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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

v.

MORGAN DREXEN, INC., AND WALTER J. LEDDA, INDIVIDUALLY AND AS OWNER, OFFICER, OR MANAGER OF MORGAN DREXEN, INC.,

Defendants.

Case No. SACV13-01267 JLS (JEMx)

**NON-PARTIES HOWARD LAW, P.C., VINCENT HOWARD, WILLIAMSON & HOWARD, LLP, THE WILLIAMSON LAW FIRM, LLC AND LAWRENCE WILLIAMSON'S RESPONSE TO ORDER TO SHOW CAUSE RE CONTEMPT; DECLARATIONS OF VINCENT HOWARD, LAWRENCE WILLIAMSON, BARBARA HOWARD AND REQUEST FOR JUDICIAL NOTICE FILED IN SUPPORT THEREOF**

**DATE: September 4, 2015**
**TIME: 1:30 p.m.**
**PLACE: Ctrm. 10A**

**HON. JOSEPHINE L. STATON**

# TABLE OF CONTENTS


| SECTION | TITLE | PAGE |
|---|---|---|
| I | Preliminary Statement | 1 |
| II | Statement of Facts | 4 |
| III | Legal Authorities | 9 |
| | A. The Legal Standard | 9 |
| | B. The Law Firms Cannot Be Deemed Subject To the Injunction Based Upon Federal Rule of Civil Procedure 65(d) | 10 |
| | 1. The Law Firms Did Not Act In Concert With Morgan Drexeen Or Aid And Abet Conduct By Morgan Drexen | 11 |
| | 2. The Law Firms Are Not Legally Identified With Morgan Drexen | 13 |
| | C. The Language Relied Upon By The CFPB Does Not Apply To The Law Firms | 19 |
| | D. The CFPB's Position Would Deny The Law Firms Due Process And Their Jury Trial Rights | 22 |
| | E. The CFPB Is Seeking To Exercise Regulatory Powers That Were Not Granted By Congress | 23 |
| | F. The Application Is Not Supported By Any Admissible Evidence | 24 |
| IV | Conclusion | 25 |

# TABLE OF AUTHORITIES

**Cases**

Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc., 96 F.3d 1390, 1394 (Fed.Cir.1996) ..... 12, 13

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832–33 (2d Cir.1930) ..... 12, 13, 18, 24

Am. Bar Ass'n v. F.T.C., 430 F.3d 457, 470 (D.C. Cir. 2005) ..... 25

Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir.1998) ..... 23

Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 117 (1940) ..... 4

In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.), 770 F.2d 328, 339 (2d Cir. 1985) ..... 23

In re Dual –Deck Video, 10 F.3d 693, 695 (9th Cir. 1993) ..... 11

Kirk v. U.S. I.N.S., 927 F.2d 1106, 1107 (9th Cir.1991) ..... 24

Levin v. Tiber Holding Corp., 277 F.3d 243, 250 (2nd Cir.2002) ..... 13

LifeScan Scotland, Ltd. v. Shasta Technologies, LLC, 2013 WL 4604746, at *5 (N.D. Cal. 2013) ..... 14

LifeScan Scotland, Ltd. V. Shasta Technologies, LLC, 2013 WL4604746 (N.D. Cal. 2013) ..... 18

Nat'l Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc., 628 F.3d 837, 854 (7th Cir. 2010) ..... 15, 16

NBA Properties, Inc. v. Gold, 895 F.2d 30, 33 (1st Cir. 1990); ..... 16

Nelson v. Adams USA, Inc., 529 U.S. 460, 465, 120 S. Ct. 1579, 1584 (2000) ..... 24

NLRB v. Sequoia Dist. Council of Carpenters, 568 F.2d 628, 633 (9th Cir.1977) ..... 15

O & L Associates v. Del Conte, 601 F. Supp. 1463, 1464-65 (S.D.N.Y. 1985) ..... 16

Paramount Pictures Corp. v. Carol Pub. Grp., Inc., 25 F. Supp. 2d 372, 375 (S.D.N.Y. 1998) ..... 16

Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 878 (9th Cir. 2000) ..... 19

Red 1 Investments, Inc. v. Amphion Int'l Ltd., 2007 WL 3348594, at *2 (E.D. Wash. 2007) ..... 14, 18

Reno Air Racing Ass'n., Inc. v. McCord, 452 F.3d 1126, 1130 (9th Cir.2006) ..... 11

Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296 (1983) ..... 22

Saga Intern., Inc. v. John D. Brush & Co., Inc., 984 F.Supp. 1283 (1997) ..... 16, 17

Spectacular Venture, L.P. v. World Star Int'l, Inc., 927 F.Supp. 683, 684-85 (S.D.N.Y.1996) ..... 15

Taylor v. Sturgell, 553 U.S. 880, 898, 128 S. Ct. 2161, 2175 (2008) ..... 4

Uebersee Finanz-Korporation, A.G. Liestal, Switzerland v. Brownell, 121 F. Supp. 420, 425 (D.D.C 1954) ..... 19

United Pharmacal Corp. v. United States, 306 F.2d 515, 516–17 (1st Cir.1962) ..... 13

United States v. Montgomery Global Advisors V LLC, 2006 WL 950102, at *2 (N.D. Cal. 2006) ..... 15

Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir.1992) ..... 11

Zepeda v. U.S. I.N.S., 753 F.2d 719, 727 (9th Cir. 1983) ..... 12, 24

**Statutes**

12 U.S.C. § 5517(e) ..... 25

**Rules**

16 C.F.R. Part 310 ..... 26

Federal Rule of Civil Procedure 65(d)(2) ..... 5, 12

Howard Law, P.C., Vincent Howard ("Mr. Howard"), Williamson & Howard, LLP, The Williamson Law Firm, LLC, and Lawrence Williamson ("Mr. Williamson") (collectively the "Law Firms") submit the following *Response* to this Court's *Order to Show Cause re Contempt*, and in further response to the *Ex Parte Application For Order To Show Cause re Contempt* (the "Application") filed by the Consumer Financial Protection Bureau (the "CFPB"). This response is supported by the concurrently filed Declarations of Vincent Howard (the "VH Decl."), Lawrence Williamson (the "LW Decl.") and Barbara Howard, and the previously filed Request for Judicial Notice ("RJN").



## I

## PRELIMINARY STATEMENT

When the CFPB initiated the underlying action (the "Action") against Morgan Drexen, Inc. ("Morgan Drexen") and Walter Ledda ("Ledda"), it was fully aware of the Law Firms' contractual relationship with the Morgan Drexen, it was fully aware of the debt and insolvency-related legal services that the Law Firms were providing to their clients, and it was fully aware of the fee structure that the Law Firm's employed in these client relationships. (VH Decl., ¶¶ 33-36; LW Decl. ¶¶ 28-29).[1] Yet,

[1] Indeed, before the CFPB issued its first subpoena commencing an investigation, Mr. Williamson flew to Washington, D.C., and detailed for the CFPB both the scope of the legal services that his law firm was providing to clients and the services that Morgan Drexen was providing to his law firm in connection with these client agreements.

notwithstanding its comprehensive understanding of the facts, the CFPB knowingly and intentionally decided not to name the Law Firms in the Action. Under established American jurisprudence, this decision had a consequence: It deprived the CFPB of the right to seek any relief against the Law Firms in the Action. Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 117 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); Taylor v. Sturgell, 553 U.S. 880, 898, 128 S. Ct. 2161, 2175 (2008) ("First, our decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party.")



Four months after the Action was initiated, Kimberly Pisinski, an attorney in the exact same position as the Law Firms, attempted to intervene in the Action in order to "vindicate her right to be free from interference given the exclusion for the practice of law in the Dodd-Frank Act and that the Tenth Amendment reserves certain rights (including regulating the practice of law), to the States." (RJN, Ex. "2"). The CFPB vigorously and successful resisted this intervention effort, by, in part, affirmatively representing to this Court that the relief sought in the Action would not "affect" Ms. Pisinski's law practice. (RJN, Ex. "3"). The Law Firms were not only fully cognizant of Ms. Pisinski's failed intervention effort, the denial of this effort reaffirmed their understanding of what was plainly stated in the Complaint: No relief was being sought against them in the Action. (VH Decl., ¶ 40; LW Decl. ¶ 30).

Notwithstanding the foregoing course of conduct, the CFPB now contends in the Application that the injunction entered against Morgan Drexen—an injunction obtained via a default—enjoins the Law Firms to same extent as Morgan Drexen. According to the CFPB, the "in concert" language in Federal Rule of Civil Procedure 65(d)(2) justifies this nunc pro tunc imposition of relief against these non-parties. As the authorities herein conclusively establish, the CFPB's proferred interpretation of the provisions in this rule is contrary to clear and binding precedent. The "in concert" language in Rule 65(d)(2) was intended to bar a non-party from knowingly aiding and abetting a violation of an injunction by *the enjoined party*—the party named in the injunction. This language does not empower a court to drag a non-party within the reach of an injunction after it is entered, in contravention of the aforementioned established due process limitation.



The Law Firms would also submit that the CFPB's contempt allegations ignore the plain language of the Injunction. The section therein that the CFPB contends the Law Firms violated, to wit, the prohibition against the collection of fees in Sections I and V, *refers to Morgan Drexen alone*. These sections omit the "and other persons in active concert or participation" addenda that appears elsewhere in the Injunction, thereby confirming that the relief granted in these sections was intended to apply to one party—Morgan Drexen.

Finally, the Law Firms would submit that the CFPB's Application is devoid of any evidentiary foundation. The Section 341(a) transcript that the CFPB relies upon is

as inadmissible as it is vague and ambiguous. Accordingly, the contempt allegations in the Application fail under the "clear and convincing" evidentiary burden applicable in contempt actions.

## II

## STATEMENT OF FACTS

Prior to entry of the judgment against Morgan Drexen, the Law Firms had active attorney-client relationships with over eight thousand individuals (the "Clients").[2] (VH Decl., ¶¶ 77, 13-18; LW Decl. ¶¶ 7-11). The range of legal services that the Law Firms provide to the Clients includes, but is not limited to advising and assisting them with the resolution of debt, insolvency and bankruptcy-related issues, and advising and assisting them with litigation matters related thereto. Id. Each of these attorney-client relationships is documented by a separate written retainer agreement. (VH Decl., ¶ 20; LW Decl. ¶ 13).

Due the significant number of Clients that the Law Firms represent, they outsourced a number of clerical, paralegal and accounting and marketing services to Morgan Drexen (prior to June 18, 2015), pursuant to a written contract. (VH Decl., ¶ 19; LW Decl. ¶ 12). For example, Morgan Drexen provided the Law Firms the day-to-day accounting support necessary to facilitate the timely payment of the sums owed by

[2] This client base has been dramatically reduced during the last month due to the letters that were transmitted to the Law Firms' clients by Morgan Drexen's Chapter 7 trustee and by the CFPB.

their clients under thousands of debt-settlement plans. (See, VH Decl., Ex. 1; RJN, Ex. 7, P. 119, ¶ 9). Notably, the accounts from which these payments are made are held in the name of the Law Firms. Id.

On August 20, 2013, the CFPB filed the Action against Morgan Drexen and Ledda, and alleged therein that these parties had violated certain provisions of the Consumer Financial Protection Act of 2010, the Telemarketing and Consumer Fraud and Abuse Prevention Act, and the Telemarketing Sales Rule relating to the offering "debt relief" services. (RJN, Ex. 1). The CFPB did not name any of the Law Firms or the Clients in the Complaint, it did not provide notice to the Law Firms and the Clients of the pendency of the Action, and it did not seek *any* relief in the Complaint against Law Firms or the Clients. To the contrary, as explained above, when one of the attorneys using Morgan Drexen's services sought to intervene in the Action to protect her rights (RJN, Ex. 2), the CFPB opposed this intervention and argued that the putative intervenor would not be adversely affected by the relief sought in the case. (RJN, Ex. 3) (The CFPB claimed specifically: "[The attorney] does not have any property interest at stake. ***Nor would a ruling against Morgan Drexen necessarily affect her***.") (emphasis added)). Based upon, inter alia, this opposition, this Court denied intervention. (RJN, Ex. 4).

On October 7, 2014, the CFPB filed a motion seeking summary judgment on all counts alleged in the Complaint. (RJN, Ex. 5). On November 25, 2014, this Court

denied this motion on the grounds that there were genuine issues of material fact in dispute that barred summary adjudication. Id.

On April 21, 2015, this Court issued terminating sanctions against Morgan Drexen based upon, inter alia, the CFPB's contention that Morgan Drexen had fabricated evidence in response to one of the CFPB's discovery requests. (RJN Ex. 6). Once this order was entered, all further rulings against Morgan Drexen were defaults, including, most importantly, the Injunction.

On April 30, 2015, Morgan Drexen filed a petition under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Central District of California initiating In re Morgan Drexen, Inc., Case No. 8:15-bk-12278-CB (the "Bankruptcy Case"). Since this filing date Morgan Drexen has continuously been subject to the control of a bankruptcy trustee. Morgan Drexen ceased operations on June 18, 2015, the day that Injunction was entered. Jeffrey I. Golden has served as Morgan Drexen's Chapter 7 trustee (the "Chapter 7 Trustee") since June 19, 2015, the day after the Injunction was entered.

*The foregoing facts are critically relevant for the following reason: Since Morgan Drexen, the only enjoined party under the terms of the Injunction, ceased operations on June 18, 2015, and at all times thereafter it was under the control of the Chapter 7 Trustee, the enjoined party lacked the ability to violate the Injunction, or to seek to do so through a third party aider and abettor.*

After Morgan Drexen's closure, the Law Firms attempted to obtain the files of their Clients that were maintained on Morgan Drexen's servers, a right provided for under the Morgan Drexen Administrative Services Contract, and to obtain the software, which they had a license to use through December 31, 2015, that allowed access to these (the "MDIS Software"). (RJN, Ex. 7). Although the Trustee was willing to accommodate the Law Firms' demands, he was unwilling to do so absent an order from this Court, due to the broad scope of the prohibitions in the Injunction. Id.

On June 26, 2015, the Law Firms filed an ex parte motion (the "Ex Parte Motion") before this Court seeking, inter alia, an order authorizing the Trustee to honor the Attorneys' contractual right to recover their Clients' files, and allowing the Trustee to provide them a copy of the MDIS Software. (RJN, Ex. 7). The Trustee concurrently filed a motion seeking authority to provide the Law Firms the files, but not the MDIS Software needed to read the client files.

The CFPB filed an opposition to the Law Firms' Ex Parte Motion wherein it concurrently argued that a) the Injunction did in fact bind the Law Firms, despite the fact that the CFPB had previously represented to the Court that rulings in the Action would not affect them as non-parties, and b) since the Law Firms were not named as parties in the underlying Action, they were bound, but had no procedural remedy.[3]

[3] This exact "we want it both ways" tactic was rejected by the Ninth Circuit in the case of In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539, 544 (9th Cir. 1996) ("Hilao seems to want to have it both ways. On the one hand, it asserts that the

On July 6, 2015, this Court entered an order addressing both the Law Firms' Ex Parte Motion and the Trustee's concurrently filed motion. In this ruling, this Court stated:

> The Court recognizes that the Attorneys are not parties in this action, and thus the Court has not made any finding that the Attorneys themselves have violated the TSR or CFPA. The Court's permanent injunction order also does not specifically name or enjoin the Attorneys.
> ….
> As a result of the fee-sharing arrangement and contractual relationship between the Attorneys and Morgan Drexen, *it appears* to the Court that the Attorneys were in "active concert or participation with" Morgan Drexen while Morgan Drexen was collecting illegal up-front fees from Affected Consumers. The majority of the Court's injunction not only binds Morgan Drexen, but also those "in active concert or participation with" Morgan Drexen. Accordingly, because the Attorneys *appear to have been* in "active concert or participation" with Morgan Drexen and thus fit within one of Rule 65's categories of non-parties that are bound by a permanent injunction, the majority of the Court's permanent injunction order applies equally to the Attorneys as it does to Morgan Drexen.

(RJN, Ex. "8") (the "July 6 Order") (emphasis added). The Law Firms have filed an appeal with respect to the July 6 Order.

As more fully explained in the Legal Authorities cited herein, to the extent that the statement in the July 6 Order to the effect that the "Attorneys" "appear to have been" in concert Morgan Drexen is something more than dicta, then this ruling is untenable for the following reason: The "in concert" language Federal Rule of Civil Procedure 65(d) refers to parties that aid and abet *post-injunction* actions by the

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Republic has no standing to appeal because it has not been harmed by the injunction. On the other hand, it contended at oral argument that the Republic could be cited for contempt if it were to violate the injunction.")

*enjoined party*, in this case, Morgan Drexen, that violate the terms of an injunction. In contrast, the language in the July 6 Order clearly refers to the alleged *pre-injunction* relationship that existed between the "Attorneys" and Morgan Drexen. This relationship does not provide a basis for relief under the "in concert" provision in Rule 65(d). See United Pharmacal Corp. v. United States, 306 F.2d 515, 516–17 (1st Cir.1962) ("past contractual relationship is not controlling" on question of whether nonparty violated injunction). Moreover, the language in this rule does not allow the issuing court to enjoin actions taken by non-parties independently, even if these actions would have violated the injunction had they been taken by the enjoined party.



## III

## LEGAL AUTHORITIES

### A. The Legal Standard.

Civil contempt "consists of *a party's* disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply." Reno Air Racing Ass'n., Inc. v. McCord, 452 F.3d 1126, 1130 (9th Cir.2006) (emphasis added). "The party alleging civil contempt must demonstrate that the alleged contemnor violated the court's order by 'clear and convincing evidence.' " In re Dual –Deck Video, 10 F.3d 693, 695 (9th Cir. 1993) (citing Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir.1982)).

"Civil contempt sanctions ... are employed for two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant

for losses sustained." Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir.1992) (citing United States v. United Mine Workers of Am., 330 U.S. 258, 303–04 (1947)). "Generally, the minimum sanction necessary to obtain compliance is to be imposed." Id.

**B. The Law Firms Cannot Be Deemed Subject To The Injunction Based Upon Federal Rule of Civil Procedure 65(d)**

As Judge Learned Hand explained:

> [N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen,* and the persons enjoined are free to ignore it.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832–33 (2d Cir.1930); see also Zepeda v. U.S. I.N.S., 753 F.2d 719, 727 (9th Cir. 1983) ("A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons not before the court."); Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc., 96 F.3d 1390, 1394 (Fed.Cir.1996). In construing the language in Federal Rule of Civil Procedure 65(d), the CFPB conflates the issue of *who can be enjoined*, which implicates both due process and jury trial rights, with the issue of *who can be held in contempt*, which addresses post-injunction conduct and relationships.

The Federal Circuit cogently explained this dichotomy, stating:

> In an earlier appeal in this case, we addressed the basic rules concerning enjoining non-parties. *See Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.,* 96 F.3d 1390, 40 U.S.P.Q.2d 1106 (Fed.Cir.1996). This appeal, by contrast, involves holding non-parties in contempt of an injunction. The two are quite different. As a general matter, a court may not enjoin a non-party that has not appeared before it to have its rights legally adjudicated. ... **Non-parties may be held in contempt, however, if they "either abet the defendant, or [are] legally identified with him."**

Additive Controls, 154 F.3d 1345, 1351 (Fed. Cir. 1998) (emphasis added). As the analyses in the below subparagraphs confirms, the Law Firms cannot be placed within the parameters of Rule 65(d) based upon either an abetting contention, or on the basis of a "legally identified" contention.



**1. The Law Firms Did Not Act In Concert With Morgan Drexen or Aid and Abet Contemptuous Conduct By Morgan Drexen.**

Several critical points are manifest from the quoted language in the Additive Controls case, and from the plain language in Rule 65(d) itself. First, non-party liability under Rule 65(d) under an "abetting" contention can only result from conduct that occurs *after* the entry of the Injunction (a violation by the enjoined party cannot be abetted until there is an injunction in place to violate). Second, the contumacious conduct in the first instance must be that of the named *enjoined party*, since it is this conduct that is being abetted. See Alemite Mfg., 42 F.2d 832, 833 (2d Cir.1930) ("the only occasion when a person not a party may be punished, is when he has helped to bring about ... an act of a party"). Accordingly, an abetting contention cannot be made unless there has been contumacious conduct by the enjoined party, in this case, Morgan Drexen. Third and finally, there cannot be a contempt finding against the

alleged abettor, presumably in this case, the Law Firms, without a finding of contempt against Morgan Drexen. See Levin v. Tiber Holding Corp., 277 F.3d 243, 250 (2nd Cir.2002); United Pharmacal Corp. v. United States, 306 F.2d 515, 516–17 (1st Cir.1962) ("[I]f the person enjoined is not involved in the contempt, an employee, and by the same token one in active concert or participation, cannot be either, because the decree has not been violated."); Red 1 Investments, Inc. v. Amphion Int'l Ltd., 2007 WL 3348594, at *2 (E.D. Wash. 2007) ("Thus, a non-party who is alleged to have acted in concert to aid and abet a violation of an injunction can be held in contempt only upon the "predicate" finding that the enjoined party has violated the order."); LifeScan Scotland, Ltd. v. Shasta Technologies, LLC, 2013 WL 4604746, at *5 (N.D. Cal. 2013) ("As the Federal Circuit explained, "[h]aving a relationship to an enjoined party of the sort set forth in Rule 65(d) exposes a non-party to contempt for assisting the party to violate the injunction, *but does not justify granting injunctive relief against the non-party in its separate capacity.*" *Id."* (emphasis added)).

In this case, it is undisputed that the CFPB has not alleged any contumacious conduct by Morgan Drexen. Although this is understandable, given the fact that Morgan Drexen closed its doors on the day the Injunction was entered, (and the Chapter 7 Trustee has attested in Docket No. 367 that no contempt has occurred), it is also fatal to any claim under the aiding and abetting prong in Rule 65(d).

**2. The Law Firm's Are Not "Legally Identified" With Morgan Drexen.**

The words "legally identified" that appear in Rule 65(d) have been interpreted very narrowly by the courts for due process reasons. See Nat'l Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc., 628 F.3d 837, 854 (7th Cir. 2010). As the Seventh Circuit explained:

> It bears emphasizing that due process requires an **extremely close identification** and will be satisfied only when the nonparty "key employee" against whom contempt sanctions are sought had substantial discretion, control, and influence over the enjoined organization—both in general and with respect to its participation in the underlying litigation—*and* there is a high degree of similarity between the activities of the old organization and the new.

Id. (emphasis added). The requisite "extremely lose identification" has almost been exclusively reserved for those circumstances where the non-party sought to be held in contempt owns or controls the enjoined entity. See e.g. NLRB v. Sequoia Dist. Council of Carpenters, 568 F.2d 628, 633 (9th Cir.1977) ("It can hardly be argued that the principal officers of a labor union are not legally identified with it, and thus liable in contempt for disobeying an order directed to the union."); Spectacular Venture, L.P. v. World Star Int'l, Inc., 927 F.Supp. 683, 684-85 (S.D.N.Y.1996) (A non-party may be found to be "legally identified" with an enjoined party where, "as a practical matter," the two individuals or entities are "one and the same"); United States v. Montgomery Global Advisors V LLC, 2006 WL 950102, at *2 (N.D. Cal. 2006)

("Here, the contempt order was against Montgomery Global. Mr. Groh, as the managing member of Montgomery Global, clearly had and continues to have the ability to act on behalf of that entity and is therefore legally identified with it.").

A non-party will not be deemed "legally identified" with the enjoined party based upon a contractual relationship. See NBA Properties, Inc. v. Gold, 895 F.2d 30, 33 (1st Cir. 1990); O & L Associates v. Del Conte, 601 F. Supp. 1463, 1464-65 (S.D.N.Y. 1985); Nat'l Spiritual Assembly, 628 F.3d 837, 854 (7th Cir. 2010); Paramount Pictures Corp. v. Carol Pub. Grp., Inc., 25 F. Supp. 2d 372, 375 (S.D.N.Y. 1998); Saga Intern., Inc. v. John D. Brush & Co., Inc., 984 F.Supp. 1283 (1997).

In the NBA Properties case, a franchisor that was selling infringing goods stipulated to a consent decree that included an injunction barring further infringing sales. Thereafter, this same franchisor granted franchises to relatives who then began selling the same infringing goods. Since the franchisor neither owned nor controlled these franchisees, despite their related party status, the First Circuit held that the requisites for relief under the "legal identification" provision in Rule 65(d) were not satisfied.

In Nat'l Spiritual Assembly, the plaintiff church obtained an injunction barring a rival from using the name "Bahai" in its name. Although the rival church complied with the injunction, one of its founding board members was involved in the founding of a second church that proceeded to use the name "Bahai." The plaintiff church sought relief under Rule 65(d) citing the "legal identity" arising from the board

members participation in the prior church. The Seventh Circuit rejected this contention holding that the level of control and identification was not sufficient.

The analysis of Rule 65(d) in Saga Intern., Inc. v. John D. Brush & Co., Inc., 984 F.Supp. 1283 (1997) concisely explains the limited reach of federal Rule of Civil Procedure 65(d). In Saga, John D. Brush & Co., Inc. ("Brush"), a maker of fireproof storage devices, filed an action against Saga International ("Saga") and others alleging patent infringement and misappropriation of trade dress claims. In 1986, this matter was settled and an injunction was issued enjoining Saga and "its officers, employees, agents, representatives and others in privity" from further infringement or trademark violations as to Brush's patents and products. Before the injunction was entered, Morton Stulhbarg left his position as the president of Saga and formed a new company, called Sisco, and Sisco allegedly began to infringe upon Brush's patent and trademarks. When Brush moved for contempt, the threshold question was whether the injunction enjoined Stuhlbarg.

When Brush argued that Stuhlbarg fell within the parameters of Rule 65(d), the Saga court rejected this position, explaining:

> Courts have uniformly held that this language is no more than a way of saying that an injunction binds only the party to the suit, as well as those who aid and abet the party's violation of the injunction…. The rule merely codified the common law practice of refusing to let a party violate an injunction through intermediaries…. Therefore, there is no merit to Brush's claim that because Stuhlbarg was an officer at the time of the settlement agreement, he is automatically bound by the injunction. An injunction is not like a tattoo. It does not permanently stick to every person employed by the party enjoined for the rest of his or her life, regardless of what course

> their lives might later take. … The reference in Rule 65(d) to "officers" means only current officers, and Stuhlbarg is no longer an officer of Saga. [5] An injunction applies only to a party, those who aid and abet a party, and those in privity with a party.

Saga, 984 F.Supp. at 1286-1287; see also LifeScan Scotland, Ltd. V. Shasta Technologies, LLC, 2013 WL4604746 (N.D. Cal. 2013) ("Having a relationship to an enjoined party of the sort set forth in Rule 65(d) exposes a non-party to contempt for assisting *the party* to violate the injunction, but does not justify granting injunctive relief against the non-party in its separate capacity.").

Under the foregoing dichotomy, the Law Firms, as non-parties, are not bound by the Injunction. However, they are barred from aiding and abetting Morgan Drexen, as *the enjoined party*, from taking any action in violation of the Injunction. See Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir.1930) ("the only occasion when a person not a party may be punished, is when he has helped to bring about ... an act of a party"); Red 1 Investments, Inc. v. Amphion Int'l Ltd., 2007 WL 3348594, at *2 (E.D. Wash. 2007) ("Thus, a non-party who is alleged to have acted in concert to aid and abet a violation of an injunction can be held in contempt only upon the 'predicate' finding that the enjoined party has violated the order."). In this case, satisfying the mandatory "predicate" for relief under the "in concert" language in Federal Rule of Civil Procedure 65(d), to wit, aiding and abetting a violation of the injunction *by Morgan Drexen*, the enjoined party, is an impossibility. *Morgan Drexen closed on*

*June 18, 2015, the day the Injunction was entered, and at all times after that fact its assets were under the control of the Chapter 7 trustee.*

Although the CFPB has not contended in the Application that the Law Firms were "in privity" with Morgan Drexen, and hence bound under the language in Federal Rule of Civil Procedure 65(d), the Law Firms would note that no such ruling is possible on the facts. As Judge Tashima also went on to explain in Saga, Stuhlbarg, the former president of the enjoined party in that case, could not be deemed to be captured by the words "in privity" in Rule 65(d). Privity requires a showing that the non-party was "so involved *in the litigation* that…it can be fairly said that he, personally, had his day in court, with the attendant ability to contest liability." Id. (emphasis added); see also Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 878 (9th Cir. 2000) ("At a minimum, however, privity requires an identity of interest in and control over the prior action such that the nonparty should reasonably expect to be bound.") (applying California law); Uebersee Finanz-Korporation, A.G. Liestal, Switzerland v. Brownell, 121 F. Supp. 420, 425 (D.D.C 1954) ("The test of privity is control of the litigation and participation therein, and not the degree of control of the party corporation itself.")

Here, the following facts eliminate any contention that a "legal identity" of the kind contemplated by Rule 65(d) existed between Morgan Drexen and any of the Law Firms:

A. The Law Firms are legally separate entities from Morgan Drexen;

B. None of the Law Firms or any of their principals ever owned an interest in Morgan Drexen;

C. Neither Morgan Drexen nor any of its owners, principals or officers ever owned an interest in the Law Firms;

D. Neither Vincent Howard nor Lawrence Williamson has ever been employed by, never mind served as an officer of Morgan Drexen;

E. Walter Ledda, the Chief Executive Officer and owner of Morgan Drexen, has had no involvement whatsoever in the Law Firms' business since the Injunction was entered.

On these facts, a finding of "legal identity" is untenable.

The simple fact is that the Law Firms were independently in the business of providing certain legal services to their clients prior to the filing of the Action and prior to the entry of the Injunction. Although Morgan Drexen provided certain services in aid of their practices, Morgan Drexen did not control their practices or businesses any more than the Law Firms controlled Morgan Drexen. For whatever reason, the CFPB elected to file the Action solely against Morgan Drexen. Having chosen this course, the agency cannot now, after the Action is over, seek to drag the non-party Law Firms within the parameters of the Injunction as a party.

**C. The Language of The Injunction Relied Upon By The CFPB Does Not Apply To The Law Firms**

In the Application, the CFPB contends that the Law Firms violated the Injunction by allegedly taking fees for providing debt-settlement and bankruptcy legal services, and by providing advice to their clients that was inconsistent with what was provided for in the letter that was transmitted to their clients by the Chapter 7 trustee. A reading of the plain language in the Injunction confirms that neither course of conduct is prohibited.

The language in the Injunction that bars the taking of fees appears in Section I and Section V of the Injunction. The relevant language is quoted below:

> **IT IS HEREBY ORDERED** that **Morgan Drexen**, whether acting directly or indirectly, is permanently restrained and enjoined from:
> …
> Receiving any remuneration or other consideration from, holding any ownership interest in, providing services to, or working in any capacity for any person engaged in or assisting others in advertising, marketing, promoting, offering for sale, selling, or providing any debt relief product or service that charges consumers advance fees.
>
> _____
>
> **IT IS FURTHER ORDERED** that:
>
> A. As of the date of this Order, **Morgan Drexen** is permanently restrained and enjoined from collecting any advance fees from consumers who may enroll in any debt relief product or service provided by Morgan Drexen in the future.
>
> B. As of the date of this Order, Morgan Drexen is permanently restrained and enjoined from collecting any further fees from Affected Consumers.

(Emphasis added). The language in Sections I and V very clearly prohibits *only* Morgan Drexen from "directly or indirectly" collecting fees from consumers, and Morgan Drexen has complied with these provisions. (See Decl. J. Golden, Docket No. 367, "I have complied with this Court's order.").

Although the CFPB has attempted to shoehorn the Law Firms into the prohibition in Sections I and V of the order by citing the words "in concert with" *the CFPB ignores the fact that these words do not appear in either of these sections*. This Court only included the words "in concert with" in Section II and III. Section II states in relevant part:

> **IT IS FURTHER ORDERED** that **Morgan Drexen and** its officers, agents, servants, and employees, **and those persons in active concert or participation with any of them** who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or indirectly in connection with the advertising, marketing, promotion, offering for sale, sale, or performance of any consumer financial product or service, are hereby permanently restrained and enjoined from misrepresenting, or assisting others in misrepresenting, expressly or by implication…

(Emphasis added). Section III states in relevant part:

> **IT IS FURTHER ORDERED** that **Morgan Drexen** and its officers, agents, servants, and employees, **and those persons or entities in active concert or participation with any of them** who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any consumer financial product or service are hereby permanently restrained and enjoined from….

(Emphasis added).

It is a well-accepted principle of interpretation that where one section of a statute or writing includes a provision and that same provision is omitted elsewhere, the omission is deemed intentional, and the distinction should be given effect. See Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296 (1983). Accordingly, the CFPB's attempt to import the words "in concert" into Section I and V of the Injunction must be rejected. The prohibitions therein are, by their very terms, limited to Morgan Drexen alone.

The Law Firms would also note that even if it were the intent of this Court to include within Section I and V of the Injunction a prohibition that somehow also applied to the unnamed Law Firms, no basis for a contempt finding would exist on the facts. It is well established that an Injunction must be narrowly drawn and strictly construed, and that contempt cannot be found where it is based upon an ambiguity in the order. See Ford v. Kammerer, 450 F.2d 279, 280 (3d Cir. 1971) ("The long-standing, salutary rule in contempt cases is that ambiguities and omissions in orders redound to the benefit of the person charged with contempt."); In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.), 770 F.2d 328, 339 (2d Cir. 1985) ("The normal standard of specificity required for an injunction is that "the party enjoined must be able to ascertain from the four corners of the order precisely what acts" are forbidden."). Here, the very "in concert" language the the CFPB seeks to use as a sword against the Law Firms does not appear in the sections that the Law Firms are alleged to have violated.

**D. The CFPB's Position Would Deny The Law Firms Due Process and Their Jury Trial Rights.**

Procedural due process is required when the federal government seeks to deprive a citizen of a protectable liberty or property interest. See Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir.1998) (citations omitted). "At a minimum, "[p]rocedural due process requires adequate notice and an opportunity to be heard." Kirk v. U.S. I.N.S., 927 F.2d 1106, 1107 (9th Cir.1991). Here, the CFPB is asking this Court to impose upon the Law Firms the provisions that were incorporated in an injunction that was entered in a proceeding wherein the Law Firms were not named as parties, or provided notice, and that was obtained by default. The authorities are uniform in holding that this was beyond the power of this Court. Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832–33 (2d Cir.1930); Zepeda v. U.S. I.N.S., 753 F.2d 719, 727 (9th Cir. 1983) ("A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons not before the court.").

The Federal Rules of Civil Procedure were "designed to further the due process of law that the Constitution guarantees." Nelson v. Adams USA, Inc., 529 U.S. 460, 465, 120 S. Ct. 1579, 1584 (2000). In this case, the Law Firms were never granted even the opportunity to seek, never mind obtain, their day-in-court on any of the underlying issues in the Action. To the contrary, it is clear from the Application that the CFPB intentionally designed this case, from start to finish, with the intent of

depriving the Law Firms of valuable property rights, while at the same time denying these firms any opportunity to defend these rights. Respectfully, the federal court system does not allow parties to obtain relief via this kind of subterfuge.

**E. The CFPB Is Seeking To Exercise Regulatory Powers That Were Not Granted By Congress.**

The CFPB's attempt to drag the non-party Law Firm's within the reach of the Injunction raises a threshold jurisdictional issue: Does the CFPB have the power, under any federal statute, to regulate the legal services that the Law Firms provide to their Clients, or to regulate what and how they charge for these services? The Law Firms would submit that this question must be answered in the negative. In support of this, the Law Firms would cite Section 1027(e) of the Consumer Financial Protection Act:

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

12 U.S.C. § 5517(e); see also Am. Bar Ass'n v. F.T.C., 430 F.3d 457, 470 (D.C. Cir. 2005) ("Lest it be forgotten, the basic language in which the Commission finds the ambiguity permitting it to regulate the practice of law is that of § 6805 empowering the Federal Trade Commission and other "federal functional regulators" to enforce the statute and regulations prescribed under it with respect to "financial institutions and other persons subject to [the Commission's] jurisdiction ...." 15 U.S.C. § 6805(a). That

language, even with-perhaps especially with-the layers of incorporated statutory and regulatory language describing financial institutions makes an exceptionally poor fit with the FTC's apparent decision that Congress, after centuries of not doing so, has suddenly decided to regulate the practice of law.")

Although the CFPB will cite the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, and contend that no there is no attorney exemption within this statute, this puts the proverbial cart before the horse. The CFPB contended in the Action that *Morgan Drexen and Ledda* violated the TSR. They did not contend that the Law Firms violated the TSR, and this Court confirmed in the July 6 Order that no rulings were made against the Law Firms under the TSR. Accordingly, the CFPB is not seeking to regulate the Law Firms' practice of law based upon the TSR or any other federal statute for that matter. The CFPB is seeking to regulate the Law Firms' practices based upon the application of an Injunction that does not name or apply to the Law Firms. This should not be allowed.



**F. <u>The Application Is Not Supported By Any Admissible Evidence.</u>**

The sole item of evidence[4] cited in support of the CFPB's Application for contempt is the transcript of the Section 341(a) meeting that was held in the Morgan

[4] The CFPB has attached communications that the Law Firms made to their clients via a website and via a letter, as if to suggest that this advice somehow violated the Injunction. This argument is not only absurd, it ignores the fact that this Court indicated on the record that the letter that was being sent by the Chapter 7 trustee to the Law Firms' client was not intended to interfere with the Law Firms' ability to

Drexen bankruptcy case. As more fully set forth in the concurrently filed Motion to Strike, this document is inadmissible. Accordingly, the Application should be denied on the grounds of a failure of proof.

## IV

## CONCLUSION

At the heart of the CFPB's Application is the assumption that somehow the federal rules, and the due process concepts inherent therein do not apply to this agency. Under the CFPB's view, it was not required to name the Law Firms in the Action, it was not required to serve the Law Firms with the summons and complaint, and it was not required to provide them with notice of any of the hearings or the depositions set in the Action, in order to subject the Law Firms to the injunctive relief obtained in the June 18, 2015 judgment. Respectfully, this position is as untenable as it is astounding. The Application should be denied.

DATED: August 26, 2015

**OKEEFE & ASSOCIATES LAW CORPORATION, P.C.**

/s/ Sean A. O'Keefe

By: _____

Sean A. O'Keefe, attorney for Howard Law, P.C., Vincent Howard, Williamson & Howard, LLP, The Williamson Firm, LLC and Lawrence Williamson

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independently advise their clients ("IT DOESN'T INTERFERE WITH ANY ATTORNEY-CLIENT COMMUNICATIONS.")