IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Law Offices of
Crystal Moroney, P.C.,

Plaintiff,

v.

Bureau of Consumer
Financial Protection, *et al.*,

Defendants.

Civil Action No. 7:19-cv-11594-KMK

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff Law Offices of Crystal Moroney, P.C., comes before the Court to challenge a civil investigative demand (CID) that itself imposes no binding obligations on Plaintiff. And the CID will not impose any such obligations unless and until Defendant Consumer Financial Protection Bureau files a petition to enforce it in district court. When and if that happens, Plaintiff will have a chance to raise any legal objections it may have to the CID. Until then, Plaintiff faces no risk of fine or penalty if it simply does nothing.

Nonetheless, Plaintiff claims that the Court must immediately resolve its various constitutional objections to the CID. At the same time, it claims that the Court must enjoin the Bureau from filing the sort of CID-enforcement proceeding that could resolve Plaintiff's objections in the context of an actual case or controversy between the parties. And Plaintiff makes these requests after having previously asked another judge of this Court to *delay* resolving its constitutional claims and then, after Plaintiff effectively prevailed in that action on other grounds, asking the court to re-open the case.

The law that established the Bureau and authorizes it to issue CIDs also put in place a comprehensive scheme of administrative and judicial review meant to avoid this sort of maneuvering by serving as the exclusive means to resolve disputes over CIDs. Plaintiff seeks to circumvent that scheme by pursuing this unripe collateral attack on the CID. The Court thus lacks jurisdiction over Plaintiff's claims. For this reason, among others set out in this brief, Plaintiff cannot show the likelihood of success on the merits that it needs to justify a preliminary injunction. Plaintiff also cannot show that it will suffer irreparable injury if the Bureau seeks to enforce the CID in court or issues any additional non-self-enforcing CIDs.

The Court should deny Plaintiff's motion for extraordinary emergency relief.

BACKGROUND

1. The Consumer Financial Protection Bureau is an agency of the United States charged with "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). Its responsibilities under the Consumer Financial Protection Act (CFPA) include "taking appropriate enforcement action to address violations of Federal consumer financial law." *Id.* § 5511(c)(4).

The Bureau, like many agencies, is authorized by statute to issue administrative subpoenas in aid of its investigations. *See id.* § 5562(c). These subpoenas—known as civil investigative demands, or CIDs—seek information in varying forms, most frequently a combination of written answers to interrogatories, written reports, documents, and testimony. *See id.* § 5562(c)(1). The Bureau may issue CIDs to the subjects of its investigations as well as to third parties where it "has reason to believe" that the recipient may be in possession of information "relevant to a violation" of federal consumer financial law. *Id*. Each CID must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." *Id.* § 5562(c)(2). This information appears in a section of the CID known as the "notification of purpose." *See* 12 C.F.R. § 1080.5.

The Bureau's regulations provide that CID recipients can raise objections to the CID—such as that the requests in the CID would impose an undue burden—and negotiate appropriate modifications via a meet-and-confer process with Bureau investigators. *See id.* § 1080.6(c). If the recipient remains dissatisfied, it may file an administrative petition with the Bureau's Director seeking an order to set aside or modify the CID. *See* 12 U.S.C. § 5562(f); 12 C.F.R. § 1080.6(e). The Bureau's rules also establish a process—consistent with the rules governing discovery in ordinary civil litigation—by which CID recipients can assert any appropriate claims of privilege

by providing a schedule of the specific materials withheld and the grounds for claiming that each item is privileged. *See* 12 C.F.R. § 1080.8(a). The rules further provide for confidential treatment of information received in response to CIDs. *Id.* § 1080.14.

CIDs "are not self-enforcing, and non-compliance triggers no fine or penalty." *See John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (denying motion to enjoin attempts to enforce Bureau CID). Instead, "[i]f a recipient declines to respond to the CID, the Bureau must obtain a court order to enforce it." *Id.* In order to do so, the Bureau must file a petition in an appropriate district court seeking an order compelling compliance with the CID. *See* 12 U.S.C. § 5562(e); *see also id.* § 5562(h)(1) (conferring jurisdiction on district courts to decide CID-enforcement petitions filed by the Bureau). "In that court proceeding, the recipient can raise any relevant legal objection to enforcement of the CID." *John Doe Co.*, 849 F.3d at 1131.

2. Plaintiff is a debt-collection law firm. ECF No. 14-2 (hereinafter, "Moroney Aff."), ¶¶ 6–8. As part of an investigation into potential violations of the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and the CFPA's prohibition on unfair, deceptive, and abusive business practices, the Bureau sent Plaintiff a first CID in June 2017 seeking information about the firm's debt-collection operation. ECF No. 1-2 (first CID). The parties negotiated changes to the CID during the meet-and-confer process set out in the Bureau's rules. Plaintiff partially responded to the modified CID. ECF No. 14-2, ¶ 11. It then refused to provide any additional information, arguing that the withheld material was "confidential information" (a broader category than attorney-client privilege) under certain rules of professional responsibility. *See* ECF No. 14-4 (parties' correspondence), at 54–61. After attempts to resolve this issue with Plaintiff failed, the Bureau filed a petition to enforce the CID in this District. *See BCFP v. Law Offices of Crystal Moroney, P.C.*, No. 7:19-cv-1732-NSR (filed Feb. 25, 2019).

Plaintiff opposed the Bureau's petition, arguing in part that the CID failed sufficiently to describe the scope and purpose of the Bureau's investigation as required by 12 U.S.C. § 5562(c)(2). ECF No. 14-4 (Plaintiff's Opposition), at 8–11. Plaintiff also argued that the CID could not be enforced because a provision of the CFPA purporting to limit the grounds on which the Bureau's Director may be removed to "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3), violates the constitutional separation of powers. ECF No. 14-4, at 2–8. In the alternative, Plaintiff asked that the court wait to resolve the Bureau's petition—and Plaintiff's defenses—until after the Second Circuit decided a currently pending appeal involving the constitutionality of the removal provision. *Id.* at 11–14 (citing *CFPB v. RD Legal Funding, LLC*, No. 18-2743 (2d Cir.)).

The Bureau sought additional time to file its reply in expectation that the Supreme Court would soon decide whether to grant certiorari in a different case about the removal provision, *Seila Law LLC v. CFPB*, No. 19-7 (S. Ct.), and that the Court's decision would likely inform the Bureau's reply brief. ECF No. 14-6 (Bureau Mot. for Extension of Time), at 2. The Supreme Court granted certiorari in *Seila Law* on October 18, 2019.

On November 4, the Bureau notified Plaintiff that it was withdrawing the CID and filed a notice with the district court alerting it that the Bureau's petition to enforce that CID was now moot. ECF No. 14-8 (Bureau's notice); *see generally, e.g.*, *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1085 (D.C. Cir. 2017) (subpoena-enforcement proceeding became moot where issuing congressional subcommittee "no longer s[ought] to enforce any part of the subpoena"). The district court accordingly denied the Bureau's petition as moot. *See* Order, *BCFP v. LOCM*, No. 7:19-cv-1732 (S.D.N.Y. Nov. 7, 2019).

On November 14, the Bureau issued a new, revised CID to Plaintiff. ECF No. 1-7 (second CID). This second CID—the subject of this action—seeks much the same information as the first but differs primarily in that it provides Plaintiff with the additional detail about the scope and purpose of the Bureau's investigation that Plaintiff claimed was lacking in the first CID. *Compare* ECF No. 1-2, at 2 (first CID's notification of purpose), *with* ECF No. 1-7, at 3 (second CID's). Plaintiff responded by filing a pre-motion letter with the court seeking to re-open the proceeding. The letter accused the Bureau of "contriv[ing] a false claim of mootness" and "judge-shopping," presumably based on a belief that the Bureau would file a petition to enforce the revised CID and fail to relate the matter for resolution by the same district judge.[1] ECF No. 1-8 (Plaintiff's pre-motion letter), at 3. At a hearing on Plaintiff's proposed motion, the court expressed serious doubts that the revised second CID had any effect on the mootness of the withdrawn first CID. ECF No. 1-9 (hearing transcript), at 3–8 ("THE COURT: I can't prevent [the Bureau] from refiling another investigative petition. I can't prevent them from doing that."). On December 5, Plaintiff notified the court that it was abandoning its proposed motion to re-open the case.

The same day, Plaintiff initiated the administrative process set out in the CFPA for disputing a CID by filing a petition with the Bureau's Director to set aside or modify the second CID. Defs' Ex. A; *see also* 12 U.S.C. § 5562(f). Plaintiff's petition does not dispute that the second CID provides enough information about the Bureau's investigation to satisfy 12 U.S.C. § 5562(c)(2). The petition also does not seek to challenge the CID on the grounds that any

[1] Now, Plaintiff is at pains to stress that this case should *not* be assigned to the district judge who oversaw the prior proceeding. *See* Mem. at 3 n.1.

The Bureau takes no position on whether the cases should be related, and defers to the sound discretion of the Court on that question.

particular requests would impose an undue burden (although Plaintiff does argue that it should not have to re-produce any material it gave the Bureau in response to the first CID).

Plaintiff's petition remains pending. To date, the Bureau has not sought to enforce the second CID in this or any other court. *See id.* § 5562(e).

LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy" that may issue only upon a "clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). To get this extraordinary relief, a plaintiff bears the burden of establishing that it "is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20.[2]

ARGUMENT

Plaintiff cannot establish any of the factors required for a preliminary injunction.

I. Plaintiff Cannot Show a Likelihood of Success on the Merits

a. The Court lacks jurisdiction because Plaintiff has not followed the exclusive review scheme Congress established for Bureau CIDs.

"A district court lacks subject matter jurisdiction to hear claims where Congress creates a comprehensive regulatory scheme from which it is fairly discernible that Congress intended that agency expertise would be brought to bear prior to any court review." *Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 146 (2d Cir. 2016). Congress created just such a scheme for adjudicating disputes

[2] The Second Circuit in some circumstances applies a less rigorous "fair ground for litigation" standard. *Able v. United States*, 44 F.3d 128, 130–31 (2d Cir. 1995). As LOCM acknowledges, Mem. at 9, that road is closed here, where LOCM seeks to enjoin "government action taken in the public interest pursuant to a statutory or regulatory scheme." *Able*, 44 F.3d at 131–32. LOCM instead must satisfy the more demanding "likelihood of success on the merits" standard.

over Bureau CIDs, yet Plaintiff seeks to circumvent that process with this improper collateral attack. As a result, this Court lacks jurisdiction over Plaintiff's claims. *See Chau v. SEC*, 72 F. Supp. 3d 417, 425 (S.D.N.Y. 2014) ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate."), *aff'd*, 665 F. App'x 67 (2d Cir. 2016).

Determining whether Congress intended the CFPA to preclude jurisdiction over Plaintiff's claims requires a two-part inquiry. First, the Court must ask whether such intent is "fairly discernible" from the "text, structure, and purpose" of the statute. *Tilton v. SEC*, 824 F.3d 276, 281 (2d Cir. 2016) (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9–10 (2012)). Second, the Court asks whether the particular claims at issue are "of the type Congress intended to be reviewed within th[e] statutory structure." *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010).

Applying the first step of that analysis here, the text, structure, and purpose of the relevant statutory provisions "make clear that Congress intended the [Bureau's] scheme of administrative review to permit the [Bureau] to bring its expertise to bear in enforcing [CIDs]." *See id.* The CFPA establishes a comprehensive and detailed scheme for adjudicating disputes about CIDs. It specifies: when the Bureau may issue such demands, *see* 12 U.S.C. § 5562(c)(1); when and how the recipient of such a demand may petition the Bureau for an order modifying or setting aside the demand, *see id.* § 5562(f)(1); the effect of a petition on compliance with the demand, *see id.* § 5562(f)(2); the grounds on which a recipient may petition for an order to set aside or modify a demand, *see id.* § 5562(f)(3); the Bureau's authority to file a petition to enforce a demand, *see id*. § 5562(e); the appropriate venue for such petitions, *see id*.; where service of process can be made, *see id.* § 5562(e)(2); that a district court in which the Bureau files a petition

has jurisdiction, *see id.* § 5562(h)(1); the relief the district court may order, *see id.*; and how district court orders may be appealed, *see id.* § 5562(h)(2).

The CFPA even gives a person who has provided materials, answers, or testimony the ability to petition a court with respect to a Bureau-designated custodian of such records, and grants district courts jurisdiction to resolve those specific types of claims. *See id.* §§ 5562(g), 5561(3). The statute does not similarly confer jurisdiction over other types of claims a CID recipient might seek to bring. *Cf. Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 630 (4th Cir. 2018) (holding that National Gas Act precluded jurisdiction over plaintiffs' claims and noting that the Act "indicates that Congress knew how to allow for district court jurisdiction" for certain types of claims, "yet it chose not to do so when it came to" the type of claims plaintiffs sought to press). "Given the painstaking detail with which the [CFPA] sets out the method for [enforcing CIDs], it is fairly discernible that Congress intended to deny [CID recipients] an additional avenue of review in district court." *See Elgin*, 567 U.S. at 11–12 (holding Civil Service Reform Act precluded district court jurisdiction over challengers' constitutional claims).

Turning to the second step of the analysis, Plaintiff's objections to the CIDs are "of the type Congress intended to be reviewed within th[e] statutory structure." *Tilton*, 824 F.3d at 281. This step requires considering whether the statutory scheme forecloses all meaningful judicial review, whether the claims are "wholly collateral" to the review provisions, and whether the claims are "outside the agency's expertise." *Id.* All three of these factors confirm that Plaintiff's objections should be addressed through the process Congress created for doing just that.

First, Plaintiff will not be denied an opportunity for meaningful review of its objections to the CID because it can raise them as defenses to a CID-enforcement proceeding, should the Bureau determine that it is necessary to pursue one. *See John Doe Co.*, 849 F.3d at 1131 ("In that

court proceeding, the recipient [of a CID] can raise any relevant legal objection to enforcement of the CID."). Second, Plaintiff's claims are not "wholly collateral" to the statute's review provisions because they are "the vehicle by which [the Plaintiff] seeks to prevail" in resisting the Bureau's CID. *Tilton*, 824 F.3d at 287–88 (internal quotation marks omitted). That is in fact the sole object of Plaintiff's challenge. *See* Compl., at 1 (Plaintiff seeks to stop the Bureau "from perpetuating a lawless and retaliatory Civil Investigative Demand"). Thus, Plaintiff's claims are "procedurally intertwined" with the process—currently underway—of administrative and judicial review regarding the CID. *Tilton*, 824 F.3d at 287.

Third, the Bureau has significant institutional expertise to bring to bear on the question of when or whether its investigation might require it to seek to compel Plaintiff's compliance with the CID, or whether the investigation should continue at all. Application of such expertise to the facts here could "obviate any need for judicial review" of Plaintiff's objections to the CID, *id.* at 290–91, in the event the Bureau determines not to seek a court order enforcing it. Plaintiff's claims thus do not fall "outside the agency's expertise" for purposes of this analysis. *See id.* at 289 ("an agency may bring its expertise to bear on a constitutional claim indirectly, by resolving accompanying, potentially dispositive issues in the same proceeding").

Nor does it alter this analysis that Plaintiff's objections to the CID are constitutional in nature. *Tilton* similarly involved a constitutional separation-of-powers challenge, but the Second Circuit held that courts lacked jurisdiction to decide such objection outside the specific regime Congress had established. *See also Bebo v. SEC*, 799 F.3d 765, 773 (7th Cir. 2015) ("*Elgin* made clear that" a challenger cannot circumvent Congress's exclusive review scheme "merely because her claims are facial constitutional challenges."). The D.C. Circuit reached a similar conclusion in rejecting a pre-enforcement challenge to a Bureau CID that was based on the same separation-

of-powers argument Plaintiff seeks to advance here. The court concluded in that case that it was "not the proper forum" for a CID recipient "to press its separation of powers claim." *John Doe Co.*, 849 F.3d at 1134. The plaintiff could instead raise its claim as a defense in an ongoing Bureau CID-enforcement proceeding against it, just as Plaintiff will have the chance to do here before it could incur any fine or penalty from non-compliance.

b. The Court lacks jurisdiction because Plaintiff's request to enjoin the Bureau from filing any future CID-enforcement action is unripe.

This case is even easier than *Tilton* and similar cases about administrative enforcement proceedings, in which private parties must bear the burden of putting on a defense before they can present their arguments in an Article III court, because the Bureau must file an action in court in order to compel any action on Plaintiff's part. Plaintiff has not shown that any such CID-enforcement proceeding is imminent, and thus its challenge to the CID is unripe.

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). Plaintiff's claimed need for a preliminary injunction rests entirely on such events: the Bureau either seeking to enforce the CID or issuing additional CIDs in connection with this investigation. Plaintiff has not and cannot establish that any such action is imminent. At this point, the Bureau has merely sent Plaintiff a non-self-enforcing CID.

This is also not a case in which Plaintiff can't afford to wait because it faces a Hobson's choice between complying with the CID or racking up potentially severe future penalties. Again, Plaintiff is under no current binding legal obligation to comply. That will remain the case unless and until the Bureau resolves Plaintiff's pending petition to the Director, seeks to enforce the CID in district court, and the court grants such an order (after hearing Plaintiff's constitutional

objections). Thus, Plaintiff "has come to this court to halt an agency action that requires nothing on its part, and certainly does not force it to 'bet the farm'" by risking sanction if it fails to act. *John Doe Co.*, 849 F.3d at 1134 (quoting *Free Enterprise Fund*, 561 U.S. at 490).

c. Plaintiff has not identified a cause of action or waiver of sovereign immunity under which it could proceed.

Plaintiff bears the burden of establishing that this Court has subject-matter jurisdiction by identifying both a cause of action under which it seeks to proceed and an applicable waiver of the federal government's sovereign immunity. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) ("plaintiff bears the burden of establishing that her claims fall within an applicable waiver" of immunity); *Pine v. T Mobile Corp. HQ*, No. 19-cv-2583-CM, 2019 WL 2866714, at *2 (S.D.N.Y. July 3, 2019) ("As Plaintiff does not identify any cause of action arising under federal law, he fails to satisfy his burden of showing that the Court can exercise federal question jurisdiction over this action."). Plaintiff has done neither.

First, Plaintiff has not identified a cause of action. The Complaint cites the Declaratory Judgment Act, Compl. ¶ 1 (citing 28 U.S.C. § 2201), but that Act "is procedural only, and does not create an independent cause of action." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244 (2d Cir. 2012) (internal quotation marks and citations omitted). The Complaint also cites the general federal-question jurisdiction provision in 28 U.S.C. § 1331, Compl. ¶ 1, but that provision too "creates no right of action." *Savalle v. Nestle Waters N. Am., Inc.*, 289 F. Supp. 2d 31, 32 (D. Conn. 2003). Finally, the Complaint cites the Tucker Act, 28 U.S.C. § 1346, which confers jurisdiction over certain types of monetary claims against the United States. Compl. ¶ 1. But that provision has no relevance to the claims for declaratory and injunctive relief that Plaintiff seeks to press, *see Lee v. Thornton*, 420 U.S. 139, 140 (1975) ("The Tucker Act empowers district

courts to award damages but not to grant injunctive or declaratory relief."), and certainly does not provide Plaintiff a cause of action.

Second, Plaintiff has not identified an applicable waiver of sovereign immunity. "Absent an 'unequivocally expressed' statutory waiver, the United States, its agencies, and its employees (when functioning in their official capacities) are immune from suit based on the principle of sovereign immunity." *Suffolk Cty., N.Y. v. Sebelius*, 605 F.3d 135, 140 (2d Cir. 2010) (quoting *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260–61 (1999)). None of the provisions Plaintiff cites in its Complaint include a general waiver of sovereign immunity that would allow Plaintiff's claims to move forward. *See Serra v. Gen. Servs. Admin.*, 667 F. Supp. 1042, 1049, 1051 n.4 (S.D.N.Y. 1987) (section 1331 and Declaratory Judgment Act); *United States v. Bormes*, 568 U.S. 6, 9 (2012) (Tucker Act). Absent such a waiver, the Court is without jurisdiction. *See Makarova*, 201 F.3d at 113.

These are both fatal defects which, standing alone, justify denying the relief Plaintiff seeks (and dismissing its Complaint). But even if Plaintiff amended its Complaint to invoke the Administrative Procedure Act for a cause of action, *see* 5 U.S.C. § 704, and its waiver of sovereign immunity, *see id.* § 702, those claims would also fail because Plaintiff does not challenge any "final agency action" cognizable under the APA. *See Shakhnes v. Berlin*, 689 F.3d 244, 260 (2d Cir. 2012) (Under the APA, "courts may not review agency actions unless such actions are 'final.'" (citing *Bennett v. Spear*, 520 U.S. 154, 177 (1997)); *see also Pearl River Union Free Sch. Dist. v. Duncan*, 56 F. Supp. 3d 339, 350 (S.D.N.Y. 2014) (concluding that the finality requirement is not jurisdictional but remains "an essential element of an APA claim").

A final agency action must be one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Shakhnes*, 689 F.3d at 260 (quoting

Bennett, 520 U.S. at 177–78). Bureau CIDs do not fit that definition because they do not themselves determine "rights or obligations" or give rise to "legal consequences." *See D.R. Horton, Inc. v. Leibowitz*, No. 4:10-cv-547, 2010 WL 4630210, at *3 (N.D. Tex. Nov. 3, 2010) (holding that a CID issued by the FTC under its identical statutory authority was not "final agency action," and dismissing plaintiff's pre-enforcement challenge to the CID); *cf. FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980) (even the FTC's issuance of an administrative complaint "was not 'final agency action'"). Instead, "no action at all is required" on Plaintiff's part "unless and until the CID is enforced" by a district court, after a proceeding in which Plaintiff "can raise any relevant legal objection to enforcement of the CID." *John Doe Co.*, 849 F.3d at 1134, 1131. Thus, even if the Court otherwise had jurisdiction over Plaintiff's claims, they would fail at the outset.[3]

d. Even on the merits, Plaintiff's claims would not justify the relief it seeks.

Given the insurmountable threshold obstacles to Plaintiff's claims, the Bureau will limit its response on the merits here. Even a brief overview, however, makes clear that Plaintiff cannot show that it is likely to prevail even if the Court were to reach the underlying merits.

[3] To be sure, the Supreme Court entertained a freestanding separation-of-powers challenge to a different agency in *Free Enterprise Fund*. 561 U.S. at 491 n.2. In that case, however, the Court was primarily concerned that the challengers could not otherwise "meaningfully pursue their constitutional claims." *Id.* at 490. Here, by contrast, Plaintiff need only wait to raise its objections in the event that the Bureau files a CID-enforcement proceeding as part of the statutory review scheme that Plaintiff seeks to evade.

First, Plaintiff claims that the Bureau violated its due process rights by withdrawing the first CID and later issuing the second, revised CID.[4] This contention makes little sense. The mere receipt of a CID does not deprive Plaintiff of any property or liberty interest. Plaintiff can suffer no penalty until after it has received all the process that comes with a CID-enforcement proceeding in federal court. In any event, Plaintiff's complaint about the Bureau's withdrawal of the first CID (so that it could provide the additional information in the notification of purpose that Plaintiff claimed was lacking) is not well-founded. There is nothing unusual about a plaintiff choosing to dismiss claims without prejudice to its ability to pursue those or similar claims at a later date. *See* Fed. R. Civ. P. 41(a). Nor is it clear what due process interest would be remedied by enjoining the Bureau from initiating the judicially managed process of a CID-enforcement action, during which Plaintiff could raise any appropriate defenses. Plaintiff's claim that it is harmed merely by having to wait for a resolution of those defenses is not tenable. It is also hard to square with Plaintiff's request during the prior action to enforce the first CID that the court *delay* resolving Plaintiff's constitutional objections. *See* ECF No. 14-4, at 11–15 (seeking stay).

Second, Plaintiff objects to the fact that the Bureau is funded primarily outside the annual appropriations process. *See* 12 U.S.C. § 5497(a), (e) (Bureau may draw upon the earnings of the Federal Reserve System, up to a specified cap, and must obtain any additional funding through annual appropriations). But it is well established that "Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or

[4] Plaintiff's objection is even broader than that; it asserts that it is unconstitutional for *any* agency to issue an administrative subpoena in any circumstances. Mem. at 10. This claim, which is contradicted by more than a century of Supreme Court precedent, *see, e.g.*, *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1165 (2017) (district courts should enforce duly issued agency subpoenas except in limited circumstances); *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894) (affirming agency's ability to enforce administrative subpoena in court), does not bolster Plaintiff's case that it is likely to succeed on the merits.

investments rather than the ordinary appropriations process." *PHH Corp. v. CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc). Indeed, Congress has done so for numerous agencies. *See, e.g.*, 12 U.S.C. § 243 (Federal Reserve Board); *id.* §§ 1815(d), 1820(e) (FDIC); 16 U.S.C. §§ 6802, 6806 (National Park Service); 21 U.S.C. §§ 379f–379j-62 (FDA); *see also* Act to Establish the Post-Office and Post-Roads Within the United States, 1 Stat. 354 (May 8, 1794) (establishing a United States Post Office funded through rates of postage). Plaintiff is not likely to show that this commonplace and longstanding method of agency funding is unconstitutional.

Finally, Plaintiff argues that the removal restriction in 12 U.S.C. § 5491(c)(3) violates the Take Care Clause of Article II. The Bureau agrees that this restriction unconstitutionally limits the President's ability to ensure the faithful execution of the law. But the removal restriction is severable from the rest of the statute, and its invalidity thus does not affect the provisions of the statute authorizing the Bureau to issue and seek to enforce CIDs. *See* 12 U.S.C. § 5302 (express severability clause); *PHH Corp.*, 881 F.3d at 200 (Kavanaugh, J., dissenting) (appropriate remedy for unconstitutional removal provision is to sever it and allow the Bureau to "continue to operate … as an executive agency"). More fundamentally, Plaintiff cannot explain why the invalidity of this provision would justify enjoining the Bureau from even attempting to enforce a CID in court, where the constitutionality of the removal provision could be properly raised and adjudicated, and the court could then fashion an appropriate remedy.

II. Plaintiff Cannot Show It Will Suffer Irreparable Harm in the Absence of an Injunction

A showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009); *see also Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence

of an injunction."). To satisfy this requirement, Plaintiff must show that if the Court does not grant it the injunction it seeks, it will suffer an injury that is "neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Faiveley*, 559 F.3d at 118. Plaintiff cannot make this showing.

Most importantly, until the Bureau files a petition in district court for an order enforcing the CID and the court grants such an order, Plaintiff is not under a binding obligation to do anything. *See John Doe Co.*, 849 F.3d at 1134 (Plaintiff "has not identified any exceptional measures it must undertake in response to the CID. In fact, … no action at all is required unless and until the CID is enforced."). Plaintiff thus cannot show an injury that is "actual and imminent" merely from receiving a non-self-enforcing CID from the Bureau.

Plaintiff emphasizes the time and expense that its principal says she spent in preparing to respond to, and then preparing to contest, the Bureau's first CID. Mem. at 15.[5] As an initial matter, both the Supreme Court and the Second Circuit have made clear that such litigation-related expenses are not cognizable as irreparable injury. *See Standard Oil*, 449 U.S. at 244 ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *Tilton*, 824 F.3d at 285 ("The litigant's financial and emotional costs in litigating the initial proceeding are simply the price of participating in the American legal system, and not an irreparable injury…"); *accord John Doe Co.*, 849 F.3d at 1135; *Bebo*, 799 F.3d at 775. That alone is fatal to Plaintiff's attempt to rely on these costs to meet its burden.

[5] *See also* Moroney Aff., at ¶¶ 18-22 (stating under oath that, among other hardships, Ms. Moroney spent 41 hours per week for roughly 5 months preparing to respond to the Bureau's first CID, and then spent 31 hours per week for roughly 3 more months preparing for a hearing at which Plaintiff's counsel intended to argue that the CID was legally deficient).

What's more, past expenses do not themselves establish that Plaintiff will suffer future harm without an injunction. Simply put, the relief Plaintiff seeks will not prevent the expenses of which it complains. If Plaintiff means the Court to infer that it will incur similar expenses in responding to the second CID, Plaintiff will not be obligated to do so unless and until the Bureau seeks to enforce the CID and the district court issues an order compelling Plaintiff's compliance, after hearing and rejecting its constitutional arguments. Such costs—in addition to not being cognizable as "irreparable injury" in the first place—cannot be called "imminent."

There is also no reason to think the second CID would, if it is eventually enforced, impose the same level of compliance costs on Plaintiff as the first CID. As Plaintiff emphasizes, the second CID seeks much the same information as the first CID, which Plaintiff says it has already devoted significant resources to responding to. Indeed, notwithstanding Plaintiff's representations here that the CID is burdensome enough to put it out of business, its pending petition to modify or set aside the CID barely mentions burden at all. *But see* Defs' Ex. A at 16 (arguing in passing that having to re-produce certain materials would be "unnecessary, duplicative, overly burdensome, and does not serve the Bureau's purpose").

Plaintiff claims that it will "probably" go out of business if forced to comply with or challenge the CID also do not support an injunction. Mem. at 15; *see also* Moroney Aff., ¶ 26 (stating that the costs of responding to or challenging second CID "may force me to close my law firm"). As evidence, Plaintiff offers hardly more than "the self-serving statement of its President that its business will collapse. With nothing more than this statement, plaintiff's claim is speculative" rather than "actual and imminent." *Auto Sunroof of Larchmont, Inc. v. Am. Sunroof Corp.*, 639 F. Supp. 1492, 1494 (S.D.N.Y. 1986); *see also Sunni, LLC v. Edible Arrangements, Inc*., No. 14-cv-461-KPF, 2014 WL 1226210, at *11 (S.D.N.Y. Mar. 25, 2014)

(Plaintiffs failed to show that loss of business was imminent where they "submitted no evidence regarding their current capitalization, their annual or monthly profits, or their ability to withstand a significant loss in business, or even closure, for a short period of time."). A preliminary injunction "should issue not upon a plaintiff's imaginative, worst case scenario of the consequences flowing from the defendant's alleged wrong but upon a concrete showing of imminent irreparable injury." *USA Network v. Jones Intercable, Inc*., 704 F. Supp. 488, 491 (S.D.N.Y. 1989). Instead of such a concrete showing, Plaintiff offers only a few highly speculative statements about what "may," "might," or "probably" will happen if its motion is denied. Moroney Aff., ¶¶ 26, 27; Mem. at 15.

Plaintiff also claims injury in the form of reputational harm, alleging that "Defendants are publicizing their duplicative investigation to [Plaintiff's] clients, ruining [its] reputation and further damaging [its] business." Mem. at 15; *see also* Moroney Aff., ¶ 30 ("CFPB's third-party CIDs to my clients have publicized the investigation of my law firm and damaged my reputation and standing with them."). But this alleged injury would not be prevented by the preliminary injunction that Plaintiff seeks. The existence of the Bureau's investigation has been public information since the Bureau filed its petition to enforce the first CID in federal court.[6] Plaintiff cannot explain why the issuance of any additional CIDs in aid of that investigation would have any further effect on Plaintiff's reputation, or why an injunction against the Bureau sending or seeking to enforce additional CIDs would spare Plaintiff further blushes.

[6] Indeed, Plaintiff appears to have alerted its clients to the existence of the Bureau's investigation long ago. As Plaintiff previously explained, it contacted its clients in October 2017 seeking their consent to disclose information in response to the Bureau's first CID. ECF No. 14-4, at 16 n.6; *see also* Aff. of Crystal Moroney, ¶ 9, *BCFP v. LOCM*, No. 7:19-cv-1732 (S.D.N.Y. Oct. 3, 2019) (ECF No. 17-5) (testifying to the same). An injunction would not unring this bell.

Moreover, Plaintiff previously argued that it was "patently improper" for the Bureau to serve CIDs on *it* relating to its debt-collection work and suggested that the Bureau should instead direct any future CIDs to its clients—the very conduct Plaintiff now claims necessitates a preliminary injunction. *See* ECF No. 14-4, at 17 ("If the Bureau seeks information as to the credit granting practices of the Law Firm's clients, the Bureau can generate a tailored request to one or more clients seeking specific information."). Such arguments undercut Plaintiff's allegations now that it will incur grave reputational harm from any future Bureau CIDs.[7]

Finally, Plaintiff argues that because it has alleged the "deprivation of a constitutional right," "no further showing of irreparable injury is necessary." Mem. at 14. That is not the law. As explained above, Plaintiff will have the opportunity to press its constitutional objections to the CID in the event that the Bureau denies Plaintiff's petition to the Director and seeks to enforce the CID in court. It faces no form of *per se* irreparable injury merely from having to wait to raise its objection at a later date. *See Tilton*, 824 F.3d at 285 (holding that litigants may have to "complete a proceeding that may ultimately prove constitutionally infirm," but that such burden is "not an irreparable injury that necessitates" immediate review); *Bebo*, 799 F.3d at 775 ("Every person hoping to enjoin an ongoing administrative proceeding could make this argument [that it is suffering ongoing constitutional injury], yet courts consistently require plaintiffs to use the administrative review schemes established by Congress.").

Thus, Plaintiff has fallen far short of showing that it is likely to suffer irreparable injury without the preliminary injunction it seeks.

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[7] Notwithstanding Plaintiff's purported concern for publicity, it apparently chose, through counsel, to issue a press release touting its challenge to the Bureau's investigation. Press Release, New Civil Liberties Alliance, *NCLA Lawsuit Says CFPB Is Funded Unconstitutionally* (Dec. 19, 2019), *available at* https://bit.ly/310sZIY.

III. The Balance of Harms and the Public Interest Weigh Against an Injunction

The third and fourth injunctive factors, the balance of harms and the public interest, "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors support denying Plaintiff's motion.

The Bureau is charged with the primary responsibility to enforce the federal consumer financial laws and to ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices." 12 U.S.C. § 5511(b). The Bureau sent the CID at issue here as part of an investigation into whether debt collectors or others ignored warnings that the debts they sought to collect were the product of identify theft or otherwise disputed by consumers, among other potentially serious violations of federal consumer financial law. *See* ECF No. 1-7, at 3. Plaintiff now seeks relief that would disrupt the Bureau's ongoing investigation, and it has done so outside the exclusive regime that Congress established for the orderly resolution of disputes over CIDs. The balance of harms and public interest strongly favor resolving Plaintiff's objections—should it become necessary to do so—through the process set out in the Bureau's statute. More generally, "the public has a strong interest in the vigorous enforcement of consumer protection laws" that would be undermined by the relief Plaintiff seeks. *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 205 (D.D.C. 2017).

Finally, as discussed above, Plaintiff faces no cognizable injury from the fact that it must wait to raise its constitutional objections through the appropriate channels rather than via this premature collateral attack. Therefore, the balance of harms and the public interest also weigh against a preliminary injunction.

CONCLUSION

For these reasons, the Court should deny Plaintiff's motion.

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Respectfully submitted,

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