawyer assistants, limiting an attorney's ability to associate with such assistants when engaging in the practice of debt-management law, cannot stand, as it is unconstitutional pursuant to the separation-of-powers doctrine.

3. The Amended DMSA's Regulation of Attorneys Who Are Not Licensed, but otherwise authorized to Practice Law in the State of Colorado Violates the Separation of Powers Doctrine.

The Court next resolves the question of whether the Amended DMSA's regulation of attorneys, not licensed, but otherwise authorized to practice law in Colorado, violates the separation-of-powers doctrine.

Morgan Drexen claims that the Amended DMSA's regulation of attorneys who are not licensed, but otherwise authorized to practice law in Colorado, violates the separation-of-powers doctrine because out-of-state attorneys are explicitly permitted to practice law in Colorado and are subject to the Colorado Rules of Professional Conduct.

The Original DMSA's Legal Service Exemption provided that any attorney "licensed or otherwise authorized to practice law" in Colorado was exempt from the DMSA. However, the 2011 Amendment removed the phrase "or otherwise authorized" from the Original DMSA's Legal Services Exemption, thereby allowing the legislature to regulate out-of-state attorneys.

The Colorado Supreme Court has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado. *Crowe*, 123 P.3d at 205-06. This exclusive authority is not limited to in-state attorneys, but rather extends to all attorneys practicing law in Colorado. *See People v. Fain*, 229 P.3d 302, 305 (Colo. O.P.D.J. 2010) ("out-of-state attorney[s] who practice law in the state of Colorado [are] subject to the Colorado Rules of Professional Conduct and rules of procedure regarding attorney discipline"). Lawyers cannot practice law in Colorado unless they are licensed in Colorado or "unless specifically authorized by C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222 or federal or tribal law." Colo. R. Prof'l Conduct 5.5. Pursuant to C.R.C.P. 220, attorneys may practice law in Colorado if they are licensed and actively practicing law in another jurisdiction, in good standing in all jurisdictions to which they are admitted, have not established domicile in Colorado, and do not solicit or accept Colorado clients or hold themselves out to the general public as practicing Colorado law. Further, C.R.C.P. 221 expressly permits an out-of-state attorney to appear in a Colorado state court by applying for *pro hac vice* status.

a. The DMSA's Application to Attorneys Violates the Separation-of-Powers Doctrine.

The State conclusively asserts that because there are "no manifest inconsistencies" between the DMSA and the Rules of Professional Conduct, the General Assembly is free to repeal the attorney exemption all together, thereby making the DMSA applicable to all attorneys.

However, this assertion fails on multiple grounds. First, it is inconsistent with the legislative history of the implementation of the Original DMSA and the 2011 Amendment. Specifically, Administrator Udis testified:

> [t]he main reason the attorneys are carved out of [the DMSA] is because, frankly [the General Assembly] is not allowed to regulate the attorneys. That is a separation of powers issue. They are regulated by the Supreme Court and the Supreme Court is the only one that can actually regulate attorneys as attorneys.

DMSA: Hearings on HB11-1206 before the H.R. Comm. on Econ. and Bus. Dev., February 17, 2011 at 10:13-20.

As additional support for its contention that the DMSA may regulate attorneys, the State directs the Court to the FDCPA and the Colorado Consumer Protection Act ("CCPA"), which the State maintains are analogous to the DMSA. The Colorado Supreme Court has upheld the FDCPA and CCPA as applying to attorneys because the conduct regulated by those acts mirrors the Colorado Rules of Professional Conduct. *See Crowe*, 126 P.3d at 207; *Shapiro and Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992). However, as discussed throughout this Order, the Court concludes that there are numerous conflicts between the DMSA and the Rules of Professional Conduct, beyond the conduct regulated by the DMSA.

Accordingly, because of these manifest inconsistencies between the DMSA and the Rules of Professional Conduct, the DMSA is not analogous with the FDCPA or the CCPA. The

DMSA's application to attorneys therefore violates the separation of powers doctrine and cannot stand.

b. The State's Assertion that the DMSA Merely Regulates Debt-Management Services and not Legal Services is Not Persuasive.

The State next contends that the DMSA merely regulates those who provide debt-management services rather than regulating legal services. However, as discussed above, when attorneys, including out-of-state attorneys, negotiate settlement offers under the DMSA, they are practicing law. *See In re Boyer*, 988 P.2d at 627. As such, the State's contention that the DMSA merely regulates debt-management services rather than legal services is unpersuasive.

c. C.R.S. §§ 12-14.5-204 – 209 are in Direct Conflict with the Separation-of-Powers Doctrine, as Applied to Attorneys Otherwise Authorized to Practice in the State.

As discussed above, C.R.S. §§ 12-14.5-204 – 209 require providers under the DMSA to register with the state and that any certificate of registration is subject to issuance or denial by the Administrator. Conversely, the Colorado Supreme Court has the sole authority to determine who may be admitted to practice law in Colorado, including those who are not licensed, but are otherwise authorized to practice. *See e.g. Fain*, 229 P.3d at 305; *Denver Bar Ass'n*, 391 P.2d at 470; C.R.C.P. 201.1.

Here, requiring out-of-state attorneys to register with the Administrator in order to practice debt-management law in Colorado is wholly inconsistent with the Colorado Supreme Court's exclusive jurisdiction over the admission of attorneys to practice law in Colorado.

Accordingly, the Court concludes that the DMSA registration provisions, §§ 12-14.5-204 – 209, as applied to out-of-state attorneys otherwise authorized to practice in Colorado, are manifestly inconsistent with Colorado case law and C.R.C.P. 201.1 and therefore, are in direct conflict with the separation-of-powers doctrine.

d. C.R.S. §§ 12-14.5-233 – 234 are in Direct Conflict with the Separation-of-Powers Doctrine, as Applied to Attorneys Otherwise Authorized to Practice in the State.

Similarly, as discussed above, C.R.S. §§ 12-14.5-233 – 234 give the Administrator the ability to revoke a providers registration for violation of the DMSA. However, as applied to out-of-state attorneys authorized to practice law in Colorado, §§ 12-14.5-233 – 23 effectively allow the Administrator to prevent those attorneys from practicing law in Colorado in the area of consumer debt settlement and in essence constitute a partial revocation of an out-of-state attorney's authorization to practice. In Colorado, the Colorado Supreme Court, not the Legislature, has exclusive authority to discipline attorneys, including suspending or revoking an attorney's license or authorization. *See Denver Bar Ass'n*, 391 P.2d at 470; C.R.C.P. 241.1, *et seq*. Accordingly, the Court concludes that the Administrator's ability to revoke a provider's registration, as applied to out-of-state attorneys, is in direct conflict with the separation-of-powers doctrine and cannot stand.

e. C.R.S. § 12-14.5-223 is Manifestly Inconsistent with the Colorado Rules of Professional Conduct, as Applied to Out-of-State Attorneys Otherwise Authorized to Practice in the State.

Morgan Drexen also asserts that C.R.S. § 12-14.5-223 conflicts with the Colorado Rules of Professional Conduct by placing limitations on the fees a provider may charge to clients, while the Rules of Professional Conduct provide only that a fee may not be unreasonable, based a number of different factors. *See* Colo. R. Prof'l Conduct 1.5.

The State asserts that with the amendment of the DMSA in 2011, the Legislature eliminated the DMSA's restrictions on fees a provider may charge. However, § 12-14.5-223 as presented in the Amended DMSA still provides certain limitations on the fees a provider can charge. For example, § 12-14.5-223(d)(1)(A) requires that a provider's fees "not [] exceed[]

fifty dollars for consultation, obtaining a credit report, and setting up an account." Further, § 12-14.5-223(d)(1)(B) provides that a providers monthly service fee may not exceed "ten dollars times the numbers of creditors, remaining in the plan at the time the fee is assessed, but not more than fifty dollars in any month."

While the Court is not charged, today, with determining the reasonableness of the fees charged to clients for debt-management services or the reasonableness of the fees allowed under the DMSA, such a restriction on attorneys, including out-of-state attorneys, creates manifest inconsistencies between the DMSA and the Colorado Rules of Professional Conduct. Specifically, where effective representation requires a higher fee than what is statutorily allowed under the DMSA, attorneys are precluded from charging that higher fee to their clients, even if it is reasonable and necessary pursuant to Colo. R. Prof'l Conduct 1.5. This is particularly concerning when considering the State's contention with respect to § 12-14.5-232(b), that attorneys should simply assert protective orders when the Administrator seeks review of a provider's records in order to keep client communications confidential, which will inevitably increase the costs of representation.

Accordingly, the Court concludes that § 12-14.5-223, placing limits on a provider's fees, when applied to out-of-state attorneys, directly conflicts with the Colorado Rules of Professional Conduct.

f. C.R.S. § 12-14.5-228 is Manifestly Inconsistent with the Colorado Rules of Professional Conduct, as Applied to Attorneys Otherwise Authorized to Practice in the State.

Morgan Drexen further asserts that C.R.S. § 12-14.5-228 directly conflicts with the Colorado Rules of Professional Conduct by prohibiting providers, including out-of-state attorneys, from offering certain recommendations or advice to their clients.

Colo. R. Prof'l Conduct 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Conversely, § 12-14.5-228 provides, in pertinent part, that a provider may not "[m]ake a representation [to a debtor] that participation in a plan will or may prevent litigation, collection activity, garnishment, attachment, repossession, foreclosure, eviction, or loss of employment." § 12-14.5-228(a)(12)(C). Further, a provider may not "[a]dvise, encourage, or suggest to the individual not to make a payment to creditors under the plan." *Id*. at 228(a)(17).

While the State maintains that nothing in the language of the Amended DMSA prevents an attorney from complying with his or her ethical obligation to sufficiently explain matters to a client to allow the client to make an informed decision, the Court concludes otherwise. In providing a client with sufficient information, attorneys must necessarily inform their clients of the potential legal effects of the actions a client wishes to pursue. The potential legal effects of entering into a settlement, including the prohibited communications in § 12-14.5-228(a)(12)(C), agreement are no exception. Further, attorneys are charged with representing the best interest of their clients, and in some instances, continued payments to the creditor under the plan may not represent the client's best interest. As such, the prohibited communications in § 12-14.5-228(a)(17) may also prevent an attorney from providing sufficient legal advice to fulfill his or her ethical obligations.

Accordingly, the Court concludes that § 12-14.5-228, as applied to out-of-state attorneys, authorized to practice law in Colorado, prevents such attorneys from providing meaningful legal advice to their clients in violation of the Colorado Rules of Professional Conduct.

In conclusion, because out-of-state attorneys, licensed and in good standing in other states, are explicitly permitted to practice law in Colorado without being licensed in Colorado,

C.R.C.P. 220(2); Colo. R. Prof'l Conduct 5.5(a)(1), and because the Colorado Supreme Court has exclusive authority to regulate such out-of-state attorneys pursuant to the Colorado Rules of Professional Conduct, *Crowe*, 123 P.3d at 205-06, the Court finds that the Amended DMSA creates manifest inconsistencies with Colorado Law and the Colorado Rules of Professional Conduct. Accordingly, the DMSA's application to out-of-state attorneys is unconstitutional pursuant to the separation-of-powers doctrine.

II. The Attorney Plaintiffs' Motion for Determination of Questions of Law

Like Morgan Drexen, the Attorney Plaintiffs assert that the Amended DMSA violates the separation-of-powers provision of Article III of the Colorado Constitution by requiring nonemployee non-lawyer assistants and out-of-state attorneys to comply with its provisions.

Having determined that the Amended DMSA is unconstitutional pursuant to the separation-of-powers doctrine, the Court restricts its analysis of the Attorney Plaintiffs' Motion to their additional constitutional claims regarding the Amended DMSA.

In addition to their claim that the Amended DMSA violates the Colorado Constitution, the Attorney Plaintiffs also assert that: (1) the Amended DMSA violates the Privileges and Immunities Clause of Article IV of the United States Constitution by discriminating against lawyers not licensed to practice in the Colorado; and, (2) the Amended DMSA unlawfully burdens interstate commerce, in violation of the Commerce Clause of the United States Constitution.

In its initial Response to the Attorney Plaintiffs' Cross Motion, the State did not address the Attorney Plaintiffs' United States constitutional claims, asserting that because the Attorney Plaintiffs had not moved to amend their Complaint, nor demonstrated "lack of knowledge, mistake, inadvertence, or other reason," for failing to raise these claims in their Amended

Complaint, *see Polk v. Denver Dist. Court*, 849 P.2d 23, 25 (Colo. 1993), the claims are not proper for the Court's consideration. However, because the United States constitutional issues raised by the Attorney Plaintiffs are related and pertinent to the issues already raised by the parties in this litigation, the Court, on June 16, 2012, ordered the parties to fully brief the United States constitutional issues to best serve the interests of judicial efficiency.

In its supplemental Response, as ordered by the Court, the State argues that the Amended DMSA does not discriminate on the basis of residency, and thus, neither the Privileges and Immunities Clause nor the Commerce Clause are implicated. Conversely, the Attorney Plaintiffs contend that the Amended DMSA does discriminate on the basis of residency, and that it unjustly interferes with interstate commerce.

A. The Amended DMSA Violates the Privileges and Immunities Clause of Article IV of the United States Constitution

United States Constitution requires that "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. Stated differently, states "must accord residents and nonresidents equal treatment . . . with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Supreme Court of N.H. v. Piper,* 470 U.S. 274, 279 (1985). A statute that deprives non-residents of a protected privilege violates the Privileges and Immunities Clause, unless "there is a substantial reason for the difference in treatment; and . . . the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Id.* at 284.

Pursuant to C.R.C.P. 220, attorneys who are licensed to practice law in other states may practice law in Colorado. In order to appear before a state court in Colorado, out-of-state attorneys must apply for admission to the Colorado Bar *pro hac vice* under C.R.C.P. 221.

Further, C.R.C.P. 220(1)(c) provides that in order to practice law in Colorado as out-of-state attorneys, the applicant must not have established domicile in Colorado.

Here, while the State concedes that the Amended DMSA treats in-state and out-of-state attorneys differently, it asserts that the Amended DMSA does not implicate the Privileges and Immunities Clause because the DMSA's exemption for "an attorney licensed to practice in this state" does not discriminate on the basis of residency. However, out-of-state attorneys practicing under C.R.C.P. 220 must, by definition, be non-residents of Colorado. If out-of-state attorneys establish residency in Colorado, they can no longer practice under C.R.C.P. 220. As such, because C.R.C.P. 220 requires that out-of-state attorneys must be non-residents of Colorado, the residency of out-of-state attorneys is necessarily at issue in the determination of whether an attorney will be subjected to the requirements of the Amended DMSA. Therefore, the Court concludes that the Amended DMSA's scheme of exempting services performed by attorneys licensed to practice in Colorado, while not exempting services performed by equally qualified out-of-state attorneys, treats in-state and out-of-state attorneys differently on the basis of their residency.

However, the Court's inquiry does not end there. While the Amended DMSA discriminates against out-of-state attorneys on the basis of residency, such discrimination will be permitted if "there is a substantial reason for the difference in treatment; and . . . the discrimination . . . bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284. In its original Response, the State declined to address the Privileges and Immunities issue. In its supplemental Response, the State focused its argument on the fact that the statute does not discriminate on the basis of residency. As the records stands, the State has advanced no

substantial reason for the difference in treatment or a substantial relationship to the State's objective.

At most, the Court may infer from the entirety of the record that the State's objective through the Amended DMSA is the protection of consumers through oversight and regulation of debt collection. Here, with the exception of the inconsistencies in the Amended DMSA and the Rules of Professional Conduct, as discussed above with respect to the separation-of-powers issue, the DMSA's objective of protecting consumers is encompassed by the regulation of attorneys pursuant to the Rules of Professional Conduct. Under C.R.C.P. 220, any misconduct by out-of-state attorneys would be punished in the same manner as misconduct by in-state attorneys pursuant to the Colorado Rules of Professional Conduct. Therefore, the Court finds no substantial reason for the difference in treatment. Additionally, because the conduct of out-of-state attorneys is already controlled by the Colorado Rules of Professional Conduct, the Court finds no substantial relationship between the Amended DMSA's discrimination against out-of-state attorneys and the DMSA's objective of protecting consumers.

Accordingly, because the Amended DMSA discriminates against out-of-state attorneys on the basis of residency, and because there is no substantial reason for the discrimination, nor is there a substantial relationship between the discrimination and the State's objective, the Court concludes that the Amended DMSA violates the Privileges and Immunities Clause of the United States Constitution.

B. The Amended DMSA Violates the Commerce Clause of the United States Constitution

The United States Constitution also provides that "Congress shall have the power . . .[t]o regulate Commerce . . . among the several states." U.S. Const. art. I, § 8. The Commerce Clause has been interpreted to contain "an implied limitation on the power of the states to interfere with

or impose burdens on interstate commerce." *Western & Southern Life Ins. CO. v. State Bd. Of Equalization of California*, 451 U.S. 648, 652 (1981). Additionally, the Commerce Clause "invalidate[s] local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State." *C & A Carbone v. Town of Clarkstown,* 511 U.S. 383, 390 (1994). Stated differently, the Commerce Clause "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). Discrimination against out-of-state commerce in favor of in-state commerce is invalid, except for "a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* at 392. The practice of law is undoubtedly commerce. *Goldfarb v. Va. State Bar,* 421 U.S. 773, 785-86 (1975).

Here, the Court has already concluded that the Amended DMSA unlawfully discriminates against out-of-state attorneys. In addition to violating the Privileges & Immunities Clause, the discrimination of out-of-state attorneys also improperly burdens interstate commerce. For example, under the Amended DMSA, out-of-state attorneys are subjected to a registration process and a myriad of other requirements, while in-state attorneys are exempted from those requirements. The results of this distinction are that in-state attorneys are effectively insulated from DMSA regulated competition, while out-of-state attorneys are burdened by the additional regulatory requirements of the Amended DMSA. Furthermore, the Amended DMSA's distinction places the out-of-state attorneys at a competitive disadvantage to in-state attorneys practicing in the field of debt collection because the Amended DMSA imposes additional fees on out-of-state attorneys that are not assessed to their in-state counterparts. Thus, out-of-state

attorneys are unfairly burdened by the Amended DMSA, as they are prevented from engaging in interstate commerce in the same fashion as in-state attorneys engaging in similar intrastate commerce.

As previously noted, the disparate registration and regulatory requirements applied to out of state attorneys under the Amended DMSA are not *per se* invalid. If the State can demonstrate that it has no other means to advance a legitimate local interest, the State's burden on interstate commerce will not be unconstitutional. *New Energy*, 468 U.S. at 392.

However, the State again advances no evidence or argument confirming a legitimate local interest to refute the Attorney Plaintiffs' argument that the Amended DMSA violates the Commerce Clause. The State also has not addressed whether it has "no other means" to advance the interest at issue here. Consequently, the Court is left to infer that the State's local interest is the protection of consumers through oversight and regulation of debt collection. As discussed above, out-of-state attorneys practicing in Colorado pursuant to C.R.C.P. 220 are subject to the same Rules of Professional Conduct and subject to the same discipline as in-state, licensed attorneys practicing in Colorado. Therefore, the State's interest of oversight and regulation of attorneys who practice debt collection is already protected by the Colorado Rules of Professional Conduct, by which all attorneys practicing in Colorado must abide. Stated differently, the State has other means to advance the interest at issue here because the interest is already protected by the disciplinary scheme currently in place in the Colorado Supreme Court, which regulates and oversees all attorney conduct in the State of Colorado.

Accordingly, because the Amended DMSA improperly burdens interstate commerce in favor of intrastate commerce, and because the State has not demonstrated that there are "no other

means" to advance its legitimate local interest, the Court concludes that the Amended DMSA violates the Commerce Clause of the United States Constitution.

CONCLUSION

WHEREFORE, based on the foregoing, the Court determines, as a matter of law, that: (1) Morgan Drexen was covered under the Original DMSA's Legal Services Exemption; (2) the Amended DMSA violates Article III of the Colorado Constitution, pursuant to the separation-of-powers doctrine; (3) the Amended DMSA improperly discriminates on out-of-state attorneys in violation of Article IV, Section 2 of the United States Constitution; and, (4) the Amended DMSA improperly burdens interstate commerce in violation of Article I, Section 8 of the United States Constitution.

DONE this 12th day of September, 2012.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900

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)

Hon. Josephine L. Staton
Courtroom: 10A (Santa Ana)

[PROPOSED] ORDER RE DEFENDANTS' MOTION TO DISMISS

DATE: December 13, 2013
TIME: 2:30 p.m.
CTRM: 10A

Action Filed: August 20, 2013
Trial Date: Not set

Having read and considered the matters presented by the parties in connection with Defendants Morgan Drexen, Inc. and Walter Ledda's Motion to Dismiss Complaint because CFPB is unconstitutional and pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court hereby GRANTS this motion, and dismisses Plaintiff's Complaint with prejudice.

IT IS SO ORDERED.

Dated: _____

_____
Hon. Josephine L. Staton
United States District Court Judge

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900