Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

December 3, 2020

Via ECF

Hon. Kenneth M. Karas
The Hon. Charles L. Brieant Jr. Federal Building
and United States Courthouse
300 Quarropas Street
White Plains, NY 10601

RE: *CFPB v. Law Offices of Crystal Moroney, P.C.*, No. 7:20-cv-03240-KMK (S.D.N.Y.)

Dear Judge Karas:

I write to notify the Court of recent authority relevant to Respondent Law Office of Crystal Moroney's pending motion to stay the Court's judgment pending appeal—specifically, to Respondent's likelihood of success on the merits of its claims.

First, the court in *Bureau of Consumer Financial Protection v. Citizens Bank, N.A.*, --- F. Supp. 3d ----, 2020 WL 7042251 (D.R.I. Dec. 1, 2020), recently followed this Court's reasoning in denying a motion to dismiss that was based on substantially the same arguments Respondent has made here regarding ratification and the Bureau's method of funding. The court held that "a CFPB enforcement action pending at the time of [the Supreme Court's decision in] *Seila Law* may continue if the action is ratified by the Director." Slip op. at 16-28. It also concluded that "[t]he CFPB's funding does not violate the Appropriations Clause." *Id.* at 33-35. That decision is attached as Exhibit 1.

Second, the court in *Bureau of Consumer Financial Protection v. Fair Collections & Outsourcing, Inc.*, No. 8:19-cv-02817, 2020 WL 7043847 (D. Md. Nov. 30, 2020), denied a motion to dismiss on similar grounds and for similar reasons. The court held that "the current CFPB Director properly ratified the enforcement action" following *Seila Law* such that dismissal

was not warranted. Slip op. at 10-15. Further, the court held that the fact "[t]hat Congress funded the CFPB outside the normal appropriations process does not create a constitutional problem." *Id.* at 16-20. That decision is attached as Exhibit 2.

Third, the Second Circuit vacated the judgment in *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018), on which Respondent has relied in this litigation. The district court in that case had held that ratification of a Bureau enforcement action by the Bureau's then-Acting Director did not cure the constitutional problem stemming from the removal provision in the Bureau's statute. Rather than affirming dismissal of the case, as RD Legal urged, the Second Circuit remanded for the district court to address Director Kraninger's post-*Seila* ratification. 828 F. App'x 68, 70 (2d Cir. 2020). That decision is attached as Exhibit 3.

Respectfully submitted,

/s/ Kevin E. Friedl
Kevin E. Friedl
Senior Counsel
Consumer Financial Protection Bureau

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BUREAU OF CONSUMER FINANCIAL PROTECTION,	)	
Plaintiff,	)	
v.	)	C.A. No. 20-044 WES
CITIZENS BANK, N.A.,	)	
Defendant.	)	

OPINION AND ORDER

Defendant Citizens Bank, N.A. moves to dismiss all counts of Plaintiff Bureau of Consumer Financial Protection's Complaint, arguing that the claims are time-barred, the case cannot proceed due to the separation of powers violation identified in Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020), and Plaintiff's funding structure is unconstitutional. Defendant also argues that certain claims and prayers for relief should be dismissed because they are inadequately pled. For the following reasons, Defendant's Motion to Dismiss, ECF No. 14, is DENIED.

I. Background

On April 22, 2016, the Bureau of Consumer Financial Protection ("CFPB") issued a Civil Investigative Demand ("CID") to Citizens "to determine whether Citizens Bank engaged in, or was engaging in, unlawful acts and practices in connection with claims of

billing errors or fraud relating to credit cards, or the provisions of credit counseling information to customers . . . ." Tolling Agreement, Richman Decl. Ex. 6, ECF No. 15-6. The parties later signed agreements tolling all relevant statutes of limitations from February 23, 2017, to January 31, 2020. See Tolling Agreements, Richman Decl. Exs. 6-12, ECF Nos. 15-6 to 15-12.[1] On the penultimate day of tolling, the CFPB filed its Complaint, alleging that Citizens violated the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., and the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. § 5481 et seq., in its dealings with credit card customers.[2] See Compl., ECF No. 1. The alleged violations began in 2010 or earlier and ended, depending on the violation, sometime in 2015 or 2016. See id. ¶¶ 15, 20, 22, 23. Citizens moved to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the

[1] Although the Complaint does not reference these agreements, Citizens attached them to its Motion to Dismiss, and neither party disputes their authenticity. See Tolling Agreements, Richman Decl. Exs. 6-12, ECF Nos. 15-6 to 15-12.

[2] Counts I and II allege that when some credit cardholders reported unauthorized use on their cards, Citizens automatically denied the claims if the customers did not complete a "Fraud Affidavit" averring to their claims at the penalty of perjury. Compl. ¶¶ 31-38. Counts III and IV allege that Citizens failed to refund certain finance charges and fees that accrued as the result of charges later deemed to be unauthorized. Id. ¶¶ 39-46. Counts V and VI allege that Citizens failed to provide required written notices of acknowledgment and denial in response to written billing error claims submitted by cardholders. Id. ¶¶ 47-54. Counts VII and VIII allege that Citizens failed to refer cardholders to credit counseling, as required by law. Id. ¶¶ 55-62.

Federal Rules of Civil Procedure, arguing (1) the claims are time-barred; (2) the CFPB is unconstitutional in multiple ways, thus requiring dismissal of the case; and (3) certain claims and prayers for relief are inadequately pled. See Mem. in Supp. of Mot. to Dismiss ("Mot. to Dismiss") 10, 15, 23, ECF No. 14-1.

To understand the Bank's constitutional argument, greater context is needed. Prior to and during this case, the CFPB has been in peril. The brainchild of then-Professor and now-Senator Elizabeth Warren, the CFPB was created in the wake of the "Great Recession" as part of the Dodd-Frank Act. See Seila Law, 140 S. Ct. at 2192; id. at 2244 (Kagan, J., concurring in part). Professor Warren envisioned an agency led by an independent board, like that of the Federal Reserve. See PHH Corp. v. CFPB, 839 F.3d 1, 6 (D.C. Cir. 2016) ("PHH I"), reh'g en banc granted, order vacated (Feb. 16, 2017), on reh'g en banc, 881 F.3d 75 (D.C. Cir. 2018) ("PHH II") (citation omitted). But in the end, the CFPA, which was passed as part of the Dodd-Frank Act, established the CFPB with just a single Director, appointed for a five-year term and removable only for inefficiency, neglect, or malfeasance. See 12 U.S.C. § 5491(c)(1), (3).

In 2017, the Department of Justice argued in a case challenging the CFPA that this for-cause removal provision was unconstitutional. See Brief for United States as Amicus Curiae 23, PHH II (No. 15-1177), 2017 WL 1035617. Lower federal courts,

however, concluded otherwise. See PHH II, 881 F.3d at 77; CFPB v. Seila Law LLC, 923 F.3d 680, 683 (9th Cir. 2019), vacated and remanded, 140 S. Ct. 2183 (2020). One of those cases made its way to the Supreme Court, where the CFPB relented, adopting the position of the Department of Justice. See Seila Law, 140 S. Ct. at 2195. In September 2019, CFPB Director Kathleen Kraninger also sent a letter to Congress stating that the for-cause removal provision was unconstitutional. See Letter from Director Kathleen Kraninger to Speaker Nancy Pelosi 1 (Sept. 17, 2019), ECF No. 15-3. She maintained, however, that the provision was severable and that the CFPB could thus continue to operate with her at the helm. See id. at 2-3. The Supreme Court agreed. See Seila Law, 140 S. Ct. at 2192, 2197. The Court declined, however, to answer whether post-severance ratification of an enforcement action by the Director would cure the constitutional infirmity. See id. at 2208.

Shortly thereafter, Director Kraninger ratified the agency's action in this case. See Kraninger Decl. 2, ECF No. 26-1. This Court requested supplemental briefing regarding the impact of Seila Law, and specifically the effectiveness (or not) of the ratification; the Court heard oral argument on October 20, 2020.

II. Legal Standard

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to

relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Id. at 678 (citation and quotations omitted). In addition to the Complaint, the Court may consider "documents the authenticity of which are not disputed by the parties; . . . documents central to the plaintiffs' claims; [and] documents sufficiently referred to in the complaint." Curran v. Cousins, 509 F.3d 36, 44 (1st Cir. 2007) (citation and quotations omitted).

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the legal standard is "similar to that accorded a dismissal for failure to state a claim[.]" Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995). The Court must grant the motion to dismiss "[i]f the well-pleaded facts, evaluated in that generous manner, do not support a finding of federal subject-matter jurisdiction." Fothergill v. United States, 566 F.3d 248, 251 (1st Cir. 2009). Under Rule 12(b)(1), the Court has wider latitude to consider materials outside the pleadings. See Menge v. N. Am. Specialty Ins. Co., 905 F. Supp. 2d 414, 416 (D.R.I. 2012) (citing Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002)).

III. Discussion

1. Statute of Limitations

The CFPB is tasked with enforcing nineteen consumer protection statutes, including the CFPA (the CFPB's enabling statute) and TILA. See 12 U.S.C. § 5481(12) and (14); see also id. § 5581. Counts I, III, and V are brought under TILA, its implementing Regulation Z, and the Official Staff Interpretations of Regulation Z ("staff commentary"). Counts II, IV, and VI are brought based on the same conduct alleged in Counts I, III, and V, respectively, but are pled under the CFPA. See 15 U.S.C. § 1607(b) ("[A] violation of any requirement imposed under [TILA] shall be deemed to be a violation of [the CFPA].").

TILA imposes various restrictions on the ways in which lenders interact with their customers. The act also contains two provisions providing for enforcement of those restrictions: 15 U.S.C. §§ 1607 and 1640. Citizens contends that the CFPB's claims here are governed by § 1640 and its one-year statute of limitations. See Mot. to Dismiss 15. Conversely, the CFPB argues that the claims are brought pursuant to § 1607, which states that TILA compliance shall be enforced under Subtitle E of the CFPA. See Pl.'s Opp'n 7-8, ECF No. 19. Subtitle E, in turn, provides that claims must be brought within three years of their discovery by the CFPB. 12 U.S.C. § 5564(g)(1).

The Complaint alleges that the unlawful conduct began (at the latest) in 2010 and ended sometime between early 2015 and early 2016. See Compl. ¶¶ 15, 20, 22, 23. Per the tolling agreements, all relevant statutes of limitations were tolled from February 23, 2017, until January 31, 2020. See Tolling Agreements, Richman Decl. Exs. 6-12, ECF Nos. 15-6 to 15-12. Thus, if Citizens is correct, and a one-year deadline applies, all the claims were time-barred prior to the start of the tolling agreements, and the entire case must be dismissed. Conversely, if the CFPB is correct that a three-year discovery period applies, the statute of limitations had not expired at the time that the tolling agreements were signed. Assuming that the tolling agreements were valid (more on this in Section III(2)(b)), none of the claims would be time-barred.[3] For the following reasons, the Court concludes that the three-year limit controls.

a. Statutory Language

"[S]tatutory interpretation turns on the language itself, the specific context in which that language is used, and the broader

[3] To be fully accurate, if the CFPB had discovered some of the violations prior to 2015, some of the claims could be time-barred in part. But Citizens makes no such assertion. Moreover, because the date of discovery is not contained within the Complaint, any dispute regarding the date of discovery must be left for summary judgment or trial. See Alvarez-Mauras v. Banco Pop. of Puerto Rico, 919 F.3d 617, 628 (1st Cir. 2019) (stating that statute of limitations can be basis for a motion to dismiss "as long as the facts [are] clear on the face of the plaintiff's pleadings" (citation and quotations omitted)).

context of the statute as a whole." Nken v. Holder, 556 U.S. 418, 426 (2009) (citation and quotations omitted). In the absence of ambiguity or absurdity, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Carcieri v. Salazar, 555 U.S. 379, 392-393 (2009) (citation and quotations omitted).

Section 1640, titled "Civil liability," provides that "any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person . . . ." 15 U.S.C. § 1640(a). "[A]ny action under this section may be brought . . . within one year . . . of the violation . . . ." Id. § 1640(e). An enforcement action may also be brought by the appropriate state attorney general within three years of the violation. Id. "The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under [§ 1607,]" and the federal agency may intervene. Id.

Section 1607, titled "Administrative enforcement," provides: "Enforcing Agencies[.] Subject to subtitle B of the [CFPA], compliance with the requirements imposed under this subchapter shall be enforced under [various statutes, including] . . . subtitle E of the [CFPA], by the [CFPB], with respect to any person subject to this subchapter." Id. § 1607(a). "For the purpose of the exercise by [the CFPB] of its powers under [the CFPA], a

violation of any requirement imposed under this subchapter shall be deemed to be a violation of [the CFPA]." Id. § 1607(b).

Subtitle E of the CFPA, as referenced in § 1607, provides a general cause of action for the CFPB: "If any person violates a Federal consumer financial law, the [CFPB] may . . . commence a civil action against such person to impose a civil penalty or to seek all appropriate legal or equitable relief . . . ." 12 U.S.C. § 5564(a). However, "[a]n action arising under [the CFPA] does not include claims arising solely under enumerated consumer laws." Id. § 5564(g)(2)(A).[4] "Except as otherwise permitted by law or equity, no action may be brought under [the CFPA] more than 3 years after the date of discovery of the violation." Id. § 5564(g)(1).

b. Statutory Interpretation

The CFPB argues that § 1640 controls actions brought by private individuals, while § 1607 governs actions brought by federal agencies (whether in court or otherwise). See Pl.'s Opp'n 7-16. Because § 1607 states that such actions are brought under Subtitle E of the CFPA, the CFPB maintains that Subtitle E's three-year statute of limitations applies. Pl.'s Opp'n 8-9. Citizens contends that TILA's division of labor falls along a different

[4] The counts brought under the CFPA are pled under 12 U.S.C. § 5536(a)(1)(A), which prohibits a "covered person" or "service provider" from violating a federal consumer financial law. See 12 U.S.C. § 5536(a)(1)(A). Due to the additional element of the defendant's status as a covered person or service provider, these counts do not arise solely under enumerated consumer laws.

axis: § 1640 controls all actions brought in court, including by the CFPB, while § 1607 governs only administrative actions. See Mot. to Dismiss 15-22. Therefore, Citizens maintains that the one-year limitation in § 1640 applies. See id.

Several factors weigh in the CFPB's favor. First, § 1640 specifically provides that a creditor who violates TILA "with respect to any person is liable to such person[.]" 15 U.S.C. § 1640(a) (emphasis added). Section 1640 contains no other language specifically creating a cause of action, except for the language that allows state attorneys general to bring suit and federal agencies to intervene in a state attorney general's action. See id. § 1640(e). Therefore, the plain language indicates that § 1640 only governs cases brought by individuals or state attorneys general. Indeed, the Courts of Appeals for the Third and Eighth Circuits have each referred to § 1640 as creating a "private right of action." Vallies v. Sky Bank, 591 F.3d 152, 156 (3d Cir. 2009); Citizens State Bank of Marshfield, Mo. v. Fed. Deposit Ins. Corp., 751 F.2d 209, 217 (8th Cir. 1984).[5]

[5] Citizens asserts that the Eighth Circuit "appl[ied] Section 1640's limitations against the FDIC." Mot. to Dismiss 17 (citing Citizens State Bank of Marshfield, Mo. v. FDIC, 751 F.2d 209, 218 (8th Cir. 1984)). True, but not for reasons that help Citizens. Relying on § 1640's "private right of action[,]" the court held that TILA created no mechanism for administrative agencies to seek restitution, not that § 1640 governed the enforcement proceeding or that the one-year limitation precluded relief. See Citizens State Bank, 751 F.2d at 217. Of course, the CFPA subsequently gave the CFPB authority to seek restitution and other forms of

Surveying this statutory landscape, the District of Southern Florida "conclude[d] that [§ 1640] does not apply to administrative actions" and that the CFPA's three-year limitation instead governs the CFPB's civil enforcement actions. CFPB v. Ocwen Fin. Corp., No. 17-80495, 2019 U.S. Dist. LEXIS 152336, at *74 (S.D. Fla. Sept. 5, 2019). The court in FTC v. CompuCredit Corp., No. 1:08-CV-1976-BBM-RGV, 2008 WL 8762850 (N.D. Ga. Oct. 8, 2008), was faced with a similar situation. There, the Federal Trade Commission ("FTC") brought an enforcement action under both the Fair Debt Collection Practices Act ("FDCPA") and the Federal Trade Commission Act ("FTC Act"). See id. at *10. The court ruled that a certain section of the FDCPA did not govern the FTC's actions because that section was limited "to actions by 'consumers' against 'debt collectors'" (similar to § 1640's use of "person"). Id. (quoting 15 U.S.C. § 1692k(d) and citing Weiss v. Regal Collections, 385 F.3d 337, 341 (3d Cir. 2004), abrogated on other grounds by Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 168 (2016)). Instead, the court ruled that the FTC's cause of action came from 15 U.S.C. § 1692l(a), which - using language nearly identical to § 1607 - allows the FTC to enforce violations of the FDCPA and

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relief for violations of TILA. See 12 U.S.C. § 5565(a). Thus, Citizens State Bank actually provides mild support for the CFPB's position that § 1640 does not govern civil enforcement actions brought by administrative agencies.

deems those violations to be violations of the FTC Act.[6] See id. Thus, the relevant statute of limitation was contained within the FTC Act, not the FDCPA. See id.; see also CFPB v. Weltman, Weinberg & Reis Co., L.P.A., No. 1:17 CV 817, 2017 WL 4348916, at *7 (N.D. Ohio Sept. 29, 2017) ("find[ing] the reasoning in CompuCredit to be persuasive"). This logic applies equally here and supports the CFPB's position.

On the other hand, Citizens points to CFPB v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878 (S.D. Ind. 2015) ("ITT"), in which the court held that the one-year limitation period in § 1640 applied to the CFPB's civil actions:

> First, we see no persuasive evidence that 15 U.S.C. § 1640 governs only private civil actions. The provision itself does not exclude actions in which a government agency is the plaintiff, and in fact it explicitly recognizes the possibility of intervention by federal agencies in civil suits initiated by private parties. 15 U.S.C. § 1640(e)(1). Second, agency interpretations support the conclusion that the agency enforcement powers contemplated by Section 1607 are administrative

[6] Compare 15 U.S.C. § 16921(a) ("[The FTC] shall be authorized to enforce compliance with this subchapter, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another Government agency . . . , subject to subtitle B of the [CFPA]. For purpose of the exercise by the [FTC] of its functions and powers under the [FTC ACT,] a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act.") with id. § 1607(a) ("Subject to subtitle B of the [CFPA], compliance with the requirements imposed under this subchapter shall be enforced under . . . subtitle E of the [CFPA], by the [CFPB] . . . .") and id. § 1607(b) ("For the purpose of the exercise by [the CFPB] of its powers under [the CFPA], a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under [the CFPA].").

> in nature, and are separate from any authorization to file civil suits. In interpreting its enforcement authority under TILA, the Comptroller of the Currency stated that "[t]he Comptroller's administrative authority to enforce compliance with [TILA] and Regulation Z . . . [is] based on [15 U.S.C. § 1607, which is] separate from and independent of the civil liability provisions of . . . [TILA]." OCC Interpretive Letter, Fed. Banking L. Rep. 85,040 (Oct. 6, 1977). Similarly, the Federal Reserve's interpretive manual for Regulation Z states that "regulatory administrative enforcement actions . . . are not subject to the one-year statute of limitations." Fed. Reserve Board Consumer Compliance Handbook, Regulation Z at 57 (Nov. 2013) (emphasis added).

Id. at 922–23 (some citations omitted).

However, this Court does not find the agency interpretations on which the ITT court relied to be persuasive. The court quoted a 1977 letter from the Comptroller of the Currency to support the proposition that § 1607 governs only administrative actions, not court actions, but the next (unquoted) sentence in the letter implies the very opposite: "[W]e note that although individual borrowers are restricted . . . by a one-year statute of limitations the Comptroller is not restricted by any statute of limitations under [TILA]." OCC Interpretive Letter, Fed. Banking L. Rep. 85,040, 1977 WL 23261, at *1 (Oct. 6, 1977). The ITT court also relied on a passage from the Federal Reserve's Regulation Z handbook from 2013 stating that the one-year limitation does not apply to regulatory administrative enforcement actions (which by implication do not include court actions). See 219 F. Supp. 3d at 923. But the 2015 version of the handbook makes no such

distinction, simply stating that "actions brought by regulators[] are not subject to the general one-year statute of limitations." See Fed. Reserve Board Consumer Compliance Handbook, Regulation Z at 82 (Nov. 2015). To the extent that the Federal Reserve in 2013 may have interpreted § 1607 to apply only to non-court proceedings, its interpretation has changed. Thus, much of the ITT court's reasoning is unconvincing.

Citizens also points to the now-vacated decision in PHH I, but the case is largely inapposite. See Mot. to Dismiss 16, 22. In PHH I, the parties disagreed regarding the applicable statute of limitations when the CFPB sues under the Real Estate Settlement Procedures Act ("RESPA"). See 839 F.3d at 52. The RESPA provides a one-year statute of limitations for cases brought by private individuals and a three-year statute of limitations for "actions" brought by the CFPB. Id. (citing 12 U.S.C. § 2614). Unlike here, the parties took for granted that the CFPB was not governed by the one-year limitation for private parties. See id. Instead, the question was whether the three-year limitation applied solely to the CFPB's civil actions in court, or if it also governed the CFPB's administrative enforcement actions. See id. As a matter of statutory interpretation, the court determined that the section applied to both types of actions. See id.

Citizens tries to bolster its argument with the following statement from PHH I: "for actions the CFPB brings in court under

any of the 18 pre-existing consumer protection statutes, the CFPB may only 'commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as applicable.'" Id. at 51 n.28 (quoting 12 U.S.C. § 5564(g)(2)(B)). But this passage does not shed any light on the primary issue here: whether TILA contains a statute of limitations applicable to actions brought by the CFPB. If TILA does, that statute of limitations would clearly control the TILA counts, and would likely also control the derivative CFPA counts. But the Court concludes that TILA does not contain a statute of limitations applicable to the CFPB, so PHH I is largely beside the point.

In sum, TILA's plain language dictates that § 1640 governs civil suits brought by individuals and state attorneys general, while § 1607 provides the cause of action for federal enforcement agencies such as the CFPB. The cases mustered in opposition by Citizens are either inapt or unconvincing. Because § 1607 does not contain a statute of limitations, instead stating that cases brought by the CFPB "shall be enforced under . . . subtitle E of the [CFPA]," this action is governed by subtitle E's requirement that cases be brought within three years of discovery by the CFPB. 15 U.S.C. § 1607(a)(6); see also 12 U.S.C. § 5564(g)(1). As explained below, with the tolling agreements in the mix, the lawsuit was filed and ratified before the expiration of the three-year period.

2. Seila Law and Ratification

Citizens next argues for dismissal based on the Supreme Court's recent holding that the CFPA unconstitutionally restricts the ability of the President to remove the CFPB Director. See Seila Law, 140 S. Ct. at 2197; see generally Def.'s Suppl. Br. in Supp. of Mot. to Dismiss ("Def.'s Suppl. Br."), ECF No. 33. Based on this holding, Citizens contends that the CFPB lacked Article II authority to bring this suit in January 2020. See Def.'s Suppl. Br. 16-17. Citizens also argues that the CFPB lacked standing as an executive agency, thereby depriving this Court of Article III jurisdiction. See id.

The Constitution grants the President the power to "take Care that the Laws be faithfully executed." Art. II, § 3. Therefore, he (and someday she) generally has "the authority to remove those who assist him in carrying out his duties." Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 513-14 (2010). The CFPA, however, restricts the reasons for which the CFPB Director can be removed. See 12 U.S.C. § 5491(c)(3). In Seila Law the Supreme Court held that "the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers." 140 S. Ct. at 2197. Nonetheless, the Supreme Court held that "the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority." Id. at

2192. And, thus, "[t]he agency may therefore continue to operate, but its Director . . . must be removable by the President at will." Id. In support of its decision to sever the provision rather than strike down the entire CFPA, the Court noted that dismantling the CFPB and shifting its responsibilities back to the agencies that had previously enforced consumer protection laws "would trigger a major regulatory disruption and would leave appreciable damage to Congress's work in the consumer-finance arena." Id. at 2210.

But what comes of pending enforcement actions? The Court declined to answer:

> The Government [argues] that the [CID], though initially issued by a Director unconstitutionally insulated from removal, can still be enforced on remand because it has since been ratified by an Acting Director accountable to the President. The parties dispute whether this alleged ratification in fact occurred and whether, if so, it is legally sufficient to cure the constitutional defect in the original demand. That debate turns on case-specific factual and legal questions not addressed below and not briefed here. A remand . . . is therefore the appropriate course . . . .

Id. at 2208.[7]

Although the Supreme Court did not resolve this issue, it clearly framed the question as one of ratification. The doctrine of ratification stems from agency law. See FEC v. NRA Political Victory Fund, 513 U.S. 88, 98 (1994). The basic idea is that a

[7] In that proceeding, the CFPB had sued to enforce compliance with a CID. See Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2194 (2020). Though the procedural posture was different from that here, the constitutional issues were much the same.

legitimate agent (here, the CFPB Director, post-Seila Law) can ratify a decision made previously by an improper agent (the Director, pre-Seila Law) on behalf of a principal (the CFPB itself). In essence, ratification is the act of making a decision nunc pro tunc to the time of the original, improperly made decision. For a ratification to be effective, three basic requirements must be met. "First, the ratifier must, at the time of ratification, still have the authority to take the action to be ratified. Second, the ratifier must have full knowledge of the decision to be ratified. Third, the ratifier must make a detached and considered affirmation of the earlier decision." Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 602 (3d Cir. 2016).

Here, the parties dispute the validity of two CFPB actions: (a) the decision to file the civil action in January 2020, and (b) the decision to enter into the tolling agreements from 2017 to 2020. For the reasons that follow, the Court concludes that (a) the ratification of the civil action was sufficient to remedy the harm caused by the Director's unconstitutional insulation, and (b) the tolling agreements were not contaminated by the unconstitutional removal provision and thus do not require ratification.

a. Ratification of the Civil Action

Two days after the decision in Seila Law was issued, Director Kraninger ratified this lawsuit. See Kraninger Decl. 2, ECF No.

26-1. Citizens argues that this ratification did not cure the constitutional infirmity underlying this enforcement action. See generally Def.'s Suppl. Br.

Though the Seila Law decision is still young, the two courts to address this issue thus far have determined that a CFPB enforcement action pending at the time of Seila Law may continue if the action is ratified by the Director. See CFPB v. Chou Team Realty LLC, No. 8:20-cv-00043, slip op. at 4 (C.D. Cal. Aug. 21, 2020) ("Any constitutional deficiency regarding the removability issue at the time the Complaint was filed was cured by [severance] coupled with [ratification]."); Mot. Hr'g Tr. 67, CFPB v. Law Offices of Crystal Moroney, P.C., No. 7:20-cv-03240 (S.D.N.Y. Aug. 19, 2020) ("[T]he more efficient and sensible course seems to be to take the ratification of this prior decision at face value and treat that as the adequate remedy for the constitutional violation bearing in mind the discretion the judiciary employs in the selection of remedies." (citation and quotations omitted)). For the following reasons, this Court agrees; ratification is a sufficient remedy for the constitutional violation. Thus, dismissal is unnecessary.

i. Structural Infirmity

The Bank's primary contention is that ratification is insufficient because the constitutional defect identified in Seila Law was structural. See Def.'s Suppl. Br. 6-8, 11. Under the

generally accepted principles of ratification, an agent cannot ratify a decision unless the principal had capacity to take the action at the time of the original decision. See CFPB v. Gordon, 819 F.3d 1179, 1191 (9th Cir. 2016) (citing Restatement on Agency (Second) § 84(1)).[8] Due to this purported structural defect, Citizens argues that the CFPB (as principal) lacked capacity to file the Complaint in January 2020, so the Director (as agent) cannot now ratify it. See Def.'s Suppl. Br. 11. Relatedly, Citizens contends that this purported structural defect stripped the CFPB of its executive branch authority and, in turn, its standing to bring this suit. See id. at 16-17. Furthermore, Citizens argues that if the action can be ratified, the Bank is left with no remedy for being subjected to the enforcement decision of an unconstitutionally insulated director. See id. at 6-7.

As Citizens notes, the Court in Seila Law "[held] that the structure of the CFPB violates the separation of powers[.]" Id. at 11 (quoting Seila Law, 140 S. Ct. at 2192). But the Court also expressed concern that striking down the entire CFPA "would trigger a major regulatory disruption and would leave appreciable damage

[8] Due to the Court's determination, explained below, that the constitutional defect primarily affected the directorship, not the CFPB as a whole, the Court need not delve into the more flexible rule from the Third Restatement, which "advises that a ratification is valid even if the principal did not have capacity to act at the time . . . ." CFPB v. Gordon, 819 F.3d 1179, 1191-92 (9th Cir. 2016) (citing Restatement on Agency (Third) § 4.04 cmt. b).

to Congress's work in the consumer-finance arena." Seila Law, 140 S. Ct. at 2210. Condemning all past (or even just all pending) CFPB actions, without the possibility of ratification, would have a similar effect. Moreover, after crossing out the removal restrictions, the Court concluded that "the CFPB may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal by the President." Id. at 2207–08. Had the structure of the CFPB as a whole been unconstitutional, the excision of the for-cause provision would not have fixed the problem. Bigger changes would have been required. This Court thus interprets the Supreme Court's use of the word "structure" to refer to attributes of the CFPB's top brass, not deeper issues with the authority or makeup of the Bureau as a whole.

In Gordon, the former CFPB Director's recess appointment was deemed unconstitutional because it was made without the advice and consent of the Senate. See 819 F.3d at 1185–86. The enforcement action at issue had been initiated while the Director's appointment was invalid, but following his subsequent confirmation by the Senate he ratified all his previous actions. See id. The Court of Appeals for the Ninth Circuit held that "Congress authorized the CFPB to bring the action in question. Because the CFPB had the authority to bring the action at the time [the case was initiated], [the Director's] ratification, done after he was

properly appointed as Director, resolve[d] any Appointments Clause deficiencies." Id. at 1192 (citations omitted).

Similarly, in FEC v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996), the court ruled that the newly reconstituted Federal Election Commission ("FEC") could ratify the enforcement action of its predecessor, whose make-up had violated separation of powers. See id. at 708. The court rejected the argument made here by Citizens: "Legi-Tech's contention that the FEC's reconstitution and ratification is not an effective remedy because separation of powers is a 'structural' constitutional defect that necessarily voids all prior decisions is overstated." Id. "To be sure, Legi-Tech was prejudiced . . . when the FEC brought suit. But . . . the relevant issue is the degree of continuing prejudice now, after the FEC's reconstitution and ratification, and whether that degree of prejudice - if it exists - requires dismissal." Id.

Lastly, in PHH I the court held the CFPA's removal restrictions to be unconstitutional. See 839 F.3d at 39. Though the opinion was vacated, its reasoning was largely upheld in Seila Law. See 140 S. Ct. at 2192; PHH II, 881 F.3d at 77. Of particular relevance here, then-Judge Kavanaugh stated that the "constitutional ruling w[ould] not halt the CFPB's ongoing operations or the CFPB's ability to uphold the [district court judgment] against PHH . . . ." PHH I, 839 F.3d at 39.

The principles articulated in Gordon, Legi-Tech, and PHH I fully apply here. "Constitutional litigation is not a game of gotcha against Congress" or the CFPB. Barr v. Am. Ass'n. of Political Consultants, Inc, 140 S. Ct. 2335, 2351 (2020). Because the constitutional deficiency identified in Seila Law concerned only the CFPB's directorship, and because the deficiency was found to be severable, the CFPB was never divested of its power to act as a principal and its standing as a plaintiff.

ii. Unclean Hands

Next, Citizens argues that "[d]ismissal is the proper remedy where, as here, federal officers discharge their duties in a way that is known to them to violate the United States Constitution." Def.'s Suppl. Br. 2 (citation and quotations omitted). Because ratification is an equitable doctrine, the Court has discretion to balance the interests at stake. See Advanced Disposal, 820 F.3d at 603.

Citizens relies on the fact that in September 2019, while Seila Law was pending before the Supreme Court, the Director sent a letter to Congress, adopting the position that the removal provision violated the Constitution, but concluding that the CFPB could continue to operate because the removal provision was severable from the rest of the CFPA. See Letter from Director Kathleen Kraninger to Speaker Nancy Pelosi 2-3 (Sept. 17, 2019), ECF No. 15-3. As it turned out, Director Kraninger was right.

"[N]othing in the Seila Law decision . . . suggests that the [CFPB] was engaged in some sort of bad conduct requiring [an] overly broad remedy to deter that conduct going forward. It was the [CFPB's] position that prevailed in Seila Law, that the removal provision is unconstitutional but severable." Hr'g Tr. 40, Law Offices of Crystal Moroney, No. 7:20-cv-03240. Neither the Director nor the CFPB engaged in nefarious behavior; rather, they plugged away at the mission entrusted to them by Congress, making the best of a flawed statutory scheme. Their hands are clean.

iii. Reasoned Judgment

Third, Citizens argues that the speed at which the Director ratified the decision demonstrates its invalidity. See Def.'s Suppl. Br. 27-30. Indeed, for a ratification to be effective, "the ratifier must make a detached and considered affirmation of the earlier decision." Advanced Disposal, 820 F.3d at 602. However, "absent a contention that [the decision-maker was] actually biased[,]" the Court cannot second-guess such a decision. Legi-Tech, 75 F.3d at 709. Thus, courts have consistently upheld ratifications even under circumstances indicating a less-than-thorough review. See Advanced Disposal, 820 F.3d at 604 (holding that where ratifier "claims that it specifically considered the relevant supporting materials[, and opposing party] d[id] not present any evidence suggesting otherwise[, a court] can therefore presume that [ratifier] appropriately reconsidered[] its earlier

[decision]" (citation omitted)); Gordon, 819 F.3d at 1186 (upholding ratification of "any and all actions" taken during six-month period); Legi-Tech, 75 F.3d at 709 (refusing to "examine the internal deliberations" leading to ratification even though review may have been "nothing more than a 'rubberstamp'").

Here, Director Kraninger declared that she "considered the basis for the [CFPB]'s decision to file the . . . lawsuit." Kraninger Decl. 2, ECF No. 26-1. Other than the truncated review period, there is no reason to doubt her. The Court finds that the ratification was the product of a reasoned judgment.

iv. Sufficient Remedy

"In the specific context of the President's removal power, [it is] sufficient that the challenger 'sustain[s] injury' from an executive act that allegedly exceeds the official's authority." Seila Law, 140 S. Ct. at 2196 (quoting Bowsher v. Synar, 478 U.S. 714, 721 (1986)). Therefore, although the preceding three arguments are unavailing, Citizens did suffer an injury of some sort. To determine the upshot of this injury, the Court must examine "the degree of continuing prejudice [following] ratification, and whether that degree of prejudice . . . requires dismissal." Legi-Tech, 75 F.3d at 708.

In Collins v. Mnuchin, the Fifth Circuit held that the Director of the Federal Housing Finance Agency ("FHFA") was unconstitutionally insulated from removal. 938 F.3d 553, 587 (5th

Cir. 2019), cert. granted, 19-422, 2020 WL 3865248 (U.S. July 9, 2020), and cert. granted, 19-563, 2020 WL 3865249 (U.S. July 9, 2020). In considering the proper remedy, the court took judicial notice of the fact that Presidents Obama and Trump had each "picked their own FHFA directors, allaying concerns that the removal restriction prevented them from installing someone who would carry out their policy vision." Id. at 594. Same here. Following his nomination by President Obama, CFPB Director Richard Cordray served until President Trump's first year in office, at which point he resigned, leaving Leandra English to temporarily take the reins. See English v. Trump, 279 F. Supp. 3d 307, 311 (D.D.C. 2018), appeal dismissed, 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018). But President Trump installed Mick Mulvaney as Acting Director, and after a standoff with Ms. English, Mr. Mulvaney prevailed. See id. at 314-15, 337. President Trump subsequently nominated Director Kraninger, who was confirmed by the Senate in 2018. See Kraninger Decl. 1, ECF No. 26-1.

The Bank's injury is that the President – but for the statutory restrictions - might have removed the Director in order to reverse her enforcement decision in this case, or that a Director fully accountable to the President might have behaved differently. Ratification resolves those possibilities. Despite the President's newly unencumbered power of removal, Director

Kraninger remains in charge, and she ratified the decision to bring the instant case.

Moreover, the type of constitutional infirmity here is even less acute than that in Gordon and Legi-Tech, Appointments Clause cases in which ratification was deemed sufficient. See Gordon, 819 F.3d at 1192; Legi-Tech, 75 F.3d at 709. In those cases, "officers were vested with authority that was never properly theirs to exercise[,]" whereas removal cases deal with officials who "are duly appointed by the appropriate officials and exercise authority that is properly theirs." Collins, 938 F.3d at 593 (citation and quotations omitted). Therefore, while Appointments Clause violations sometimes require a "backward-looking remedy", removal restrictions generally do not. Id. at 596 (Duncan, J., concurring) (citing Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) and Free Enterprise Fund, 561 U.S. at 508–09). Dismissal with prejudice would be overkill, and dismissal without prejudice would be pointless; the Bureau could just bring the action again. See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203, 214 (D.C. Cir. 1998) (noting that "redoing the . . . proceedings would bring about the same outcome").

On the other hand, Citizens points to Lucia, in which the Court stated that "Appointments Clause remedies are designed . . . to create incentives to raise Appointments Clause challenges." 138 S. Ct. at 2055 n.5 (citation and quotations omitted). But

that principle is only marginally applicable here. First, the instant case does not involve the Appointments Clause; as discussed, unconstitutional removal restrictions are less malignant. See Collins, 938 F.3d at 596 (Duncan, J., concurring). Second, the constitutional violation has already been identified and fixed – at least prospectively – by severance. If anyone should reap the benefit, it is Seila Law LLC, not Citizens. Of course, providing a benefit to latecomers such as Citizens would provide an additional enticement, but to an excessive degree. The Court concludes that a harsh remedy is not necessary to create proper incentives for future litigants.[9]

Arguably, the proper course of action would have been for the CFPB to wait until the Supreme Court's decision in Seila Law, and then file suit in this case. But what is the continuing prejudice to Citizens from the CFPB's failure to do so? Only that Citizens had to file its papers a few months earlier. This injury does not necessitate dismissal with prejudice.

b. Tolling Agreements

In its supplemental brief, Citizens makes the additional argument that the tolling agreements (apart from the lawsuit

[9] The Court also stated that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (citation and quotations omitted). Here, though, the CFPB Director did not adjudicate anything.

itself) were also invalid due to the unconstitutionality identified in Seila Law. Def.'s Suppl. Br. 17-20. The CFPB disagrees, arguing that despite the removal provision the CFPB on the whole was constitutional and could therefore enter into tolling agreements. See Oct. 20, 2020 Hr'g Tr. 43.[10]

As stated, for ratification to be effective, the ratifier must have the power "not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." NRA Political Victory Fund, 513 U.S. at 98 (citation and quotations omitted). In NRA Political Victory Fund, the FEC filed a petition for certiorari in one of its cases, despite the fact that the Solicitor General held the exclusive authority to do so. See id. at 98-99. After the ninety-day period to file the petition had elapsed, the Solicitor General attempted to ratify the FEC's petition, but the Court held that the ratification was too late. See id.

Here, absent the tolling agreements, the statute of limitations would have expired years ago. Ratification of the

[10] At oral argument, Citizens repeatedly stated that the CFPB had conceded that the statute of limitations had run, and that the CFPB was arguing for the statute of limitations to be equitably tolled. See Oct. 20, 2020 Hr'g Tr. 4-6, 8, 10, 18, 28, 49, 51 (citing Pl.'s Suppl. Br. 9, ECF No. 32). But the Court does not interpret the single paragraph mentioning equitable tolling in the CFPB's brief to constitute such a concession. See Pl.'s Suppl. Br. 9. Moreover, at oral argument, the CFPB made its position clear: "[T]here is no need here for equitable tolling. The [CFPB] satisfied the statute of limitation." Oct. 20, 2020 Hr'g Tr. 30.

civil action is therefore predicated on the validity of those agreements. The agreements themselves cannot be ratified because it would be nonsensical to toll an already expired deadline. Thus, the survival of this case turns on whether the tolling agreements were rendered ineffectual by the unconstitutionality identified in Seila Law. As discussed, the CFPB as an agency was not unconstitutional or powerless; rather its directorship was unlawful in certain respects. The question, therefore, is whether an enforcement agency with an unconstitutionally insulated director can enter into a tolling agreement.[11]

This question must live on a spectrum. On one end of the spectrum are the Bureau's decisions to bring civil enforcement actions, which Citizens described at oral argument as "the purest exercise of executive power[.]" Oct. 20, 2020 Hr'g Tr. 26. Due to the importance of these decisions to both the CFPB and defendants, such choices are imputed to the Director as "agent" of

[11] Citizens makes two assertions that do not require much discussion. First, Citizens argues that the agreements cannot stand because "'contractual provisions made in contravention of a statute' and, a fortiori, the Constitution, 'are void and unenforceable . . . .'" Def.'s Suppl. Br. 18 (quoting California v. United States, 271 F.3d 1377, 1383 (Fed. Cir. 2001)). Similarly, Citizens contends that the agreements are void under administrative law because a court must set aside an agency action that is unconstitutional. Id. (citing 5 U.S.C. § 706(2)(A), (B)). But these arguments beg the question at issue, which is whether the removal provision of the CFPA infected the tolling agreements with unconstitutionality.

the CFPB, even where, as here, the Director's name does not appear on the Complaint itself. See Compl. 12.[12] Therefore, when an aspect of the directorship is declared unconstitutional, pending cases must be ratified by a constitutionally acceptable leader. See Legi-Tech, 75 F.3d at 708. Moreover, certain circumstances render ratification incapable of remedying the harm. See, e.g., Lucia, 138 S. Ct. at 2055; NRA Political Victory Fund, 513 U.S. at 98-99.

On the other end of the spectrum are the agency's ministerial tasks, for which ratification would be absurd. For example, if a governmental agency leases office space, the building owner could not claim that the lease was void because the agency's director was unconstitutionally insulated from removal at the time the lease was signed. Clearly, many of the smaller decisions involved in the CFPB's enforcement activities are not imputed to the Director.

A tolling agreement is a tool that both sides seek to use for their advantage. The CFPB gains time to gather more information,

[12] Indeed, a CFPB policy manual seems to require its attorneys to receive approval from the Director prior to filing a civil action. See Office of Enforcement, CFPB, Policies and Procedures Manual, 96, 125 (Oct. 5, 2017) (available at https://files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf). The Court does not cite this document as factual proof of the CFPB's policies or of the procedures that were followed in this case. Rather, the Court references this document as support for the general idea that some decisions are more important than others and thus can be imputed to the Director.

and the subject of the investigation has the opportunity to negotiate a settlement, demonstrate good behavior, or otherwise convince the Bureau to drop the case. These agreements are on par in importance with motions filed in a case or substantive conversations between enforcement counsel and defense counsel. Such actions are important, but they pale in importance next to the decision to bring a complaint. The tolling agreements are mundane enough that they fall below the threshold at which they are imputed to the Director, and thus are not rendered void or unenforceable by Seila Law.

The tolling agreements are also protected temporally. In Seila Law, the Supreme Court made no indication that it was invalidating all the past actions of the CFPB. Sometimes, what's done is done. See, e.g., Buckley v. Valeo, 424 U.S. 1, 142 (1976) (stating that "past acts of the Commission are . . . accorded de facto validity" despite Appointments Clause violation). Though Seila Law calls into question all pending civil actions, forcing the CFPB to argue here for the saving grace of ratification, the Supreme Court did not hold that every antecedent action or decision need also be ratified.

For example, if the CFPB obtained the evidence necessary to bring a civil action through a pre-Seila Law CID, the case would not live or die based on ratification of that CID. This is true because the decision to bring the civil action was separate from

the decision to issue the CID. Even though the two are related, only the pending civil action itself requires post-severance blessing. In the same way, although the current suit is dependent on the tolling agreements, the decisions to enter into the tolling agreements and to bring the civil suit are distinct. The decision to sign the tolling agreements is not a pending matter – unlike this case itself - and is therefore undisturbed by the Supreme Court's holding in Seila Law.

For these reasons, the Court concludes that the tolling agreements are valid, and the suit was filed within the three-year discovery deadline. See 12 U.S.C. § 5564(g)(1).

3. Funding Structure

Citizens next claims that the CFPB's funding structure is unconstitutional. The United States Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. The Supreme Court has "underscore[d] the straightforward and explicit command of the Appropriations Clause. It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990) (citation and quotations omitted).

The CFPB's core funding does not come from Congressional appropriations. Instead, the CFPB receives a portion of the operating budget of the Federal Reserve, see 12 U.S.C. § 5497(a),

which, in turn, is funded by fees paid by financial institutions, see 12 U.S.C. § 243.

Over the past decade, both before and after Seila Law, litigants have argued that the CFPB's funding structure is unconstitutional.[13] None has succeeded. See PHH II, 881 F.3d at 95 ("The way the CFPB is funded fits within the tradition of independent financial regulators."); CFPB v. Navient Corp., 3:17-CV-101, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017) (stating that CFPB's funding is not "constitutionally concerning"); ITT Educ. Services, Inc., 219 F. Supp. 3d at 897 ("[Defendant's] conclusory assertion that the CFPA's funding structure violates the [Constitution is] without merit"); CFPB v. Morgan Drexen, Inc., 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014) ("[T]he structure of the CFPB does not violate the Appropriations Clause."); Mot. Hr'g Tr. 58, Law Offices of Crystal Moroney, No. 7:20-cv-03240 (CFPB's funding structure "does not violate the appropriations and vesting clauses in the Constitution."). In short, because the CFPB's funding does not come from the Treasury, there is no constitutional requirement that Congress control the yearly budget. See Am. Fed'n

[13] In Seila Law, the Court stated that "[t]he CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control." 140 S. Ct. at 2204. But this statement only concerned the constitutionality of the removal provision, not the constitutionality of the funding mechanism. See id. at 2209 ("The only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal.").

of Gov't Emps., AFL-CIO, Local 1647 v. Fed. Labor Relations Auth., 388 F.3d 405, 409 (3d Cir. 2004) ("Congress [may] loosen its own reins on public expenditure."). The CFPB's funding does not violate the Appropriations Clause.

4. Pleading Defects

Citizens claims two pleading defects in Counts I and II. These counts allege that Citizens committed statutory violations by requiring customers to substantiate reports of unauthorized use with fraud affidavits signed at the penalty of perjury.

a. Staff Commentary

First, Citizens argues that the CFPB impermissibly relies on its staff commentary to Regulation Z, instead of the TILA statute or Regulation Z itself, to make out a violation. See Mot. to Dismiss 28. Regulation Z states that an issuer must conduct a "reasonable investigation" in response to a written notice from the cardholder of unauthorized use, but does not make clear whether this requirement applies to reports of unauthorized use made by telephone. See 12 C.F.R. §§ 1026.12(b), 1026.13(f). The commentary, on the other hand, explicitly extends the requirement to telephone reports. See 12 C.F.R. pt. 1026, Supp. I, 12(b)(3). Additionally, the staff commentary states that an issuer may not "automatically" reject a report of unauthorized use based on a cardholder's refusal to complete an affidavit, signed at the penalty of perjury, to support the claim of unauthorized use. 12

C.F.R. pt. 1026, Supp. I, 13(f)(3). The regulation itself makes no mention of such affidavits. 12 C.F.R. §§ 1026.12(b), 1026.13(f). Seizing upon these distinctions, Citizens argues that the commentary lacks authority because public statements from the CFPB and statements contained within the introduction to the commentary characterize the staff commentary as mere guidance. Def.'s Reply 16, ECF No. 20.

The Supreme Court, however, has foreclosed this argument. "Unless demonstrably irrational, [] staff opinions construing [TILA] or Regulation [Z] [are] dispositive." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980). At the time of Ford Motor, the CFPB did not exist, and the Federal Reserve Board was authorized to issue regulations regarding TILA. In 2010, Congress transferred this authority to the CFPB, and the Federal Reserve Board's staff opinions "were adopted in wholesale form, minus a few technical changes . . . ." Fridman v. NYCB Mortg. Co., LLC, 780 F.3d 773, 776 (7th Cir. 2015). Since then, Courts of Appeals have uniformly held that the staff commentary, now published by the CFPB instead of the Federal Reserve, remains dispositive unless demonstrably irrational. See Curtis v. Propel Prop. Tax Funding, LLC, 915 F.3d 234, 242 (4th Cir. 2019) (stating that courts "defer" to the staff commentary (citing Ford Motor, 444 U.S. at 557)); Krieger v. Bank of Am., N.A., 890 F.3d 429, 436 n.3 (3d Cir. 2018) ("[A]s long as the agency's views are not demonstrably irrational,

we treat them as dispositive." (citations and quotations omitted)); Fridman, 780 F.3d at 776 (noting that the commentary may deserve even greater deference under the CFPB than it did under the Federal Reserve, but concluding that "for present purposes it is enough to say that [a certain part of the staff commentary] is not 'demonstrably irrational'").

Citizens makes no argument that the relevant sections of the staff commentary are demonstrably irrational; nor could it. The provisions at issue are logical extensions of the rules laid out in TILA and Regulation Z. Without a reasonable investigation, the requirement that banks refund unauthorized charges would be meaningless. Moreover, the prohibition against requiring affidavits at the penalty of perjury is entirely consistent with TILA's goal of "plac[ing] the risk of fraud primarily on the card issuer . . . ." Krieger, 890 F.3d at 434 (quoting DBI Architects, P.C. v. Am. Express Travel-Related Servs. Co., 388 F.3d 886, 892 (D.C. Cir. 2004)).

The Complaint sets forth a plausible claim to relief by alleging non-compliance with the staff commentary.

b. Factual Sufficiency

Citizens next argues that even if non-compliance with the staff commentary is a valid basis for liability, Counts I and II fail to allege sufficient facts. Mot. to Dismiss 30. This argument falls short. The commentary provides, in part, that:

> [t]he card issuer may not automatically deny a claim based solely on the cardholder's failure or refusal to . . . provid[e] an affidavit[.] . . . The procedures involved in investigating claims may differ, but . . . a creditor may not require the cardholder to provide an affidavit . . . under penalty of perjury as part of a reasonable investigation.

12 C.F.R. pt. 1026, Supp. I, 13(f)(3).

The Complaint alleges that "Citizens's process permitted Bank employees to require consumers to complete the Fraud Affidavit provided by the Bank, and automatically deny the claim if the consumer failed to do so[,]" that "[d]ue to the language used in the Fraud Affidavit . . . and its notarization requirement, consumers' signatures . . . were subject to the penalty of perjury[,]" and that "[i]n numerous instances, Citizens automatically denied consumers' billing error notices and unauthorized use claims because those consumers refused to or were unable to complete the Fraud Affidavit." Compl. ¶¶ 16, 18, 19.

Citizens argues that the use of the word "permitted" indicates that the rejection of the claims was not automatic. See Mot. to Dismiss 27. This contention misses the mark. The allegation is not that Citizens required a fraud affidavit of every customer, but rather that in numerous instances, Citizens denied claims simply because the cardholder did not complete a fraud affidavit. Such denials violate the plain language of the staff commentary. See 12 C.F.R. pt. 1026, Supp. I, 13(f)(3). Counts I and II were adequately pled.

5. Enforcement of Regulation Z

Citizens next argues that the counts brought under the CFPA fail to the extent that they rely on Regulation Z because the regulation was initially promulgated by the Federal Reserve. See Mot. to Dismiss 30-31. Indeed, the only regulations enforceable under the CFPA are those "prescribed by the [CFPB]." See 12 U.S.C. §§ 5481(14), 5536(a)(1)(A). The Dodd-Frank Act, however, provided that "[a]ll consumer financial protection functions of the [Federal Reserve] are transferred to the [CFPB]." 12 U.S.C. § 5581(b)(1)(A). Pursuant to its newly obtained authority, the CFPB in 2011 republished Regulation Z as an interim final rule for public comment. See Truth in Lending (Regulation Z), 76 Fed. Reg. 79768 (Proposed Dec. 22, 2011). In 2013, the CFPB published the final version of Regulation Z. See Truth in Lending (Regulation Z), 78 Fed. Reg. 76033 (Dec. 16, 2013). This republished version of Regulation Z clearly was "prescribed" by the CFPB. The Bank's argument ignores clear congressional intent and, if successful, would upend an entire regulatory system. Violations of Regulation Z are actionable under the CFPA.

6. Categories of Relief

Lastly, Citizens contends that certain types of relief sought by the CFPB are unavailable because the Complaint does not allege facts sufficient to support those forms of relief. Mot. to Dismiss 32-35. This argument fails.

First, the Bank argues that injunctive relief is unavailable because the Complaint alleges no ongoing violations. However, "it need not appear that the plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted." Doe v. U.S. Dep't. of Justice, 753 F.2d 1092, 1104 (D.C. Cir. 1985). Thus, "a motion to dismiss is not a proper vehicle for addressing a prayer for relief, which is not part of the cause of action." Reininger v. Oklahoma, 292 F. Supp. 3d 1254, 1266 (W.D. Okla. 2017).[14] Here, the Complaint clearly makes out a basis for at least some relief for each count. See Fed. R. Civ. P. 8(a) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). It is no matter that certain types of requested relief arguably do

[14] Hence, it is unsurprising that most of the cases cited by Citizens do not concern motions to dismiss. See Davis v. Fed. Election Comm'n., 554 U.S. 724, 732 (2008) (summary judgment); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 167 (2000) (same); City of Los Angeles v. Lyons, 461 U.S. 95, 100 (1983) (preliminary injunction); SEC v. Sargent, 329 F.3d 34, 39 (1st Cir. 2003) (question of post-trial relief); Donahue v. City of Boston, 304 F.3d 110, 115-16 (1st Cir. 2002) (summary judgment); SEC v. Pros Intern., Inc., 994 F.2d 767, 768 (10th Cir. 1993) (same); SEC v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 185 (D.R.I. 2004) (question of post-trial relief); SEC v. Mellert, C03-0619 MHP, 2006 WL 927743, at *1 (N.D. Cal. Mar. 29, 2006) (question of civil penalty based on criminal conviction). In the only three cited cases dealing with motions to dismiss, the actions were dismissed in their entirety due to the plaintiffs' failure to make out any claim for relief. See SEC v. Gentile, 939 F.3d 549, 552-53, 566 (3d Cir. 2019); U.S. ex rel. Guth v. Roedel Parsons Koch Blache Balhoff & McCollister, 626 Fed. Appx. 528, 529 (5th Cir. 2015); Ice Cream Distribs. of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc., 487 F. App'x 362, 362-63 (9th Cir. 2012).

not have a factual basis. This dispute is one for summary judgment or trial.

Second, the Bank argues that undisputed facts (outside of the Complaint) establish that all affected customers have been reimbursed, and that demands for damages, restitution, refunds, or disgorgement should therefore be stricken from the Complaint. See Mot. to Dismiss 33-35. Rule 12(f) of the Federal Rules of Civil Procedure provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Such motions "are generally disfavored and will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." DeMoulis v. Sullivan, CIV. A. 91-12533-Z, 1993 WL 81500, at *6 (D. Mass. Feb. 26, 1993) (citation and quotations omitted).

Here, Citizens states that the CFPB is "well aware that they seek monetary remedies for customers who already received payments from the Bank." Mot. to Dismiss 34. Again, this contention involves factual issues that must be resolved at summary judgment or trial. There is no cause to strike material from the Complaint at this time.

IV. Conclusion

For the reasons stated herein, the Motion to Dismiss, ECF No. 14, is DENIED.

IT IS SO ORDERED.

William E. Smith
District Judge
Date: December 1, 2020

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

BUREAU OF CONSUMER FINANCIAL PROTECTION,	*	
Plaintiff,	*	**Case No.: GJH-19-2817**
v.	*	
FAIR COLLECTIONS & OUTSOURCING, INC., *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION

Plaintiff Consumer Financial Protection Bureau ("CFPB" or "Bureau") filed a seven-count Complaint against Fair Collection and Outsourcing, Inc., a third-party debt collection agency headquartered in Beltsville, Maryland. ECF No. 1. The suit also names as Defendants three affiliated companies and their owner Michael E. Sobota (hereinafter, collectively, referred to as "FCO" or "Defendants"). *Id.* The CFPB's Complaint asserts causes of action under the Credit Furnishers Rule, 12 C.F.R. §1022.42 (Count I), the Fair Credit Reporting Act, 15 U.S.C. §1681, et. seq. (Counts II through VI), and the Fair Debt Collection Practices Act, 15 U.S.C. §1692, et. seq. (Count VII). *Id.* ¶¶ 88–123. Now pending before the Court is Defendants' Motion to Dismiss, and/or in the Alternative, for Stay of Proceedings. ECF No. 7. No hearing is necessary. Loc. R. 105.6 (D. Md. 2018). For the following reasons, Defendants' motion is denied.

I. BACKGROUND[1]

Defendants operate the largest debt collection company in the multi-unit housing industry. ECF No. 1 ¶ 1.[2] They collect debt on behalf of assisted living facilities and large apartment complexes, including student and military housing. *Id.* On September 25, 2019, the CFPB filed a seven-count Complaint against Defendants, alleging that Defendants failed to take steps to ensure the accuracy of the information about consumers that they furnish to consumer-reporting agencies, failed to conduct reasonable investigations of consumers' disputes about debts Defendants placed on their credit reports, reported information that was alleged to have been the result of identity theft without determining whether the information was accurate, and collected debt without a reasonable basis to assert it was owed, among other allegations. ECF No. 1 ¶¶ 88–123.

Defendants moved to dismiss this lawsuit, claiming that the structure of CFPB was unconstitutional and that Plaintiff therefore lacked standing. ECF No. 7. Defendants alternatively moved for a stay of proceedings until the Supreme Court decided *Seila Law v. Consumer Financial Protection Bureau*, ___ U.S. ___, 140 S. Ct. 2183 (2020), as that case involved the constitutionality of the CFPB. *See id.* On June 29, 2020, before this Court ruled on Defendants' motion, the Supreme Court decided *Seila Law*, holding that the CFPB's enabling statute violates Article II of the Constitution to the extent it contained a provision only permitting removal of the CFPB's single Director by the President for cause, but finding that clause separable, and thus upholding the constitutionality of the agency. *See Seila Law*, 140 S. Ct. 2183.

[1] For purposes of considering Defendants' Motion to Dismiss, the Court accepts the facts alleged in the Complaint as true. *See Aziz v. Alcolac*, 658 F.3d 388, 390 (4th Cir. 2011).
[2] Pin cites to documents filed on the Court's electronic filing system (CM/ECF) refer to the page numbers generated by that system.

Three days after the issuance of the *Seila Law* opinion, the Bureau's Director filed a declaration ratifying the Bureau's decision to bring this lawsuit. ECF No. 14-1. Defendants moved for leave to file supplemental briefing to address the legality of the Director's post-*Seila Law* ratification. ECF No. 15. This Court granted Defendants' motion. ECF No. 18. Defendants submitted supplemental briefing in support of their motion to dismiss or stay proceedings on September 14, 2020, ECF No. 19, the CFPB responded on September 21, 2020, ECF No. 20, and Defendants submitted their reply on October 5, 2020, ECF NO. 22.

II. MOTION TO STAY

As an alternative to dismissal, Defendants ask the Court to stay this lawsuit pending a ruling by the Supreme Court in *Collins v. Mnuchin*, No. 19-422, 2020 WL 3865248, (cert. granted July 9, 2020). A district court has broad discretion to stay proceedings as part of its inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *See Landis v. N. Am*., 299 U.S. 248, 254 (1936). But that discretion is not without limits. *In re Sacramento Mun. Utility Dist*., 395 Fed. App'x 684, 687 (Fed. Cir. 2010). A court must "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 255; *see also United States v. Ga. Pac. Corp*., 562 F.2d 294, 296 (4th Cir. 1977) ("The determination by a district judge in granting or denying a motion to stay proceedings calls for an exercise of judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket.").

"When considering a discretionary motion to stay, courts typically examine three factors: (1) the impact on the orderly course of justice, sometimes referred to as judicial economy, measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected from a stay; (2) the hardship to the moving party if the case is not

stayed; and (3) the potential damage or prejudice to the non-moving party if a stay is granted." *Int'l Refugee Assistance Project v. Trump*, 323 F. Supp. 3d 726, 731 (D. Md. 2018). "[A] district court has discretion to stay actions when proceedings in another matter involve similar issues." *Popoola v. MD-Individual Practice Ass'n, Inc*., No. Civ.A.DKC 2000–2946, 2001 WL 579774 (D. Md. May 23, 2001) (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1360 (2d. ed. 1990)). In order to issue a stay, a court must be satisfied that a "pressing need" exists, and that "the need for a stay outweighs any possible harm to the nonmovant." *Elite Const. Team, Inc. v. Wal-Mart Stores, Inc*., JKB-14-2358, 2015 WL 925927, at *3 (D. Md. Mar. 2, 2015).

Defendants argue that a stay is warranted because the issues presented in its Motion to Dismiss are pending before the Supreme Court in *Collins v. Mnuchin*, and thus this Court should wait for the Supreme Court's ruling. According to Defendant, "the Court is considering whether the Federal Housing Financial Agency's ("FHFA") structure violates the separation of powers, and if so, whether it should set aside action taken by the FHFA when it was unconstitutionally structured." ECF No. 19 at 9. Because, Defendants assert, "[a] related remedy is sought here, i.e., dismissal of a lawsuit filed by an unconstitutional created agency," *id.*, *Collins v. Mnuchin* presents "the potential for a dispositive ruling in favor of FCO," *id.* at 25. In the Court's view, however, Defendant's preferred outcome is not sufficiently likely to warrant a stay.

First, *Collins v. Mnuchin* will not, by necessity, translate to a case involving a different agency, given that there are key factual differences between the CFPB and FHFA. Therefore, it is far from certain that even if the Supreme Court finds the FHFA's structure unconstitutional and proceeds to determine the proper remedy, its holding would be controlling with respect to the CFPB.

Furthermore, *Collins v. Mnuchin* does not involve an action that was subsequently ratified and, thus, the question of ratification is not at issue in that case—as the challengers stated in their brief before the Fifth Circuit, "[t]he validity of any efforts at ratification would need to be decided in a future case depending on the specific procedures used and facts presented." Suppl. En Banc Br. of Pls.-Appellants at 35, *Collins v. Mnuchin*, No. 17-20364 (5th Cir. filed Dec. 12, 2018). Thus, although Defendants state, "[i]f the Supreme Court in *Collins v. Mnuchin* holds that agency action taken during the period when it was unconstitutionally structured must be set aside, this ruling would require this Court to dismiss the present enforcement action," ECF No. 19 at 25, that is not necessarily true. *Collins v. Mnuchin* will be addressing that question only with respect to an unratified action.[3] This case, involving a ratified action, presents a separate question. Moreover, regarding that separate question—whether a later-ratified action originally taken during the period when an agency was unconstitutionally structured must be set aside—as discussed below, *Seila Law* has already suggested that the answer is no. If dismissal were absolutely required, it would not have remanded to the Ninth Circuit for a determination of the validity and permissibility of ratification, as doing so would have been "futile." 140 S. Ct. at 2208.

Given the uncertainty surrounding the effect a decision in *Collins v. Mnuchin* will have on the present case, the Court will deny Defendant's Motion to Stay.

[3] Indeed, setting aside such an unratified action would be consistent with precedent. *See, e.g.*, *FEC v. NRA Political Victory Fund*; *Noel Canning v. NRLB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014) (holding that unratified actions taken by the NLRB when it lacked a quorum void). Notably, after *Noel Canning* was decided, the agencies ratified decisions made when the NLRB lacked a quorum, and those ratifications were upheld. *See, e.g.*, *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017).

III. MOTION TO DISMISS

A. Standard of Review

Defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing this Court lacks jurisdiction over the matter because the Bureau lacks standing. *See, e.g.*, *Miller v. Pacific Shore Funding*, 224 F.Supp.2d 994-95 (D. Md. 2002) (citing *Marshall v. Meadows*, 105 F.3d 904, 905-96 (4th Cir. 1977)). "A district court should grant a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) 'only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.'" *Upstate Forever v. Kinder Morgan Energy Partners*, L.P., 887 F.3d 637, 645 (4th Cir. 2018) (quoting *Evans v. B.F. Perkins Co*., 166 F.3d 642, 647 (4th Cir. 1999)). "The burden of establishing subject matter jurisdiction rests with the plaintiff." *Demetres v. East West Constr.*, 776 F.3d 271, 272 (4th Cir. 2015). "When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), 'the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.'" *Evans*, 166 F.3d at 647 (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). Where jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506 (1868)).

B. Discussion

Defendants assert four reasons they contend require dismissal of this matter, arguing that (1) dismissal is the proper remedy for constitutional defects; (2) the CFPB lacks standing to

bring the matter; (3) the CFPB Director's July 2 ratification was invalid; and (4) the CFPB's funding structure is unconstitutional. The Court will address each argument in turn.

1. Dismissal for Constitutional Defects

Defendants first argue that because *Seila Law* established that the Bureau's leadership structure, consisting of one Director only removable by the President for cause, was constitutionally defective, dismissal is the appropriate remedy. ECF No. 19 at 11. Defendants rely on several cases involving improper appointments of government officials to assert that "'one who makes a timely challenge to the constitutional validity of' a government official's authority 'is entitled to a decision on the merits of the question and whatever relief may be appropriate.'" ECF No. 19 at 10 (quoting *Ryder v. United States*, 515 U.S. 177, 182–83 (1995)). The Supreme Court has determined that such relief is important in order to incentivize litigants to bring these challenges. *Ryder*, 515 U.S. at 182–83; *see also Lucia v. SEC*, __ U.S. __, 138 S. Ct. 2044, 2055 n.5 (2018). According to Defendants, the only remedy that would provide appropriate relief in this case and the proper incentive for future plaintiffs considering challenges to unconstitutional action by government officials is dismissal. ECF No. 22 at 7. The Court disagrees.

Although defective actions should not be permitted to proceed unabated and unremedied, courts are not required to dismiss every case involving a constitutional defect. Instead, courts must provide a remedy tailored to the defect at issue. *See United States v. Morrison*, 449 U.S. 361, 364 (1981) (noting "general rule that remedies should be tailored to the injury suffered from the constitutional violation"); *cf. Seila Law*, 140 S. Ct. at 2209 ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem[.]" (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010)).

For example, in two of the cases that Defendants raise, the Supreme Court found that a new hearing before a properly appointed (and, in *Lucia*, a different) judge was the appropriate, tailored remedy. *See Ryder v. United States*, 515 U.S. 177, 188 (1995); *see also Lucia v. SEC*, __ U.S. __, 138 S. Ct. 2044, 2055 (2018). As the court noted in *BCFP v. Law Offices of Chrystal Moroney, P.C.*, *Ryder* and *Lucia* present an "apples-and-oranges comparison" to the present case, as the adjudication here is before this Court rather than the improperly appointed or removable official. No. 7:20-cv-03240, Hr'g Tr. at 61 (S.D.N.Y Aug. 19, 2020). However, the underlying principle is instructive: reevaluation of the decision—whether a ruling in an adjudication or a decision to bring an enforcement action—by a properly appointed and removable Director can provide an adequate and tailored remedy for certain constitutional defects, and dismissal is not required.

This is consistent with the approach taken by the Supreme Court in *Seila Law*. Although Defendants state that in *Seila Law* "[a] majority of the Supreme Court recognized that 'dismiss[al]' is the 'straightforward remedy' for the undisputed "constitutional defect" in the filing of a CFPB enforcement action," ECF No. 19 at 11, they distort the Supreme Court's words. The Supreme Court merely acknowledged that "petitioner seeks a straightforward remedy," that being a dismissal. *Seila Law*, 140 S. Ct. at 2208. But, while noting that dismissal would have been a clear-cut solution, the majority did not find it to necessarily be the appropriate one—only two Justices would have dismissed the CFPB's petition for an order of enforcement in that case. Instead, the Supreme Court remanded the case for the lower court to consider whether the civil investigative demand was validly ratified, and determined that such a remand would not be "futile." 140 S. Ct. at 2208. Because the Supreme Court did not find dismissal necessary to remedy the same constitutional defect at issue here or to incentivize further constitutional

challenges, and found that ratification at least warranted consideration, this Court will follow suit, and will therefore proceed to determine whether dismissal is warranted on other grounds.

2. Standing

Defendants further argue that the Supreme Court's finding of a constitutional defect in its leadership structure voids the CFPB's standing as of the filing of the case. ECF No. 19 at 11–13. However, as the Ninth Circuit found in *Gordon*, in a government enforcement action, "it is the Executive Branch, not any particular individual, that has Article III standing." *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1187 (9th Cir. 2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992)). In that case, the Ninth Circuit found that the Article II flaw in Director Cordray's initial recess appointment "does not alter the Executive Branch's interest or power in having federal law enforced." *Id*. at 1189. "While the failure to have a properly confirmed director may raise Article II Appointments Clause issues," the court concluded, "it does not implicate our Article III jurisdiction to hear this case." *Id*.; *see also id*. at 1190 (observing that "no court, including the Supreme Court, has ever suggested that Article II problems nullify Article III jurisdiction").

This finding comports with the history of cases involving Article II defects that have not been dismissed for lack of standing. *See, e.g.*, *Legi–Tech*, 75 F.3d at 708; *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017). It also aligns with *Legi-Tech* and *LaRouche*, which found parties' "separation of powers claim[s]"—their objections to the FEC's constitutional structure—to be waivable defenses, which would not have been possible had the objections implicated the courts' Article III jurisdiction to hear the cases. *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996); *see also LaRouche v. FEC*, 28 F.3d 137, 140 (D.C. Cir. 1994) (the constitutional objection to the FEC's composition could be waived because the fact that the FEC

was "improperly constituted" did not affect "[the court's] authority to consider the FEC's enforcement action," but rather "[the FEC's] authority to bring it"). Moreover, as Plaintiff correctly notes, had the holding in *Seila Law* voided the CFPB's standing, the Supreme Court would not have remanded the case to the Ninth Circuit. *Cf.* 140 S. Ct. at 2208 (recognizing that the Court should not return the case to the Ninth Circuit if "such a remand would be futile"). Accordingly, this Court joins others in finding "[t]he outcome of *Seila Law* does not mean there is no Article III jurisdiction over this action." *Bureau of Consumer Fin. Prot. v. Chou Team Realty LLC*, No. SACV2043JVSADSX, 2020 WL 5540179, at *3 (C.D. Cal. Aug. 21, 2020); *see also CFPB v. RD Legal Funding, LLC*, No. 18-2743, Summ. Order (S.D.N.Y. Oct. 30, 2020) (allowing case to proceed and remanding case to district court for determination on the validity of Director Kraninger's ratification of the enforcement action); *BCFP v. Law Offices of Crystal Moroney*, P.C., No. 7:20-cv-03240 (S.D.N.Y. Aug. 19, 2020) (finding ratification of earlier enforcement action valid and allowing case to proceed).

3. Ratification

The Court next turns to a question left unanswered by *Seila Law*: whether the current CFPB Director properly ratified the enforcement action. Ratification is a principle drawn from agency law in which an agent originally acted without authority, but the principal later approves of the agent's prior unauthorized acts such that they remain in effect. *See GDG Acquisitions LLC v. Government of Belize*, 849 F.3d 1299, 1310 (11th Cir. 2017) (noting that ratification assumes that the agent "did not have actual authority at the time he acted"); *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (explaining role of principal that ratifies prior unauthorized acts of agent). In the context of administrative agencies, actions have been ratified when the leadership of an agency acted without authority, but leadership with proper authority

later affirmed the action. *See, e.g.*, *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017); *Legi–Tech*, 75 F.3d at 709; *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 124 (D.C. Cir. 2015); *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016); *see also* Restatement (Second) § 93(3) ("The affirmance can be made by an agent authorized so to do."). Several circuits have also considered whether an individual can "self-ratify" an action—that is, whether a specific person can ratify an action that he or she had initially taken before a constitutional defect has been remedied—and have found those ratifications can be effective. *See, e.g.*, *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602–03 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1185–86, 1190–91 (9th Cir. 2016); *Wilkes-Barre Hosp. Co., LLC v. Nat'l Labor Relations Bd.*, 857 F.3d 364, 372 (D.C. Cir. 2017).

In order for a ratification to be valid, the principal, here, the CFPB, must have had the ability to do the act both at the time it was done and at the time of ratification. 513 U.S. 88, 98 (1994); *see also Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016); *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 184 (D.D.C. 2016) ("[I]t is the principal, the CFPB, who must at all times have the authority to take the challenged action."); *see also Gordon*, 819 F.3d at 1191. Defendants claim the CFPB lacked the ability to file this case both at the time it did so and at the time of ratification. The Court will consider each argument.

First, Defendants argue that because the defect at issue was "structural," it infected the entire agency, and thus the CFPB lacked authority to initiate the enforcement action in the first place. Therefore, Defendants contend, ratification cannot cure the defect. In making this argument, Defendants attempt to distinguish this case from those in which ratification was found effective, arguing those cases involved defects that were "limited to an individual's appointment" and rendered only the agent without authority, not the agency as a whole. *See* ECF

No. 22 at 4 ("This defect [in *Gordon*] only concerned the authority of the Director as the Bureau's agent and not the authority of the Bureau itself.").

The Court finds that Defendants' emphasis on the distinction between "appointment" and "structural" defects obscures the key inquiry—the CFPB's authority at the time of the enforcement action. Indeed, the delineation between appointment and structural defects does not find support in prior case law, which conflates the two, describing Appointments Clause problems as structural and rejecting arguments that this meant ratification was impossible. *See, e.g.*, *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (discussing the "effects of the unconstitutional structure of the FEC" and finding "Legi–Tech's contention that the FEC's reconstitution and ratification is not an effective remedy because separation of powers is a 'structural' constitutional defect that necessarily voids all prior decisions is overstated"); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015) (noting that "an Appointments Clause violation is a structural error").

Moreover, while *Gordon*, *Wilkes Barre*, and others indeed center on invalid recess appointments that can plausibly be said to "involve[] defects limited to the method by which a particular individual was appointed to an otherwise unchallenged office," ECF No. 22 at 4, *Legi-Tech* and *Intercollegiate Broad. Sys.* involve defects that are broader and more "structural" than Defendants acknowledge. *Legi-Tech* involved a finding that "the presence of the two congressional officers as non-voting ex officio members of the FEC violated the Constitution" and that "the FEC is unconstitutionally composed." 75 F.3d at 706–07. *Intercollegiate Broad. Sys.,* involved officers who were appointed by the Librarian of Congress and were not removable without cause, thus rendering them improperly appointed principal officers. 796 F.3d at 115.

Nevertheless, ratification was permitted in both cases, meaning these broader, structural defects did not void the agencies' authority.

Finally, Defendants' appointments/structural distinction minimizes the significance of the appointment violations they reference. The recess appointments found unconstitutional in *Gordon* and *Noel Canning*, 705 F.3d 490, 493, 514 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513, 557 (2014), for example, were not deemed impermissible simply because they violated the courts' ideals of procedural propriety, but because they implicated the same concerns at issue here—they threatened the carefully crafted balance between the executive and legislative branches. Additionally, that certain cases "involved defects limited to the method by which a particular individual was appointed," ECF No. 22 at 4, does not mean the defect was confined to that individual alone. Instead, those defects, like the one at issue here, raise concerns precisely because of the control the leader exercises over the agency's actions. This is true whether the agent is improperly appointed or improperly removable. It is therefore not clear why, according to Defendants, ratification would be permissible in certain cases "where the defect is limited to an individual's appointment," and thus "'address[] situations in which an agent was without authority at the time he or she acted,'" *id.* (quoting *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018)), but not here, where the defect was limited to an individual Director's insulation from removal.

The important determination is whether *Seila Law*, read as a whole, dictates that the CFPB lacked authority during the time in which it was led by an improperly removable Director. It does not. The holding in *Seila Law* did not affect the CFPB's authority—only that of its Director. Indeed, the Supreme Court stated, if "the offending removal provision means the entire agency is unconstitutional and powerless to act, then a remand would be pointless," 140 S. Ct. at

2208, before finding, to the contrary, "the removal provision can be severed from the other statutory provisions relating to the CFPB's powers and responsibilities" and remanding the case to the Ninth Circuit, *id.* at 2209. The problem was the Director, and that problem was severable, leaving the agency and its authority intact.[4] The Supreme Court proceeded to determine: "[t]he provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction." *Id.* That it found they *remained* operative, rather than merely becoming so in the wake of the Supreme Court's decision, suggests that *Seila Law* did not find the *agency* had been acting without authority in the time that the removal procedures for Director violated the Constitution. In sum, because the constitutional violation was limited to the removability of the Director, and not the authority of the agency as a whole, and because the Supreme Court found the defect severable, the CFPB was not acting without authority at the time the enforcement action at issue was initiated.

Bowsher, relied on by Defendants, is not to the contrary. In *Bowsher*, the Supreme Court found a section of the Balanced Budget and Emergency Deficit Control Act of 1985 unconstitutional because it made the Comptroller General removable only by Congress, allowing Congress to unlawfully "retain[] control over the execution of the Act"—"in essence, permit[ting] a constitutional veto." *Bowsher v. Synar*, 478 U.S. 714, 734, 726 (1986). The Court concluded that Congress "cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Id.* at 726. Defendants imply *Bowsher*

[4] *Cf. Consumer Fin. Prot. Bureau v. RD Legal Funding,* LLC, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018), *amended,* No. 17-CV-890 (LAP), 2018 WL 11219167 (S.D.N.Y. Sept. 12, 2018), *vacated and remanded*, No. 18-2743, 2020 WL 6372988 (2d Cir. Oct. 30, 2020), *and aff'd in part, rev'd in part and remanded*, No. 18-2743, 2020 WL 6372988 (2d Cir. Oct. 30, 2020) (finding ratification ineffective after determining the removal provision was *not* severable, as therefore the agency "lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers"). *RD Legal Funding* is now remanded for a determination on ratification, as the Supreme Court's decision in *Seila Law* contradicted its finding that the removal provision was severable and thus the CFPB lacked enforcement authority.

stands for the principle that "[i]f the President lacks the ability to remove an agency's head, the *agency* is unaccountable and cannot be 'entrusted with executive powers,'" ECF No. 22 at 2 (citing *Bowsher*, 478 U.S. at 732) (emphasis added), suggesting the agency itself lacked authority. But that quote actually states, in full, "because Congress has retained removal authority over the Comptroller General, *he* may not be entrusted with executive powers." 478 U.S. at 732 (emphasis added). The Court did not find that the agency that the Comptroller General headed, the General Accounting Office, was unaccountable—the party without authority was the agent, not the agency. Therefore, *Bowsher* does not dictate that an unconstitutional removal clause voids the actions of the agency as a whole.

Having determined that the CFPB had authority to initiate the enforcement action on September 25, 2019, the Court turns to its authority to ratify the prior action. According to Defendants, the Director's ratification of the enforcement action was invalid because it was "premature," as the *Seila Law* judgment had not yet issued, only the opinion. ECF No. 19 at 16. The Court need not decide this question, as even if the Notice of Ratification was filed prematurely, Plaintiff's continued prosecution of this case after the Supreme Court's judgment issued reflects "the principal's assent (or conduct that justifies a reasonable assumption of assent) to be bound by the prior action of another person or entity," which is sufficient to ratify the prior acts. *See Henderson v. United Student Aid Funds, Inc*., 918 F.3d 1068, 1073 (9th Cir. 2019) (citing Restatement (Third) of Agency § 4.01)). And, of course, if Defendants were right that the initial ratification was premature and thus improper, Plaintiff could simply ratify the enforcement action tomorrow with the same result. Nevertheless, because the CFPB had authority to ratify the enforcement action, the ratification was proper.

4. Constitutionality: Funding Structure

Finally, Defendants argue this matter should be dismissed because the CFPB's funding structure "violates the separation-of-powers maxim, embodied in the Appropriations Clause." ECF No. 19 at 19. The CFPB is funded through two mechanisms. First, the Director annually requests an amount from the Federal Reserve, which is not to exceed 12 percent of the total operating expenses of the Federal Reserve System. 12 U.S.C. § 5497(a)(2). If the Bureau requires funds beyond that capped allotment, it must seek them through congressional appropriation. *Id*. § 5497(e). Second, the CFPB collects penalties in a separate fund called the "Consumer Financial Civil Penalty Fund," which is used to compensate victims of activities prohibited by "Federal consumer financial law" or, if not practicable, for consumer education and financial literacy programs. *Id*. § 5497(d). This insulation from the annual appropriations process and from congressional review stemmed from Congress' own determination that "the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator." S. Rep. No. 111-176, at 163 (2010).

The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Supreme Court has "underscore[d] the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). This clear command ensures that "Congress's control over federal expenditures is 'absolute'"—that its power over the purse

is exclusive and that no funds are expended beyond what Congress has approved. *U.S. Dep't of Navy v. Fed. Labor Relations Auth*., 665 F.3d 1339, 1348 (D.C. Cir. 2012).

Here, an act of Congress provided for the CFPB's funding, satisfying the Appropriations Clause's simple mandate. That Congress funded the CFPB outside the normal appropriations process does not create a constitutional problem. Indeed, the Constitution does not "prohibit Congress from creating funding mechanisms that enjoy some degree of insulation from its own year-to-year control." *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 896–97 (S.D. Ind. 2015). "Congress itself may choose . . . to loosen its own reins on public expenditure." *Am. Fed'n of Gov't Emps., AFL–CIO, Local 1647 v. Fed. Labor Relations Auth*., 388 F.3d 405, 409 (3d Cir. 2004). This can include "authoriz[ing] appropriations that continue for a longer period of time," *id.*, or by creating self-financing programs that are reliant "on fees, assessments, or investments," *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 95 (D.C. Cir. 2018), abrogated by *Seila Law*, 140 S. Ct. 2183; *see also Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc*., 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014) ("The Appropriations Clause 'does not in any way circumscribe Congress from creating self-financing programs . . . without first appropriating the funds as it does in typical appropriation and supplement appropriation acts.'" (quoting *AINS, Inc. v. United States*, 56 Fed. Cl. 522, 539 (Fed. Cl. 2003), *aff'd*, 365 F.3d 1333 (Fed. Cir. 2004), *abrogated on other grounds by Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011)). "The Court is aware of no authority supporting the notion that an independent source of funding creates a separation-of-powers problem." *Rop v. Fed. Hous. Fin. Agency*, No. 1:17-CV-497, 2020 WL 5361991, at *26 (W.D. Mich. Sept. 8, 2020).

As an example, the Federal Reserve has existed as an independent agency funded outside the normal appropriations process for over one hundred years. *See* Federal Reserve Act, Pub. L.

No. 63-43, § 10, 38 Stat. 251, 261 (1913) (codified as amended at 12 U.S.C. § 243). In fact, there are a number of independent agencies that operate completely outside of the normal annual appropriations process. *See* 12 U.S.C. § 1811, et seq. (Federal Deposit Insurance Corporation); 12 U.S.C. § 1755 (National Credit Union Administration); 12 U.S.C. § 4516 (Federal Housing Finance Agency); 12 U.S.C. § 2250 (Farm Credit Administration); 15 U.S.C. § 7219 (Public Company Accounting Oversight Board); 12 U.S.C. § 16 (Office of the Comptroller of the Currency); *see also PHH Corp.*, 881 F.3d at ("Congress has consistently exempted financial regulators from appropriations[.]").

Ultimately, the key inquiry for separation-of-powers purposes is whether Congress, rather than the executive or judicial branches, exercised the power of the purse. *See CFPB v. D & D Mktg.*, No. CV 15-9692 PSG (EX), 2016 WL 8849698, at *5 (C.D. Cal. Nov. 17, 2016) ("Congress's decision to allow the CFPB to self-fund through the Federal Reserve instead of annual appropriations from Congress does not violate the Appropriations Clause because it was still Congress, and not the executive or judicial branch, that made the decision about how the CFPB should be funded."). Here, Congress chose to fund the CFPB through the dual mechanisms outlined in the statute, shielding the CFPB from the traditional appropriations process to better effectuate its goal of creating an independent financial regulator. Moreover, the appropriation was not boundless, but instead was tied to a formula and other conditions. *See BCFP v. Law Offices of Chrystal Moroney, P.C.*, No. 7:20-cv-03240, Hr'g Tr. at 59, 79 (S.D.N.Y Aug. 19, 2020). The Court will not second-guess this exercise of Congressional appropriations authority. [5]

[5] *See also BCFP v. Law Offices of Chrystal Moroney, P.C.*, No. 7:20-cv-03240, Hr'g Tr. at 57–58 (S.D.N.Y Aug. 19, 2020) (finding, to the extent the defendant was arguing that the nondelegation applies because Congress has improperly transferred its authority to another branch of government, this argument failed because Congress had supplied an intelligible principle to guide the delegee's use of discretion, as required by the Supreme Court).

Moreover, while Defendants correctly note that *Seila Law* did not directly confront the constitutionality of the CFPB's funding structure, its finding that the "only constitutional defect . . . in the CFPB's structure is the Director's insulation from removal," *Seila Law*, 140 S. Ct. at 2209, and the fact that it referenced the CFPB's funding structure only as an aggravator of "the agency's threat to Presidential control," *id.* at 2204, implied that the CFPB's source of funding itself did not present a constitutional defect. *See BCFP v. Law Offices of Chrystal Moroney, P.C.*, No. 7:20-cv-03240, Hr'g Tr. at 55 (S.D.N.Y Aug. 19, 2020) ("[A]lthough the Bureau's funding structure was not directly at issue in *Seila Law*, in deciding to sever the for-cause removal provision of the CFPA, the Supreme Court did note 'the only constitutional defect we have identified in the CFPB structure is the director's insulation from removal,' and that that constitutional defect 'disappear[ed]' with a director removable at will by the President."). To the extent it exacerbated the problems with the for-clause removal clause, it threatened to tread on the President's authority, not that of Congress, *Seila Law*, 140 S. Ct. at 2204 (expressing concern that "this financial freedom makes it even more likely that the agency will 'slip from the Executive's control"), and the Supreme Court severed the removability clause to correct the balance.

Because the CFPB's funding structure complies with the Appropriations Clause's mandate that Congress control the power of the purse, the Court joins others that have considered the question in finding the CFPB's funding constitutional and declines to dismiss this case on that basis. *See, e.g.*, *BCFP v. Law Offices of Chrystal Moroney, P.C.*, No. 7:20-cv-03240 (S.D.N.Y Aug. 19, 2020); *ITT Educ. Servs., Inc*., 219 F. Supp. 3d 878; *Morgan Drexen, Inc*., 60 F. Supp. 3d 1082; *CFPB v. D & D Mktg*., 2016 WL 8849698; *PHH Corp.*, 881 F.3d 75;

Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017).

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss, and/or in the Alternative, for Stay of Proceedings, ECF No. 7, shall be denied. A separate Order follows.

Dated: November 30, 2020

/s/
GEORGE J. HAZEL
United States District Judge

EXHIBIT 3

18-2743-cv (L)
Consumer Financial Protection Bureau, People of the State of New York v. RD Legal Funding, LLC, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of October, two thousand twenty.

PRESENT: BARRINGTON D. PARKER,
DENNY CHIN,
Circuit Judges,
JANE A. RESTANI,
Judge.*

- -x

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellant-Cross Appellee,

PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General for the State of New York,
Plaintiff-Appellant-Cross Appellee,

-v- 18-2743, 18-3033, 18-2860, 18-3156

* Judge Jane A. Restani, of the United States Court of International Trade, sitting by designation.

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

Defendants-Third Party Plaintiffs-Third Party Defendants-Appellees-Cross Appellants.

- -x

FOR PLAINTIFFS-APPELLANTS-CROSS APPELLEES:	CHRISTOPHER DEAL, Senior Counsel (John R. Coleman, Deputy General Counsel, Steven Y. Bressler, Assistant General Counsel, Kristin Bateman, Senior Counsel, David A. King Jr., Counsel, *on the brief*), for Mary McLeod, General Counsel for the Consumer Financial Protection Bureau, Washington, D.C. CAROLINE A. OLSEN, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Steven C. Wu, Deputy Solicitor General, and Andrew W. Amend, Senior Assistant Solicitor General, *on the brief*), for LETITIA JAMES, Attorney General for the State of New York, New York, New York.
FOR DEFENDANTS-APPELLEES-CROSS APPELLANTS:	MICHAEL D. ROTH (David K. Willingham, Jeffrey M. Hammer, *on the brief*), King & Spalding, LLP, Los Angeles, CA, *and* Scott E. Gant, Boies, Schiller Flexner LLP, Washington, D.C.

Appeal from the United States District Court for the Southern District of New York (Preska, *J.*).

UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this Order.

Plaintiffs-appellants Consumer Financial Protection Bureau (the "CFPB") and the State of New York (the "State") appeal from a judgment of the United States District Court for the Southern District of New York entered October 29, 2018 dismissing their federal and state law claims against defendants-appellees RD Legal Funding, LLC; RD Legal Finance, LLC; RD Legal Funding Partners, LP (collectively, "RD"); and Roni Dersovitz (together with RD, "defendants"). By memorandum opinion and order entered June 21, 2018, as amended by its September 12, 2018 Order, the district court granted defendants' motion to dismiss. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review *de novo* a district court's grant of a motion to dismiss. *See Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019). The CFPB is headed by a Director, who is appointed by the President with the advice and consent of the Senate for a five-year term, during which time "[t]he President may remove the Director for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C § 5491(b)-(c) (the "for-cause removal provision"). The district court held that this for-cause removal provision is unconstitutional, and that the removal provision is not severable from the remainder of the Consumer Financial Protection Act (the "CFPA") or Title X of the Dodd-Frank

Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Accordingly, the district court struck the entirety of the CFPA. The district court also held that then-acting CFPB Director Mick Mulvaney's May 11, 2018 ratification of the CFPB's enforcement action against defendants failed to cure the constitutional deficiencies in the CFPB's structure or otherwise render defendants' arguments moot.

On June 29, 2020, the Supreme Court struck down the for-cause removal provision on the basis that it violates the separation of powers, but additionally held that the removal provision is severable from the remainder of the CFPA. *See Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2192 (2020). Following *Seila*, now-acting CFPB Director Kathleen L. Kraninger ratified the enforcement action on July 8, 2020.

In light of these developments, we affirm the district court's holding that the for-cause removal provision is unconstitutional, we reverse the district court's holding that the for-cause removal provision is not severable from the remainder of the CFPA, and we remand for the district court to consider in the first instance the validity of Director Kraninger's ratification of this enforcement action. *See Seila*, 140 S. Ct. at 2208 n.12. [1]

[1] We do not reach defendants' other arguments, including, for example, that RD Legal does not qualify as a "covered person" under the Dodd-Frank Act.

* * *

For the foregoing reasons, we **VACATE** the judgment of the district court and **REMAND** the case for further proceedings.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk