20-3471

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BUREAU OF CONSUMER FINANCIAL PROTECTION,
Petitioner-Appellee,

v.

LAW OFFICES OF CRYSTAL MORONEY, P.C.,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY TO APPELLEE'S OPPOSITION TO MOTION TO STAY PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

Pursuant to Fed. R. App. P. 27(a)(4), Respondent-Appellant Law Offices of Crystal Moroney, P.C. ("Law Firm" or "Appellant") submits this Reply to the Consumer Financial Protection Bureau's ("CFPB" or "Appellee") Opposition to Appellant's Motion to Stay Pending Appeal.

INTRODUCTION

Post-*Seila Law*, CFPB became the first and only federal agency in history whose funding is controlled by the President and derived from a self-funded independent agency, without congressional review. The unreviewable executive demand for a transfer of funds from a self-funded independent agency creates a double layer of insulation between the Executive Branch and Congress's exclusive prerogative to wield the power of the purse through lawmaking. Without "traditional constitutional constraints" on the Appropriations Clause, individuals like Appellant "lose[] liberty in a real sense." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J. concurring).

CFPB characterizes this enforcement action as a "summary proceeding[]," despite that the case has been ongoing since June 2017 because CFPB chose to self-moot the initial enforcement hearing in November 2019. Incredibly, CFPB now argues that the public interest favors immediate enforcement. Yet, CFPB cannot point to any suspicion of wrongdoing or even one injured consumer. And it

dismisses substantial and unrebutted proof of the Law Firm's imminent ruination, without citing a higher standard of proof to which Appellant should be held.

All the relevant factors favor staying the case to maintain the *status quo*, as this Court resolves the important constitutional and statutory questions implicating CFPB's enforcement authority.

ARGUMENT

I. APPELLANT HAS DEMONSTRATED A SUBSTANTIAL POSSIBILITY OF SUCCESS ON APPEAL

CFPB obliquely argues that courts have "unanimously rejected" Appellant's contention that CFPB's funding is unconstitutionally structured. *See* Opp'n to Mot. to Stay, ECF-31 at 5-7 (Jan. 15, 2021). CFPB's claim is misleading because most of the cases its cites, including the only decision by a court of appeals, predate *Seila Law*. None of these cases considered the current operative facts—a single Director serving at the President's pleasure, who demands unreviewable funding from a self-funded independent agency. *See id.* at 6 (citing the D.C. Circuit and five district cases from 2014-2018). There is little value in prior decisions that did not consider that without the Director's tenure protection, the President effectively orders the unreviewable transfer of Federal Reserve receipts to CFPB—up to $695.9 million in FY2020. *See* CFPB CFO Update (Mar. 16,

2020).[1] Those decisions are even less persuasive considering that the Supreme Court has since ruled that those courts' constitutional reasoning was fundamentally flawed. Each held that the Director's for-cause removal provision was constitutional—an interpretation *Seila Law* rejected. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020).

The only post-*Seila Law* cases on which CFPB relies are district court cases in other circuits. Not only do these cases not have precedential value, but the decisions are unpersuasive. For instance, despite acknowledging that CFPB's "funding does not come from Congressional appropriations[,]" the *Citizens Bank* court merely surveyed the now-discredited reasoning of the pre-*Seila Law* cases cited above, and then relied on the district court's decision in ***this*** case. *CFPB v. Citizens Bank, N.A.*, No. 20-044, 2020 WL 7042251, at *13 (D.R.I. Dec. 1, 2020). The *Fair Collections* court acknowledged that CFPB's funding is "insulat[ed] from the annual appropriations process and from congressional review[,]" but it nevertheless found CFPB's funding constitutional, in part, because it incorrectly believed CFPB is a self-funded independent agency. *See CFPB v. Fair Collections & Outsourcing, Inc.*, No. 8:19-cv-02817, 2020 WL 7043847, at *7-8 (D. Md. Nov. 30, 2020). And *Rop* is inapposite, since the FHFA ***is*** self-funded, unlike CFPB.

[1] Available at https://files.consumerfinance.gov/f/documents/cfpb_cfo-update_report_fy-2020_q1.pdf.

Rop v. Fed. Housing Fin. Agency, No. 1:17-CV-497, 2020 WL 5361991, at *26 (W.D. Mich. Sept. 8, 2020).

Whether the Constitution permits the President to make unreviewable demands for CFPB funding from a second agency that is self-funded, is not a question that has been answered by other circuit courts. At least one court has determined, though, that since the President "lack[s] independent constitutional authority to authorize the transfer of funds[,]" at a minimum, a statute must expressly authorize the transfer. *See Sierra Club v. Trump*, 963 F.3d 874, 887 (9th Cir. 2020). Dodd-Frank does no such thing—it instead authorizes a Director ***independent*** of the President to demand a transfer. To the extent that persuasive authority on appealed issues exists, it suggests that Appellant has at least a substantial possibility of success—or even a likelihood of success—on the merits.

II. THERE IS AMPLE EVIDENCE THAT APPELLANT WILL SUFFER IMMINENT RUINATION AND IRREPARABLE CONSTITUTIONAL HARM

A. Appellant Has Provided Ample Evidence of Imminent Ruination

The Law Firm exceeds the standard for showing imminent ruination for at least three reasons. First, Ms. Moroney submitted a detailed and specific affidavit in which she compares past expenses with short-term projections of her business' viability, in the context of the current state of her industry. *See* Appellant Mot. to Stay, ECF-23-1 at 10-13 (Jan. 11, 2021). CFPB wrongly dismisses this unrebutted evidence as "self-serving." Opp'n at 11. Ms. Moroney's declarations of fact under

penalty of perjury provide assurance that they are true.[2] Moreover, as a member of the New York and New Jersey state bars, Ms. Moroney has a duty of candor to the Court that is more consequential than that of non-lawyer affiants. *See, e.g.*, N.J.R. of Prof'l Conduct 3.3(a)(5). If any harm is more irreparable than the Law Firm's insolvency, it is the possible loss of Ms. Moroney's license to practice law and her need to find new employment outside the legal field if she were to misrepresent material facts.

Second, the facts established by Ms. Moroney's affidavit are buttressed by accountant Howard Messing's affidavit. Mr. Messing owns a quarter-century-old accounting firm, and he has been an accountant for 38 years. Aff. of Howard Messing, ECF-23-9 at ¶¶ 2, 5 (Jan. 11, 2021). CFPB does not explain why Mr. Messing's data is unreliable, why his veracity should be doubted, or how his affidavit is "self-serving." Opp'n at 11.

Third, Ms. Moroney's compliance with the First CID is the best indicator of the compliance costs of the Second CID. CFPB mischaracterizes the lower court's order by suggesting that the Law Firm will not incur expenses associated with "*contesting* that earlier CID[.]" *See* Opp'n at 12 (emphasis in original). The Law

[2] The district court did not hear witness testimony, nor did the parties engage in discovery.

Firm already incurred expenses ***both*** contesting and complying with the First CID.[3] Aff. of Crystal Moroney, ECF-23-8 at ¶ 13 (Jan. 11, 2021). If anything, compliance with the Second CID[4] will be more expensive. CFPB demands production in a non-standard form and Bates renumbering—two added and duplicative costs to the Law Firm's compliance. *See* CFPB Reply Br., ECF-25 at 14-15 (July 29, 2020) (Exhibit A). Moreover, the Second CID is larger in scope. And to satisfy her ethical obligations, Appellant must engage counsel to scour almost 6 years' documents to identify confidential and privileged material, draft a privilege log, and likely defend motions to compel production.

CFPB is wrong to suggest that the law requires more evidence of imminent insolvency. The cases to which CFPB cites do not suggest otherwise. In *Sunni, LLC*, the movants failed to show evidence regarding annual profit and loss and the ability to withstand closure. *See Sunni, LLC v. Edible Arrangements, Inc.*, No. 14-cv-461, 2014 WL 1226210, at *11 (S.D.N.Y. Mar. 25, 2014). Appellant has provided that. In *Auto Sunroof*, the movant vaguely alleged that it would lose customers and failed to prove it could not be compensated with damages. *Auto Sunroof of Larchmont, Inc. v. American Sunroof Corp.*, 639 F. Supp. 1492, 1494-

[3] The "First CID" is the June 23, 2017 investigation and enforcement hearing scheduled for November 8, 2019.

[4] The "Second CID" is the November 14, 2019 investigation and enforcement hearing held on August 18, 2020.

95 (S.D.N.Y. 1986). The Law Firm's insolvency will not be brought on by a loss of customers, but rather a flood of expenses that cannot be compensated with damages. Unlike CFPB's citations, Ms. Moroney's and Mr. Messing's data and projections are based on recent experience and they present a concrete showing of imminent, irreparable injury absent a stay.[5]

B. Appellant Has Provided Ample Evidence of Irreparable Constitutional Harm

CFPB is wrong to assert that the Law Firm's constitutional injuries are not irreparable. Although *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996), and *Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984), were Eighth Amendment cases, they drew

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[5] CFPB is also wrong to assert that Appellant must negotiate CID terms to mitigate its financial harm, and CFPB should be estopped from doing so. *See* Opp'n at 12. To avoid causing the Law Firm's insolvency in February 2020, CFPB asserted that ***not*** negotiating with it would prevent the Law Firm's ruination:

> THE COURT: So no as in no without consequences.
>
> MR. FRIEDL [CFPB]: That's right. And plaintiff has been saying no for quite some time. I think the firm understands that. So there is no penalty. And this really relates both to you know, the two main factors that plaintiff has to satisfy to get a preliminary injunction here, because I think, as your Honor seems to well understand, there's no irreparable injury from simply having to say no, we don't want to provide this information.

Prelim. Inj. Hr'g Tr. at 33-34 (Feb. 27, 2020) (Exhibit B). Where a party's argument is "clearly inconsistent with its earlier position," judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *United States v. Apple, Inc.*, 791 F.3d 290, 337 (2d Cir. 2015) (internal quotations omitted).

no line between constitutional harm under the Eighth Amendment and constitutional harm caused by the Appropriations Clause and Nondelegation Doctrine claims raised in this case. Indeed,

> [t]he separation of powers doctrine is based on the Constitution's ***division of delegated powers*** between the three branches of government. ***Its purpose is to better secure liberty*** by separating and diffusing the powers of government.

United States v. Cortes, 697 F. Supp. 1305, 1308 n.4 (S.D.N.Y. 1988) (citing *Bowsher v. Synar*, 478 U.S. 714 (1986)) (emphasis added).

"[T]he Appropriations Clause constitutes a separation-of-powers limitation" that gives rise to equitable causes of action in the same vein as claims based on the Presentment, Establishment, and Free Exercise Clauses. *See Sierra Club*, 963 F.3d at 888-89 (citing *Clinton v. City of New York*, 524 U.S. 417, 434-36 (1998) (internal quotations omitted). CFPB has no basis for asserting that some unconstitutional governmental actions deserve a presumption of irreparable harm, whereas others do not.

Appellant's constitutional injury is irreparable. Where an agency does not have lawful authority to act, surrendering documents pursuant to an unconstitutional subpoena causes irreparable harm because it cannot be remedied. CFPB's reliance upon *Church of Scientology* to assert otherwise is misplaced. The Church objected to the nature of the documents sought, not the underlying

constitutional authority of the IRS to subpoena documents. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 11 (1992). Under that case's facts, a court could fashion relief by returning documents and destroying those in the IRS's possession. *Id.* at 13. Unlike the Church, the Law Firm claims the right to be free from an unconstitutional agency's demands in the first place. Thus, a subsequent ruling in Appellant's favor cannot remedy the constitutional harm she suffered complying with an unconstitutional order. Thus, absent a stay, Appellant will suffer irreparable constitutional harm.

III. THERE IS AMPLE EVIDENCE THAT THE EQUITIES FAVOR A STAY

CFPB's claim that the balance of the equities tips in its favor is wrong for at least two reasons. First, CFPB ignores the "substantially similar" First CID and the procedural history of the case since 2017. *See* Enforcement Hr'g Tr. at 44 (Aug. 18, 2020) (Exhibit C). If CFPB intended to "carry out [its] statutory responsibilities to promptly investigate[,]" Opp'n at 9, it would not have self-mooted the First CID thereby delaying the enforcement proceeding from November 8, 2019 to August 18, 2020. CFPB's new-found desire to finally enforce its CID cannot outweigh the considerable irreparable harm that the Law Firm will suffer absent a stay.

Second, CFPB has made no showing that the public would be better served if CFPB pursues its investigation immediately, rather than staying it. If the public

were in imminent danger, surely CFPB would have identified ***one*** document to demonstrate the importance of pressing its investigation without delay. But it still has not reviewed ***any*** of the documents or interrogatories that have been in its possession since September 2017 and amended in October 2017, when Appellant responded to the First CID. That CFPB "has received complaints about Respondent's debt-collection activities[,]" sheds absolutely no light on the nature of the complaints and draws no connection between these complaints and the CID's Notification of Purpose. *See id.* at 8 n.3. CFPB's failure to show, in concrete terms, that the public interest will be frustrated by a stay, signals that its vague allegations of harm should be accorded little weight. *See Sierra Club*, 963 F.3d at 897 (rejecting Trump's argument that an injunction would frustrate border security).

The fact is, from its 2012 inception to present, the Law Firm has received only 13 complaints filed with CFPB.[6] And in each instance, the Law Firm promptly addressed all complaints with CFPB, and CFPB closed all files. CFPB never asked Appellant to take any remedial action, presumably because no remedial action was necessary. CFPB cannot now, for the first time in three-and-a-half years, credibly assert that the investigation is the product of "suspected

[6] Documents cannot be redacted here without rendering them useless.

wrongdoing described in the CID." *See* Opp'n at 8 n.3. Thus, the balance of the equities leans in favor of Appellant.

CONCLUSION

For the foregoing reasons, Respondent-Appellant Law Firm requests a stay pending appeal to maintain the *status quo* between the parties.

Respectfully submitted,

Dated: January 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2021, I filed the foregoing Motion to Stay electronically with the Clerk of Court to be served by operation of the Court's CM/ECF system upon all counsel of record in the above-captioned case. I will also email a courtesy copy to Petitioner-Appellee's counsel.

Michael P. DeGrandis
Counsel to Respondent-Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 27(a)(2)(B), this document contains 2,575 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft® Word for Microsoft 365 MSO (16.0.13426.20352) 64-bit.

Michael P. DeGrandis
Counsel to Respondent-Appellant
January 29, 2021

INDEX OF EXHIBITS

Exhibit	Description
A	CFPB Pet. to Enforce Reply, ECF No. 25, Cited Excerpts at 14-15 (July 29, 2020)
B	Preliminary Injunction Hearing Transcript, Cited Excerpts at 33-34 (Feb. 27, 2020)
C	Enforcement Hearing Transcript, Cited Excerpts at 43-44 (Aug. 18, 2020)