SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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THE PEOPLE OF THE STATE OF NEW YORK, BY BARBARA UNDERWOOD, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff,

- v -

RD LEGAL FUNDING, LLC, RD LEGAL FINANCE, LLC, RD LEGAL FUNDING PARTNERS, LP, RONI DESOVITZ,

Defendants.

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INDEX NO. 452091/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION & ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 271, 272, 274, 275, 276

were read on this motion to DISMISS .

This action brought by the Attorney General of the State of New York concerns the legality of agreements between defendants and the victims of two terrorist attacks. Defendants RD Legal Funding, LLC, RD Legal Finance, LLC, RD Legal Funding Partners, LP (collectively, RD), and Roni Dersovitz move to dismiss the complaint or, in the alternative, to stay this action pending the conclusion of a related federal action.

Their motion is granted in part.

Background

For purposes of this motion to dismiss, the facts alleged in the complaint are deemed true unless utterly refuted by documentary evidence.

RD and its principal, Dersovitz, "are in the business of … offering to advance funds to consumers who are entitled to receive compensation under a settlement fund or judgment" (Complaint ¶ 1). They sell "products consisting of cash advances to consumers, including consumers who have been approved to receive compensation for injuries or death" (¶ 24). At issue here are "Assignment and Sale" agreements between RD and two groups of consumers who were beneficiaries of funds set up to compensate "first responders to the World Trade Center attack on September 11, 2001 and United States Marines killed or injured in the 1983 terrorist attack in Beirut and their families" (collectively, the Consumers) (¶ 2). These victims were awarded compensation but were unable to immediately collect and use it. In exchange for assigning their interests in the awards, RD agreed to provide them upfront with a fraction of what they would be entitled to later.

Before entering into these agreements, defendants required Consumers to "call a debt-counseling service and pay off pre-existing liens and debts, usually by using a portion of defendants' loan" (¶ 43).

It is undisputed that RD's rates of return on these agreements are well in excess of the legal limit set by New York's usury laws. The primary issue presented is whether the usury laws potentially apply.

The Zadroga Agreements

The James Zadroga 9/11 Health and Compensation Act of 2010 established the Zadroga Fund "to assist first responders at the World Trade Center attack site with mounting medical costs and lost income" (¶ 3). In 2010, the federal government appropriated $2.75 billion to the fund for the benefit of these heroes. A special master administered the fund and first responders received awards ranging from $65,000 to more than $3,900,000 depending on the severity of their losses (¶ 35). Though "awards were paid out over time, there was virtually no risk" that the responders "would not receive the full amount of the award, which was evident from a series of reports issued by the administrator" (*id.*).

Between January 2014 and December 2015, RD entered into agreements with first responders who had already been approved to receive awards from the Zadroga Fund (*see, e.g.*, Dkt. 39 [the Zadroga Agreements]). The Zadroga Agreements state that the first responders were awarded a sum certain by the Special Master overseeing the fund and that they wanted "to receive an immediate lump sum cash payment in return for selling and assigning a portion of the Award to RD" (*see id.* at 1). Section 1(a) of the agreements sets forth the amount of the award being assigned to RD (defined as "the Property"), and section 1(b) includes the sum of money that RD paid the first responder in return for that assignment (*see id.*). In each case, the amount paid to the first responder was a small portion of the award being assigned. For example, RD remitted $267,122.59 to a first responder in exchange for an interest in $667,806.49 of the responder's award, which is approximately 40%.

Cognizant of the potential legal implications, the agreements recite in bold: "**This transaction is a true sale and assignment of the Property to RD and provides RD with the full risks and benefits of ownership of the Property**" (*id.* at 2 § 1[c]). They further say: "Notwithstanding that you and we intend that this Agreement is a true sale," RD has the right to file UCC financing statements to secure the amount that was assigned to it plus interest "in an abundance of caution to protect our interest . . . in the event that this sale and assignment might be characterized in a judicial, administrative or other proceeding as a loan" (*id.* § 1[d]).

Section 2 provides that the "entire Property Amount will be paid to RD from any funds received in full or partial satisfaction of the Award, regardless of the source of those funds, before any payment is made from the Award to [the first responder] or any other person" (*id.*).

Section 6(h) states that, so long as the first responders do not breach the agreements, RD Legal "is purchasing all of (their) interest in the Property without recourse against (them)," meaning if RD "for any reason (other than [the first responders' breach. . .]) does not receive all of the Property Amount, (the first responders) will have no obligation to pay RD any portion of the Purchase Price" that RD paid (*id.* at 5-6).[1]

The Attorney General originally challenged the legality of the Zadroga Agreements in a federal action in the Southern District of New York (*Consumer Fin. Protection Bureau v RD Legal Funding, LLC*, 332 F Supp 3d 729 [SDNY 2018] [*CFPB*]). The district court

[1] Section 6(h) thus makes clear that there is recourse against first responders if they breach the agreement.

concluded that the state-law causes of action were viable; however, after dismissing all of the federal claims, it declined to exercise supplemental jurisdiction over them. The decision is on appeal to the Second Circuit. After the state-law claims were dismissed without prejudice, the Attorney General commenced this case.

The Peterson Agreements

In 2007, in *Peterson v Islamic Republic of Iran* (*see* 2019 WL 805810, at *1 [D.D.C. Feb. 21, 2019]), victims of the 1983 Marine-barracks Beirut terrorist attack were awarded a $2.65 billion default judgment against Iran. Extensive enforcement proceedings followed (*see id.*).

Approximately five years later, in early September 2012, RD began entering into agreements with plaintiffs in the *Peterson* case who, at that point, were attempting to obtain turnover of Iran's assets located in the United States in order to satisfy their judgment (*see, e.g.*, Dkt. 59 [the Peterson Agreements]). The Peterson Agreements are structured materially identically to the Zadroga Agreements. Terror victims assigned a portion of the judgment to RD in exchange for a substantially lower amount (*see id.* at 1 [$167,640.66 remitted to victim for an interest in $585,500.00 (approximately 29%)]). Sections 1(c) and (d) of the Peterson Agreements recite that the transaction is a "true sale" but in an "abundance of caution" authorized RD to file a UCC financing statement securing the amount being assigned plus interest (*see id.* at 1-2). The Peterson Agreements also purport to be non-recourse (*see id.* at 5).

Collecting the judgment against Iran has been a tortured process involving every branch of the federal government and more than a decade of work. In February 2012,

President Obama issued an Executive Order freezing the billions of dollars in the accounts of the Central Bank of Iran and, in August of that year, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 USC § 8772 (the 2012 Act), providing that such funds were to be used to satisfy the *Peterson* plaintiffs' judgment (*see* Dkt. 271 at 5).

In March 2013, a federal district court ordered that those assets be placed in a Qualified Settlement Fund (QSF) and be turned over to the *Peterson* plaintiffs (*see Peterson v Islamic Republic of Iran*, 2013 WL 1155576, at *1 [SDNY Mar. 13, 2013], *affd* 758 F3d 185 [2d Cir 2014], *affd sub nom. Bank Markazi v Peterson*, 136 S Ct 1310 [2016]).

The decision was appealed to the Second Circuit and then all the way up to the United States Supreme Court, which affirmed in a 2016 split decision that upheld the "unusual statute" presenting separation-of-powers concerns (*Bank Markazi*, 136 S Ct at 1317). The Court emphasized the legal hurdles of collecting a judgment against a foreign state (*id.*). Both the majority and dissent, moreover, explained that the 2012 Act was seemingly passed as a customized piece of legislation specifically for the benefit of the *Peterson* plaintiffs, years after they obtained their judgment, to permit them to evade the sovereign immunity problems that formed a major impediment to their previous enforcement efforts (*id.* at 1318 and 1330 [Roberts, C.J., dissenting] ["No less than if it had passed a law saying 'respondents win,' Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory"]). Before the April 2016 determination by the divided

highest court in the land, no one could have known for sure if the *Peterson* plaintiffs would recover from the QSF.

In June 2016, the district court directed the QSF's trustee to begin distributing funds (*see* Dkt. 30). In December 2016, the trustee began doing so. The trustee paid out funds directly to the *Peterson* plaintiffs and to companies such as RD.

In February 2017, the trustee became aware of the federal litigation involving RD and the Zadroga Agreements. A month later, the trustee reported to the court that payments to RD were stopped pending an assessment of the legal implications of the RD litigation (*see* Dkt. 32 at 6). The trustee also informed the court that the Securities and Exchange Commission (SEC) had commenced administrative proceedings against defendants based on alleged misrepresentations (*see id.*).[2] In June 2017, the court appointed a special master to address the issues raised by the trustee, including whether "to resume making distributions to RD . . . on account of the Peterson plaintiffs" (*see* Dkt. 33 at 3).

The special master issued a report on December 7, 2017 (Dkt. 34). Applying New Jersey law, the recommendation was "that the Court find that it has not been established that the allegations . . . support a finding that RD . . . made material misrepresentations . .

[2] Initiated in July 2016, the SEC proceedings "focused largely on whether misrepresentations were made to investors in the hedge funds managed by (RD) about the risks involved in (RD's) Peterson investments" (Dkt. 15 at 14). In a decision issued on October 15, 2018, an administrative judge found that the SEC "has not proved by a preponderance of the evidence that Respondents' misrepresentations were material with respect to *Peterson*" (*see* Dkt. 19 at 78). However, the administrative judge found that (RD) and Dersovitz "failed to adhere to the appropriate standard of care and made repeated materially misleading statements over a period of several years" and found "them liable for willfully violating Securities Act Section 17(a)(2) and (a)(3)" (*see id.* at 88). RD and Dersovitz were fined $575,000 and $56,250, respectively, and Dersovitz was suspended for six months (*see* Dkt. 20).

. about the advance contracts at issue here" (*id.* at 36) and that the contracts are not unconscionable (*id.* at 41). In analyzing unconscionability, the special master discussed RD's risk, explaining:

> The amounts of the cash advances paid to the assigning plaintiffs were certainly significantly less than the amounts of the judgments sold in exchange for such advances. However, those figures cannot be looked at in a vacuum. The financial terms of the advance contracts need to be viewed in context, taking into account the risks that the advance companies took in entering into the transactions. As mentioned above, RD began entering into contracts with the *Peterson* Plaintiffs in late 2012. … All of the advance contracts were entered into before the Supreme Court affirmed the Turnover Judgment. Thus, there was considerable risk that the advance companies might never have been paid. Given the complexity of this litigation, there was *also* risk that, even if the advance companies were paid, payment might not be made for many years after the contracts became effective (*id.* at 46-47 [emphasis added]).

The special master rejected the argument that RD had not taken any material risk in entering into the *Peterson* Agreements, finding that it "assumed geopolitical, duration, and credit risk by entering into the contracts" (*id.* at 48).

The special master also concluded that New Jersey's usury laws did not apply to the Peterson Agreements (*see id.* at 48-50), as courts "interpreting New Jersey law have held that financing agreements similar to the advance contracts should not be considered loans and are not subject to New Jersey usury law" (*id.* at 50).[3]

In June 2018, the district court denied all of the objections to the special master's report (*Peterson v Islamic Republic of Iran*, 2018 WL 3019878 [SDNY 2018]).

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[3] A New Jersey state court, in a case involving RD Legal, recently came to the same conclusion (*see* Dkt. 275 [*RD Legal Funding Partners, LP v Acosta*, No. L-7533-16 [NJ Super Ct, Bergen County Apr. 12, 2019]).

This Action

In November 2018, the Attorney General commenced this action challenging the legality of 31 agreements involving New York residents (Dkt. 276 at 25). The Attorney General contends that the agreements are either usurious loans or are otherwise unlawful and that defendants, who engaged in persistent illegality, made misrepresentations to the Consumers in connection with them.

Defendants move to dismiss urging that the agreements are assignments of proceeds of future receivables consistent with settled New York law and that there is nothing illegal about them. They also seek a stay pending conclusion of the federal action related to the Zadroga Agreements.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from them (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and any inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant seeks dismissal based on documentary evidence, the motion will succeed only if such "evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Executive Law § 63(12) authorizes the Attorney General to vindicate the rights of New Yorkers by commencing an action against anyone engaged in repeated or persistent fraudulent or illegal activity in conducting business. Here, the Attorney General is pursuing eight causes of action against defendants: (1) persistent illegality under Executive Law § 63(12) based on violation of New York's civil usury laws, General Obligations Law (GOL) §§ 5-501 and 5-511 and Banking Law § 14-a; (2) persistent illegality based on violation of New York's criminal usury laws, GOL § 5-511 and Penal Law §§ 190.40 and 190.42; (3) fraud, under Executive Law § 63(12);[4] (4) deceptive practices in violation of General Business Law (GBL) § 349;[5] (5) persistent illegality based on violation of GBL § 349; (6) persistent illegality based on false advertising under GBL § 350;[6] (7) persistent illegality based on violation of GOL §§ 13-101(1) and (3), which respectively prohibit assignments of personal-injury claims and transfers of claims or demands that "would contravene public policy"; and (8) persistent illegality based on violation of the Anti-

[4] The fraud claim is based on defendants "i) misrepresenting that their products are a sale and not a loan; ii) misrepresenting that individuals can assign their awards for personal injuries to Defendants; iii) failing to disclose the interest rate being charged; iv) misrepresenting that the agreements are enforceable under state law when in fact the loans are usurious, and thus void, under New York law; and v) misrepresenting their ability to expedite the payment of awards and the date of disbursement of funds" (Complaint ¶ 86).

[5] The five categories of alleged deceptive practices are identical to the fraud categories (*see* Complaint ¶ 90).

[6] "Defendants have engaged in false advertising by falsely advertising their agreements as sales and not loans and by falsely advertising their ability to expedite the payment of the awards" (Complaint ¶ 100).

Assignment Act, 31 USC § 3727, which prohibits certain assignments of awards from the United States.[7]

Agreements: Definitively Sales or Possibly Loans

"Usury laws apply only to loans or forbearances, not investments" (*Seidel v 18 E. 17th St. Owners, Inc.*, 79 NY2d 735, 744 [1992]). "To constitute a loan, the agreement must 'provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard'" (*Cash4Cases, Inc. v Brunetti*, 167 AD3d 448, 449 [1st Dept 2018], quoting *Rubenstein v Small*, 273 AD 102, 104 [1st Dept 1947]). A contract's own characterization of the nature of the agreement is not conclusive, particularly in the context of assessing the applicability of usury laws (*Hall v Eagle Ins. Co.*, 151 AD 815, 826 [1st Dept 1912] ["if the form of the contract were to be controlling, the statute against usury would be substantially unenforceable"], *affd* 211 NY 507 [1914]). A "transaction must be judged by its real character rather than by the form and color which the parties have seen fit to give it" (*Rubenstein*, 273 AD at 104).

In assessing whether a transaction is really a loan in disguise, the focus is on whether the purchaser is incurring a meaningful risk that it may not ultimately recover what it bargained for. Thus, courts have held that non-recourse assignment agreements where repayment can only be obtained from the proceeds of a lawsuit whose future outcome is unknowable "are not loans, because the repayment of principal is entirely contingent on the success of the underlying lawsuit" (*Cash4Cases, Inc*, 167 AD3d at 449). Similarly,

[7] The Attorney General is not proceeding with the ninth cause of action predicated on violation of the federal Truth in Lending Act (Dkt. 271 at 8 n 2). It is dismissed with prejudice.

advancing funds in exchange for uncertain future receivables has been held exempt from usury laws when there is no recourse against an unsuccessful business because it is viewed as an uncertain bet on the fortune of the business (*see Rapid Capital Fin., LLC v Natures Mkt. Corp.*, 57 Misc 3d 979, 982 [Sup Ct, Westchester County 2017]).

Defendants urge that the agreements here are no different from litigation funding or the transfer of rights to future receivables. The Attorney General counters that, unlike in the context of litigation, where the outcome is uncertain and the costs are high, the Consumers here already won monetary awards, making their payments absolute and risk free.

The two categories of awards underlying the agreements are dramatically different from one another. Each type of agreement must be analyzed separately.

With respect to the Zadroga Agreements, the awards of the first responders who contracted with RD had already been approved. According to the Complaint, "the Zadroga Transactions were not completed until both the recipients had been notified of the amount of their awards and it was virtually certain that they would, as they ultimately did, receive the full amount" (Dkt. 271 at 17). There is no definitive proof establishing that payment of any of the awards at issue here was ever in any type of hazard or jeopardy.[8] That there was no date certain for payment does not mean that payment was truly at risk (*see B.D.*

[8] All loans to some extent place the principal at risk. Even recourse loans, where the repayment obligation is absolute, are not riskless. All borrowers present some counterparty credit risk. While one can always sue to obtain a judgment, that a judgment can be obtained does not mean it is collectible.

Estate Planning Corp. v Trachtenberg, 2013 WL 839779 [Sup Ct, NY County Mar. 1, 2013], *affd* 114 AD3d 477 [1st Dept 2014]).[9] Nor is it dispositive that payment of submitted claims or the future of the fund was sadly uncertain at times. Unlike the risk presented in the litigation-funding and future-receivables contexts, here there is no reason to doubt that the government-approved awards were a done deal. This alone warrants denial of the motion as to the Zadroga Agreements. The potential for recourse against the first responders if they failed to remit payment to RD and the steps RD took to ensure its repayment—security interests and the imposition of loan-like prerequisites to funding—further mandate against dismissal at the pleadings stage.

The same, however, is not true of the Peterson Agreements, which cannot be materially distinguished from litigation-funding transactions. There can be no question that when the Peterson Agreements were executed, years of uncertain litigation over whether the *Peterson* plaintiffs would ever actually recover any money was foreseeable. While the underlying *Peterson* judgment had long been won, having a judgment against a hostile foreign country is no guaranty of recovery, particularly given the sovereign-immunity concerns that impelled passage of the 2012 Act. Given the novelty of Congress' solution to the *Peterson* plaintiffs' collection problems, no one could have known with any

[9] By providing money repayable on a non-recourse basis backed only by the Zadroga Fund awards, RD may have only taken duration risk – the risk is that the longer it takes the claimants to get paid, the lower the lender's rate of return. The effective interest rate is merely a function of the duration of repayment. For instance, if a first responder gets $100,000 in exchange for his right to a $400,000 award, and RD obtains the $400,000 award one year later, RD makes a profit of $300,000. Had RD simply loaned $100,000 to the first responder with an annual interest rate of 300%, RD would have made the exact same amount of money. RD does not cite any case holding that duration risk alone transforms a loan into an investment. Here, as in *B.D. Estate*, the duration risk itself does not render usury laws inapplicable.

certainty if the 2012 Act would withstand appellate scrutiny. When RD provided *Peterson* consumers with money backed by the proceeds of their collection efforts, RD was betting on the success of the risky collection litigation. That RD's money was not directly used to fund the litigation does not affect the hazard laden in the transaction.

The first and second causes of actions thus survive as to the Zadroga Agreements but cannot be maintained as to the Peterson Agreements.

Misrepresentations and Deceptive Practices

The causes of action alleging violations of GBL §§ 349 and 350, persistent illegality based on violations of those provisions, and for fraud under Executive Law § 63(12), for the most part, survive dismissal as well.

GBL § 349 prohibits consumer-oriented deceptive practices (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 24-25 [1995]). The statute, "much like its federal counterpart, the Federal Trade Commission Act (15 USC § 45), is intentionally broad, applying 'to virtually all economic activity'" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 323-24 [2002]). To give rise to liability, "the allegedly deceptive acts, representations or omissions must be misleading to 'a reasonable consumer'" (*id.* at 324; *see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 345 [1999]). A "private contract dispute," however, does not "affect the consuming public at large, and therefore falls outside the purview of (GBL) § 349" (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 309 [2017]). Moreover, "to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York" (*id.* at 325).

The "standard for recovery under (GBL) § 350, while specific to false advertising, is otherwise identical to (GBL §) 349" (*Denenberg v Rosen*, 71 AD3d 187, 194 [1st Dept 2010], citing *Goshen*, 98 NY2d 314, 324 n 1).

The Attorney General pleads that defendants misrepresented that "they could expedite the processing of payments and 'cut through red tape'" and misrepresented that Consumers would receive their funds "within several days" of RD's receipt of documentation (Complaint ¶¶ 6, 58, 59, 62). Defendants contend that their statements were not misleading because the agreements state to consumers "*RD* will pay to you"; thus, its counterparties could only understand the representations to mean that RD would expedite the processing of its own payments. Defendants' after-the-fact characterization of their representations does not compel a matter-of-law determination. It is certainly plausible that a reasonable consumer could understand that RD's professed ability to "cut through red tape" referred to collection of claims from third parties (otherwise why wouldn't RD just get rid of any red tape within its own administration) (*see CFPB*, 332 F Supp at 783 ["if (Zadroga-Agreement) consumers were misled into believing that RD would act as a type of third-party facilitator between the consumer and the claims administrator, this information would be material"]).

Additionally, solely as to the Zadroga Agreements, the claims also survive based on defendants' representations that the transactions were legal sales of rights of ownership capable of being assigned (*id.* at 782-83).

These same allegations also suffice to sustain the Executive Law § 63(12) fraud claim, which broadly embraces unscrupulous practices tending to deceive or mislead

without the need for proving scienter or reliance (*People v Credit Suisse Sec. [USA] LLC*, 31 NY3d 622, 637 [2018]; *see also CFPB*, 332 F Supp 3d at 783-84 ["because the elements of a claim under Section 63(12) are entirely encompassed by the elements of deceptive acts or practices under (GBL § 349) that the Government has already pled adequately, the Complaint contains sufficient allegations to state a claim under . . . Executive Law § 63(12) as well"]).

Prohibitions on Assignments

Defendants contend that neither State nor federal laws invoked by the Attorney General (GOL §§ 13-301[1], 13-101[3]; 33 USC § 3727 [Anti-Assignment Act]) prohibit the Consumers from assigning their rights to RD.

GOL § 13-301(1) prohibits the assignment of a "claim or demand … to recover for a personal injury" (*see M.W. Zack Metal Co. v Int'l Navigation Corp. of Monrovia*, 112 AD2d 865, 867 [1st Dept 1985], *affd* 67 NY2d 892 [1986]). The Attorney General has stated a claim that defendants unlawfully assigned a "claim or demand" to recover for personal injury related to the Zadroga-Agreement consumers. They all had the right to demand money to recover for personal injury that RD purported to purchase (*see CFPB*, 332 F Supp 3d at 781). It is well settled, by contrast, that an agreement to "share the proceeds" of a personal-injury claim is not prohibited (*Sierra v Garcia*, 168 AD2d 277, 278 [1st Dept 1990]). The Peterson-Agreement consumers have a personal-injury judgment and the statute does not preclude them from assigning their proceeds (*see Goldberg & Connolly v New York Community Bancorp, Inc.*, 565 F3d 66, 70 [2d Cir

2009]). To the extent that they had claims or demands post-judgment, they related to enforcement of the already-obtained judgment and not to any personal injury.

The Attorney General has not stated an independent claim for persistent illegality based on GOL § 13-101(3)'s proscription against transferring "any claim or demand" that would violate public policy. Though public policy certainly favors compensation of terrorist-attack victims, the Attorney General has not cited any authority demonstrating that the law treats their agreements any differently or with any greater scrutiny. Nor does the Attorney General suggest any recognized legal framework for this claim. Are all transfers by terrorist-attack-victims of any relevant proceeds from any source outright prohibited regardless of the value offered in exchange or whether collection is truly uncertain? Would courts be required to engage in special analysis despite any legislative requirement to do so?[10] Because this vague claim is untenable and untethered to any precedent, it is dismissed (*cf. 159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 360-61 [2019] ["usual and most important function" is to enforce contracts, not to invalidate them under the pretext of public policy unless they "clearly contravene public right or the public welfare"]).[11]

The persistent-illegality-based-on-violation-of-the-federal-Anti-Assignment-Act claim is only asserted as to the Zadroga Agreements and survives (*see* Dkt. 276 [6/13/19

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[10] *See* GOL § 5-1706 (court approval necessary for any "direct or indirect" transfer of structured-settlement payments upon express finding that "the transfer is in the best interest of the payee").

[11] There is settled law governing when agreements are unconscionable, which the Attorney General does not cite or rely upon (*Matter of People v Northern Leasing Sys., Inc.*, 169 AD3d 527, 530 [1st Dept 2019]; *see Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 [1988]). When these standards are not met, "a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 570 [2002]). To do so could itself contravene public policy (*see 159 MP Corp.*, 33 NY3d at 360-61).

Tr. at 40]). The Anti-Assignment Act restricts "a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim" and makes clear that such a transfer cannot be made until "a warrant for payment of the claim has been issued" (31 USC § 3727). For purposes of this motion, defendants do not meaningfully argue that an assignment of the Zadroga-Agreement consumers' demands would not violate the provision; instead, they maintain that although the United States could elect not to honor them, "the assignments between the parties would remain effective" (Dkt. 15 at 35). The Attorney General points out that is exactly the problem: defendants cannot purport to assign such claims--informing consumers that it is a legal assignment when it is not--and then take recourse and presumably seek direct enforcement against the consumer upon the consumer's receipt of the funds (*see CFPB*, 332 F Supp 3d at 759 [the agreements "purport to transfer (consumers') right to receive payment directly from the United States Government to the RD Entities. This is precisely what the statute governs, and this is not allowed"]). It is possible that if there is no valid assignment because such assignments are illegal, then the agreements purporting to be assignments are unlawful attempts at an end run around New York's usury laws. In the end, this claim may be duplicative of others but that is not a ground for dismissal raised by defendants at this point.

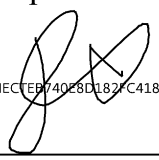
Defendants' Request for a Stay

In the interests of "efficiency," defendants--who presumably did not ask the federal court to forge ahead and exercise supplemental jurisdiction over the state-law claims that had been upheld--move for a stay of "any viable claims in this action until the conclusion of the federal action" (Dkt. 15 at 37). The federal case, however, is inactive at this point,

has not ever proceeded to discovery (Dkt. 23 at 6) and, if restored, would only involve some of the claims asserted here. It would not be efficient to halt discovery indefinitely. There is simply no downside to moving forward. Any discovery can always be used in federal court if it comes to that. A stay, under the circumstances, amounts to a total delay and is denied (*see Asher v Abbott Labs.*, 307 AD2d 211 [1st Dept 2003]).

Accordingly, it is ORDERED that defendants' motion to dismiss is granted to the following extent: (1) the Attorney General's claims are limited to the 13 Zadroga Agreements and 18 Peterson Agreements involving New York residents, and all other claims concerning agreements with residents of other states are dismissed; (2) the portions of the first and second causes of action concerning the Peterson Agreements are dismissed; (3) the portions of the third, fourth, fifth, and sixth causes of action alleging unlawful conduct related to the Peterson Agreements violating usury laws and RD's rate of return are dismissed; (4) the portions of the seventh cause of action concerning the Peterson Agreements and the portion based on violation of public policy are dismissed; and (5) the ninth cause of action is dismissed; and it is further

ORDERED that defendants' motion is denied in all other respects.



5/15/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER