UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BUREAU OF CONSUMER FINANCIAL PROTECTION, Petitioner, v. LAW OFFICES OF CRYSTAL MORONEY, P.C., Respondent.	Case No. 7:20-cv-03240-KMK

NOTICE OF RESPONDENT'S MOTION TO STAY PENDING APPEAL

PLEASE TAKE NOTICE that upon the Memorandum of Law in Support of Respondent's Motion to Stay Pending Appeal, filed simultaneously with this Notice, Respondent Law Offices of Crystal Moroney, P.C. hereby moves this Court before the Honorable Kenneth M. Karas, District Judge, at the United States Courthouse for the Southern District of New York, White Plains Division, for an Order granting a stay of this Court's August 19, 2020 Order (ECF No. 29) enforcing Petitioner's civil investigative demand, pending Respondent's appeal, which will be noticed in this Court and filed in the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted,

Dated: September 18, 2020

Michael P. DeGrandis, *pro hac vice*
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
tel.: (202) 869-5210
mike.degrandis@ncla.legal

Counsel to Respondent

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's CM/ECF system upon all counsel of record in the above-captioned case. Courtesy copies will also be emailed to Petitioners.

Michael P. DeGrandis

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BUREAU OF CONSUMER FINANCIAL PROTECTION,

Petitioner,

v.

LAW OFFICES OF CRYSTAL MORONEY, P.C.,

Respondent.

Case No. 7:20-cv-03240-KMK

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

Pursuant to Fed. R. Civ. P. 62 and this Court's inherent authority to preserve the *status quo* during the pendency of an appeal, Respondent Law Offices of Crystal Moroney, P.C. ("Ms. Moroney's Law Firm" or "the Law Firm") submits this Memorandum of Law in Support of the Motion to Stay Pending Appeal, and states as follows:

PRELIMINARY STATEMENT

This Court entered an order granting Petitioner Bureau of Consumer Financial Protection's ("CFPB" or the "Bureau") Petition to Enforce the November 14, 2019 civil investigative demand (the "Second CID") against Ms. Moroney's Law Firm on August 19, 2020 (ECF No. 29) (the "Order"). Respondent requests a stay pending appeal in response to Petitioner's immediate insistence that Ms. Moroney's Law Firm comply with this Court's Order. Petitioner insisted upon compliance on August 24, 2020, just five days after the Order's entry, and two weeks before the parties received the final transcript of the Court's oral ruling at the show cause hearing.[1]

Respondent intends to file a timely Notice of Appeal of this Court's Order, as is Respondent's right. Fed. R. App. P. 3(a)(1). Ms. Moroney's Law Firm requests a stay pending appeal to maintain the *status quo* and prevent Respondent's constitutional claims from being rendered moot and incurring irreparable harm by Respondent's pre-appeal compliance with this Court's Order.

[1] E-mail from Vanessa Assae-Bille, CFPB Sen. Lit. Counsel, to Michael P. DeGrandis, NCLA Sen. Lit. Counsel (Aug. 24, 2020, 15:51:08 EDT) (Exhibit B). Respondent requested expedited production of the transcript immediately following the show cause hearing. The parties received the transcript on September 2, 2020, but the court reporter informed the parties that her quality control review revealed some transcription errors, so the final transcript was not available to the parties until September 7, 2020.

ARGUMENT

This Court's authority to grant a stay is both equitable and discretionary. *Hayes v. City Univ. of New York*, 503 F. Supp. 946, 962 (S.D.N.Y. 1980). When considering whether to stay a final order, this Court considers four factors:

> (1) whether the movant will suffer irreparable injury absent a stay; (2) whether a party will suffer substantial injury if a stay is issued; (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal; and (4) the public interests that may be affected.

Gen. Mills, Inc. v. Champion Petfoods USA, Inc., No. 20-CV-181-KMK, 2020 WL 915824, at *2 (S.D.N.Y. Feb. 26, 2020) (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993)) (brackets omitted). Where the government is a party, the harm to the government and the public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

"In weighing these factors, courts should adopt 'a sliding scale,' such that 'the necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors.'" *Gen. Mills, Inc.*, 2020 WL 915824, at *2 (*Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006)). The Second Circuit has explained that the "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." *Thapa*, 460 F.3d at 334. This Court should exercise its discretion to enter a stay pending appeal because each factor weighs in favor of a stay.

I. RESPONDENT WILL SUFFER IRREPARABLE INJURY ABSENT A STAY

Absent a stay pending appeal, Ms. Moroney has two choices: (A) comply with the demands of a federal agency that she firmly believes is unconstitutional; or (B) accept complete business ruination and find a new job. A Hobson's Choice by which a party may either accede to a constitutional violation or suffer non-compensable (or irreversible, in this case) economic

injury is the very definition of irreparable harm. *See Red Earth LLC v. United States*, 657 F.3d 138, 146 (2d Cir. 2011) (holding that where a federal statute is alleged to violate constitutional rights, a Hobson's Choice of compliance with an unconstitutional act or economic injury as a result of the act's enforcement tips the public interest in favor of injunctive relief).

A. Failure to Grant a Stay While an Appeal Is Pending Would Cause Irreparable Injury by Cementing the Constitutional Harm Alleged by Respondent and by Mooting Respondent's Right to Appeal

Respondent's threshold objection to the enforcement action is that the Bureau's funding structure is unconstitutional, meaning the agency has no authority whatsoever to investigate, adjudicate, or enforce the Second CID. *See* Hr'g Tr. at 53 (Aug. 18, 2020) (Exhibit D). This Court acknowledged that the question of the Bureau's constitutionality "may very well be a prerequisite determination that has to be made[.]" *Id.* at 22 (Aug. 18, 2020).

If CFPB is acting without constitutional authority, the Second CID is a nullity. Without a stay of the Order, CFPB will proceed to demand documents and information to which it may not have a lawful right. Such a circumstance would raise two irreparable harms. First, the unlawful exercise of governmental authority violates Respondent's constitutional rights, a harm that is presumptively irreparable. *See Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). This Court should presume irreparable harm because "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948, at 440 (1973) (internal quotations omitted)).

Second, absent a stay, Respondent's appeal could be rendered moot because the Law Firm would be subjected to the very constitutional harm of which Respondent complains—unlawful exercise of governmental authority—before the Second Circuit can consider the appeal.

If compelled to respond to the Second CID, there may be nothing left for the Second Circuit to decide. Ms. Moroney's Law Firm cannot, in good faith and in accordance with this Court's Order, slow the compliance process or control the pace of the Second Circuit's docket to hasten consideration of her constitutional rights.

B. Failure to Grant a Stay While an Appeal Is Pending Would Cause Irreparable Injury by Ensuring Respondent's Complete Ruination

Ms. Moroney's Law Firm faces imminent irreparable injury in the form of complete business ruination. To be clear, the irreparable harm that Respondent will suffer is not excessive expenses—though Respondent would certainly suffer that, as well. Rather, Respondent asserts that her law firm will imminently suffer total, non-compensable, financial ruin absent a stay. Such financial ruination is irreparable harm. *Emons Industries, Inc. v. Liberty Mut. Ins. Co.*, 749 F. Supp. 1289, 1294 (S.D.N.Y. 1990) ("It is firmly established that '[a] threat to the continued existence of a business can constitute irreparable injury[.]'") (quoting *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978)). *See also Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989) (explaining that monetary loss "that cannot be rectified by financial compensation" is an irreparable injury); *JSG Trading Corp. v. TrayWrap Inc.*, 917 F.2d 75, 79 (2d Cir. 1990) (defining "irreparable injury" as "one that cannot be redressed through a monetary award."); *New York State Trawlers Ass'n v. Jorling*, 764 F. Supp. 24, 25-26 (E.D.N.Y. 1991) (holding that where Eleventh Amendment sovereign immunity forecloses collecting monetary damages, the harm is irreparable) (citing *United States v. New York*, 708 F.2d 92, 94 (2d Cir. 1983)).

The likelihood of ruin is illustrated by the substantial time and resources that Ms. Moroney's Law Firm expended already in response to the First CID, issued by an agency that openly admitted prior to issuing the First CID that it was unconstitutionally structured. Her first

fruitless attempt at compliance cost Respondent $75,000 in fees and expenses, forced her to lay off nearly half her staff, and substantially hindered Respondent's ability to conduct her business. Now, the Bureau is seeking immediate enforcement of a Second CID before Ms. Moroney can pursue an appeal asserting that this CID is also an unconstitutional nullity.

The Second CID's temporal scope is double that of the First and extends far beyond the applicable statute of limitations. Aff. of Crystal G. Moroney, ¶ 7 (Sept. 18, 2020) (Exhibit A). Using the First CID as a baseline, compliance with the Second CID will cost Respondent much more than $75,000 in expenses, require more than 650 hours of her time, divert staff attention away from their core business responsibilities, and substantially hinder Ms. Moroney's efforts to manage and maintain her business. *Id.* ¶ 8-11. Respondent remained in business during the First CID and enforcement proceeding because Ms. Moroney reduced staffing by 47% and reduced her salary from $155,000 to $104,000 per year. *Id.* ¶¶ 12-13. Having already reduced staff to a skeleton crew and her own salary to the bare minimum to make ends meet, Respondent cannot afford to remain in business while complying with a second unconstitutional CID.

The foregoing costs and burdens alone are sufficient to demonstrate Respondent's likelihood of total ruin if the Order is not stayed pending appeal. But in the "new normal" of COVID-19, Ms. Moroney's Law Firm—once a small business—is now a shell of its prior self. This "new normal" presents perilous new challenges that leave it teetering on the edge of insolvency, even absent CIDs issued by an unconstitutional agency's demand for documents and information. Between March and June 2020, the government forced Respondent to close her doors and Respondent had to operate with just four employees—including herself—remotely. *Id.* ¶ 14. Due to the shutdowns, many of her clients could not provide Respondent with the work upon which she had previously relied. *Id.* ¶ 15. The partial reopening in June only afforded

Respondent the opportunity to hire one employee back, requiring Ms. Moroney to personally take on additional roles including bookkeeping, consumer contact, and other administrative tasks, to keep her law firm afloat. *Id.* ¶ 16. Many debtors—quite understandably—can no longer afford to pay their debts due to hardship or loss of employment during the COVID-19 crisis, nor will they be able to pay them for the foreseeable future. *Id.* ¶ 17. And Ms. Moroney's twin 9-year old children have not been in school or in summer camp since March 2020, so she has been tending to their care during this time. *Id.* ¶ 18. Thus, her time at home is split between childcare, homeschooling, and fulfilling the several roles necessary to maintain her business.[2] *Id.* ¶ 19.

Absent a stay pending appeal, Respondent will be forced to cease business operations entirely. Respondent cannot afford to have Ms. Moroney expend any more time complying with serial CIDs, cannot afford to have any more staff time dedicated to serial CID compliance, cannot afford to lay off more staff, cannot afford $75,000 or more in additional compliance costs, and Ms. Moroney cannot afford further reductions to her salary. *Id.* ¶¶ 20-24. While either harm would be sufficiently irrevocable to justify a stay pending appeal, the combination of constitutional harm and Respondent's total ruination without the possibility for compensation is patent irrevocable harm.

II. PETITIONER WILL NOT SUFFER INJURY IF THIS COURT ISSUES A STAY

In stark contrast to Ms. Moroney's Law Firm's position, a stay will not injure CFPB as revealed by its own actions. CFPB delayed filing its first Petition to Enforce for more than 13

[2] This Court may take judicial notice of the fact of the hardships created by remote learning for parents and their young children. *See, e.g.*, Bethany Mandel, *'Remote learning' is a disaster, and terrible for children*, N.Y. Post (Sept. 16, 2020), *available at* https://nypost.com/2020/09/16/remote-learning-is-a-disaster-and-terrible-for-children/. One of the challenges faced by parents is vigilant monitoring of young children's engagement and attention. *See id.*

months after reaching an impasse with Respondent over attorney-client communications (from at least January 2018 to February 2019); delayed serving Respondent with the first Petition to Enforce for another seven months (from February 2019 to September 2019); and voluntarily dismissed the First CID on the eve of the first show cause hearing in November 2019. Cumulatively, that is nearly two years of self-imposed delays by CFPB. And despite these delays, CFPB ***still*** has not reviewed the documents that the Bureau admits are already in its possession, prior to seeking a second rule to show cause in April 2020. The lack of consumer complaints against Ms. Moroney's Law Firm also confirms that CFPB will not suffer by delaying its enforcement for the pendency of Respondent's appeal. Thus, further delaying enforcement so that Respondent may seek appellate review of her defenses to the Bureau's enforcement powers will not injure CFPB.

III. RESPONDENT HAS A SUBSTANTIAL POSSIBILITY OF SUCCESS ON APPEAL

The standard for determining whether a stay pending appeal should be granted is not whether this Court has changed its mind with respect to the merits of Respondent's opposition to the Petition to Enforce. The standard for this prong is whether Respondent has a "substantial ***possibility***" of success on appeal. *Gen. Mills, Inc.*, 2020 WL 915824, at *2 (emphasis added). To determine whether an appellant has a substantial possibility of success on appeal, a district judge should objectively examine the precedent upon which his or her decision on the merits was based, the standard of review on appeal, and whether a federal agency is owed deference to the agency's position. *Hayes*, 503 F. Supp. at 963. All three factors demonstrate a substantial possibility of Respondent's success on appeal.

First, Respondent's principal argument, that CFPB's funding is unconstitutionally structured, is a matter of first impression—not just in this Court, but in the entire United States.

While holding that Title X does not violate the Appropriations or Vesting Clauses of the United States Constitution, this Court ***also*** held that *Seila Law* did ***not*** decide the constitutionality of the Bureau's funding structure. Hr'g Tr. at 58, 54-55. Moreover, this is the first case presented to ***any*** court contesting whether the Constitution permits the President or a lone Director of a federal agency to make unreviewable demands for funding from a second agency that is self-funded, rather than receive its appropriations through bicameral bill passage and presentment. The Court's citations to other cases that previously upheld CFPB's funding structure were issued pre-*Seila Law*, before the Supreme Court severed the Director's for-cause removal provision, which gave the President control over the Bureau's budget and enforcement actions. Thus, this Court's decision could not have been based on governing precedent, but rather on a derivative of prior nonbinding decisions of courts in other jurisdictions which were themselves based on different factual and legal circumstances. "Absent definitive appellate guidance, a court no matter how confident that its decision is correct must recognize that it is operating in an area [of] uncertainty." *Hayes*, 503 F. Supp. at 963. Thus, by the very nature of the claim and lack of precedent there is a substantial possibility of Respondent's success on appeal.[3]

Second, the Second Circuit will conduct a *de novo* review of Respondent's appeal because Respondent intends to pose questions of statutory and constitutional law. *CFPB v. Gordon*, 819 F.3d 1179, 1187 (9th Cir. 2016) (considering the constitutionality of Director Cordray's appointment to the Bureau). Where an appeals court does not afford any deference to the decision of a district court, there is a substantial possibility of success on appeal. *See id.*

[3] Respondent may appeal other issues equally as unprecedented, such as the Bureau's claim to have ratified its prior unconstitutional acts because the agency serves as its own principal. This is an impossibility under well-settled agency law.

Third, CFPB is not entitled to any deference regarding whether the agency believes its own funding structure is constitutional. The Second Circuit "review[s] an agency's disposition of constitutional issues *de novo*." *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 91 (2d Cir. 2009). Additionally, in its Decision and Order in the Second CID's administrative proceeding, CFPB expressly acknowledged that the Bureau lacks the competency to decide whether its funding structure is constitutional:

> [T]he administrative process set out in the Bureau's statute and regulations for petitioning to modify or set aside a CID is not the proper forum for raising and adjudicating challenges to the constitutionality of the Bureau's statute.

Decision & Order on Pet. to Set Aside or Modify CID at 2 (Feb. 11, 2020) ("[Respondent] can raise its constitutional objection as a defense to [an enforcement] proceeding in district court.") (Exhibit E). Certainly, CFPB's current self-serving litigation position that its funding structure is constitutional should not be afforded any deference where the Bureau's interpretation of its own enabling statute prohibits it from asserting its constitutionality in its own administrative proceeding.

Thus, without appellate precedent, with the *de novo* standard upon which the Second Circuit will consider Respondent's appeal, and the lack of deference the Second Circuit will show the Bureau's statutory interpretation on review, Respondent has a substantial possibility of success on appeal.

IV. A STAY PENDING APPEAL IS IN THE PUBLIC INTEREST

The "public interest is ***best*** served by ensuring the constitutional rights of persons within the United States are upheld." *Coronel v. Decker*, 449 F. Supp. 3d 274, 287 (S.D.N.Y. 2020) (emphasis added). Thus, the public has a strong interest in preventing unconstitutional agencies from pursuing burdensome enforcement actions while appellate courts work out important and

complex constitutional questions that go to the heart of an agency's enforcement authority. *See, e.g.*, *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002) ("[T]here is a strong public interest in requiring that the plaintiffs' constitutional rights no longer be violated[.]"); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("The vindication of constitutional rights ... serve[s] the public interest almost by definition.").

The public interest in a stay is particularly strong in this case, where the Supreme Court has already struck down one aspect of CFPB's unprecedented structure. Without a stay, the Bureau would proceed undaunted and continue—once again without concern for its own constitutionality—to force Respondent's liquidating compliance before an appellate court can decide the fundamental issue of CFPB's jurisdictional authority. It should also be noted that the Supreme Court will again address the constitutionality of agency structures in its new term. *See, e.g.*, *Collins v. Mnuchin*, No. 19-422 (July 9, 2020) (granting petition for a writ of certiorari to the United States Supreme Court).

Courts, including this Court in this case, have previously stayed the Bureau's enforcement proceedings or delayed their briefing, as appellate courts and the Supreme Court determined the constitutionality of CFPB's structure. *See, e.g.*, Mem. Endorsement, ECF No. 17 (June 12, 2020) (denying consolidation and stay but delaying briefing pending the Supreme Court's *Seila Law* decision); *CFPB v. RD Legal Funding, LLC*, No. 18-2743, ECF No. 217 (2d Cir. Nov. 5, 2019); *CFPB v. Access Funding, LLC*, No. 1:16-cv-03759, ECF No. 123 (D. Md. Dec. 23, 2019). The stays awaiting *Seila Law* served the public interest because, as it turned out, the Supreme Court disagreed with most lower courts and ruled that CFPB's Director was

unconstitutional. It is similarly within the public interest for this Court to stay the Bureau's enforcement of the Second CID pending the Second Circuit's consideration of the constitutionality of CFPB's post-*Seila Law* funding structure in this matter of first impression, among other issues.

CONCLUSION

For the foregoing reasons, Respondent Ms. Moroney's Law Firm requests a stay pending appeal to maintain the *status quo* and prevent Respondent's appeal from being rendered moot by Respondent's compliance with this Court's Order.

Respectfully submitted,

Dated: September 18, 2020

Michael P. DeGrandis, *pro hac vice*
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Michael P. DeGrandis

INDEX OF EXHIBITS

Exhibit	Description
A	Aff. of Crystal G. Moroney (Sept. 18, 2020)
B	E-mail from Vanessa Assae-Bille, CFPB Sen. Lit. Counsel, to Michael P. DeGrandis, NCLA Sen. Lit. Counsel (Aug. 24, 2020, 15:51:08 EDT)
C	Unpublished Opinion | *Gen. Mills, Inc. v. Champion Petfoods USA, Inc.*, No. 20-CV-181-KMK, 2020 WL 915824 (S.D.N.Y. Feb. 26, 2020)
D	Show Cause Hr'g Tr. (Aug. 18, 2020)
E	Decision & Order on Pet. to Set Aside or Modify CID (Feb. 2, 2020)
F	Proposed Order to Stay Pending Appeal

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

BUREAU OF CONSUMER FINANCIAL PROTECTION, Petitioner, v. LAW OFFICES OF CRYSTAL MORONEY, P.C., Respondent.	Case No. 7:20-cv-03240-KMK **AFFIDAVIT OF CRYSTAL G. MORONEY**

I, Crystal G. Moroney, Esq., having been duly sworn, state upon oath:

Background

1. I am the President and Managing Officer of the Law Offices of Crystal Moroney, P.C., the Respondent in this case.

2. I offer this affidavit in support of my law firm's Motion to Stay Pending Appeal. It is based on my personal knowledge, information, and belief. I am competent to testify to the truth of the matters contained herein.

3. I am an attorney licensed to practice law in the states of New York and New Jersey. I am in good standing in both jurisdictions. I am also licensed in federal courts, including the Southern District of New York.

4. My law firm was established in 2012.

5. My law firm is a woman-owned small business, currently with six employees, including myself, collectors, an administrative assistant, and an in-house IT manager.

6. My law firm has an A- rating from the Better Business Bureau.

7. This Court granted CFPB's Petition to Enforce its November 14, 2020 civil investigative demand (the "Second CID") on August 19, 2020. The Second CID's applicable period is January 1, 2014 to November 14, 2020—82½ months of data and information. The Second CID's applicable period is twice as long as the CFPB's June 23, 2017 civil investigative demand's ("the First CID") applicable period—41½ months.

My Small Business Will Suffer Complete Ruination if Not Granted a Stay Pending Appeal

8. Facing a Second CID with a temporal scope double that of the First CID, having already incurred almost $75,000 in fees and costs negotiating, complying with, and defending against the First CID, having already incurred $5,000 in fees and costs negotiating and defending against the Second CID in the Bureau's administrative process, and being required to duplicate efforts with respect to the documents and information provided in compliance with the First CID, I can reasonably project that complying with the Second CID will cost much more than $75,000.

9. Facing a Second CID with a temporal scope double that of the First CID, having already spent seven hours each workday and three hours each weekend day between June and October 2017, reviewing the First CID, sorting responsive and nonresponsive documents, identifying privileged materials, conferring with my attorneys, conferring with my clients, conferring with my in-house IT manager, coordinating with outside IT consultants, and preparing answers to interrogatories, and now being required to duplicate efforts with respect to the documents and information provided in compliance with the First CID, I can reasonably project that complying with the Second CID will require more than 650 hours of my time.

10. Facing a Second CID with a temporal scope double that of the First CID, having previously called upon my staff to divert their attention from their core business responsibilities to assist with the First CID's compliance, I can reasonably project that I will need my staff to

stop performing their core business functions from time to time, to assist with my compliance with the Second CID.

11. Facing a Second CID with a temporal scope double that of the First CID, having been unable to engage in long-term planning since the First CID in June 2017, I can reasonably project that I will continue to be unable to manage my business' capital investments, develop new business, or perform other business management tasks essential to compete in a highly competitive marketplace.

12. To continue operations while the First and Second CIDs have been pending, I have made drastic reductions to my compensation. My salary was $155,000 per year at the time of the First CID. In 2017, I reduced my salary to $127,000 per year. In 2018, I further reduced my salary to its current level, $104,000 per year. The salary reductions were necessary to keep up with mounting legal bills and to limit the number of employees that my law firm had to lay off as a result of the First and Second CIDs. I can reasonably project that compliance with the Second CID will either cause further reductions in my compensation or, more likely, force me to close the firm and seek another job to provide for my family.

13. To continue operations while the First and Second CIDs have been pending, I made drastic changes to my business. My law firm had 17 employees at the time of the First CID, which I had to reduce by 47%. The reduction in staffing was necessary to keep up with mounting legal bills, and I can reasonably project that compliance with the Second CID will require further reductions in staffing.

14. In addition to the reduction in staff and business resulting from the CFPB's CIDs, in March 2020, New York State's COVID-19 orders forced my office to close and engage in

remote business operations. Between March and June, only four employees—myself included—were able to continue to work remotely and even then, only in a very limited capacity.

15. Due to the shutdowns, many of my clients could not provide me with the work upon which my law firm had previously relied.

16. The partial reopening in June only afforded me the opportunity to hire one employee back, requiring me to personally take on additional roles including bookkeeper, collector, administrative assistant, and IT administrator, just to keep the law firm afloat. At this time, there are only six of us working, and one of the six employees is part-time.

17. Due to COVID-19, we have extended most of our payment plans by many months to provide the consumers that have been hit with financial struggles additional time to pay and reduced monthly payments to help them survive in this COVID-19 environment. Many debtors—quite understandably—can no longer afford to pay their debts due to hardship or loss of employment during the COVID-19 crisis, nor will they be able to do so for the foreseeable future. Debt recovery during a time when millions are out of work or cannot work has been, and continues to be, very difficult.

18. My twin 9-year old children have not been in school since March 2020, nor have they attended summer camp. I must tend to their care during the work week, like many other working mothers finding themselves in this situation during these difficult times.

19. In this new school year, I must work from home at least two days a week due to New York schools operating on a hybrid schedule where my children are physically in school just two days each week. Due to their age, the days I work from home are split between assisting them with their virtual schooling and working as much as I can to keep the firm operating.

20. My law firm cannot afford to have any more of my time or my staff's time dedicated to CID compliance.

21. My law firm cannot afford to lay off more staff as five full-time and one part-time employees are trying to do the work of 17.

22. My law firm cannot afford $75,000 or more in additional compliance costs.

23. My law firm cannot make further reductions to my salary. I am already working to my maximum capacity, in addition to caring and homeschooling my young children during this difficult time. The only alternative is to close the firm and seek another job to provide for my family.

24. The Second CID's enforcement prior to this case's disposition on appeal is not an issue of financial burdens—it is an issue of total business ruination. I can reasonably project that, absent a stay, the Law Offices of Crystal Moroney, P.C. will become insolvent, as I am already giving all I have to keep it open, and I would simply have to close for financial and health reasons. There is no more time nor cutbacks I can make to keep the business open during the pendency of my appeal.

SIGNATURE BELOW ON PAGE 6

Crystal G. Moroney, Affiant, being first duly sworn, states upon oath, that all of the representations in this affidavit are true as far as Affiant knows or is informed, and that such affidavit is true, accurate, and complete to the best of Affiant's knowledge and belief:

Date: 9.18.2020

Crystal G. Moroney, Affiant

State of New York

County of Rockland

Signed and sworn before me on this 18th day of September 2020 by Crystal G. Moroney.

Notary Public

| SEAL |

My Commission Expires: _____

TERESA FARIAS
Notary Public, State of New York
No. 01FA6130825
Qualified in Rockland County
Commission Expires July 25, 20 2(

From: Assae-Bille, Vanessa (CFPB)
To: Mike DeGrandis
Cc: Patterson, Jehan (CFPB); Friedl, Kevin (CFPB)
Subject: LOCM Compliance with the CID
Date: Monday, August 24, 2020 3:51:08 PM

Hi Mike,

I write to follow up on the Court's order granting the Bureau's petition to enforce the CID. We look forward to receiving LOCM's responses promptly. Please note that the Bureau has updated its submission protocols for responding to CIDs during the pandemic; let me know if you need me to share them with you.

Best,
Vanessa

E. Vanessa Assae-Bille
Senior Litigation Counsel
Office of Enforcement
Consumer Financial Protection Bureau (CFPB)
(o) REDACTED | (c) REDACTED
REDACTED @cfpb.gov
consumerfinance.gov

2020 WL 915824
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

GENERAL MILLS, INC., Plaintiff,
v.
CHAMPION PETFOODS
USA, INC., et al., Defendants.

No. 20-CV-181 (KMK)
|
Signed 02/26/2020

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OPINION & ORDER

KENNETH M. KARAS, United States District Judge:

***1** Plaintiff General Mills, Inc. ("Plaintiff") brings this Action against Defendants Champion Petfoods, Inc. ("Champion") and Modestino Mele ("Mele") (jointly, "Defendants"), alleging violations of state law and 18 U.S.C. § 1836 (the Defense of Trade Secrets Act ("DTSA")), through breach of contract, tortious interference, unfair competition, misappropriation of trade secrets, and unjust enrichment. (Dkt. No. 7.) On January 23, 2020, after Oral Argument, the Court granted Plaintiff's Application for a Preliminary Injunction, stating its reasons on the record. (Dkt. No. 39.) Before the Court are two Motions, both filed by Defendants, seeking a stay of, and modifications to, the Preliminary Injunction. (*See* Dkt. Nos. 42, 48.) For the following reasons, both Motions are denied.

I. Background

The Court assumes the Parties' familiarity with the factual record, the procedural history and the Court's prior rulings. Accordingly, the Court recounts the procedural background only as relevant to the Motions currently under consideration.

On January 23, 2020, after Oral Argument, the Court granted Plaintiff's Application for a Preliminary Injunction and partially granted Defendants' Motion to Compel Arbitration, stating its reasons on the record. (Dkt. No. 39; Jan. 23, 2020 Hr'g Tr. (Dkt. No. 47-4).) The Court specified that its grant of a Preliminary Injunction was based on Plaintiff's contract claim only, and therefore the Court did not address the likelihood of success of Plaintiff's DTSA claims. (Jan. 23, 2020 Hr'g Tr. 16.) The Court enjoined Mele from working for Champion or disclosing Plaintiff's confidential information, and, in light of an arbitration agreement assigning arbitrability to the arbitrator, directed the Parties to arbitrate the issue of arbitrability. (*See* Dkt. Nos. 6, 10, 39). On January 27, 2020, Defendants filed a Notice of Appeal. (Dkt. No. 40.)

On January 28, 2020, Defendants filed a Pre-Motion Letter, accompanied by a prospective Memorandum of Law ("Defs.' First Mem."), seeking to file an Expedited Motion to Stay the Court's Preliminary Injunction Order Pending Appeal (the "First Motion"). (Dkt No. 42.) In furtherance of this First Motion, Defendants argue that the Preliminary Injunction was "improperly entered" because "the Court was without authority to consider Plaintiff's application" in light of the arbitration agreement. (*Id.*) In the alternative, Defendants request that the Court "modify its January 23 Order to make it clear that the Order will be dissolved immediately once the matter is before an arbitrator." (*Id.*) On January 31, 2020, Plaintiff filed a Response. (Dkt. No. 46.)

On February 2, 2020, Defendants filed an additional Pre-Motion Letter, again accompanied by a prospective Memorandum of Law ("Defs.' Sec. Mem."), seeking to file a Motion to Modify the Preliminary Injunction (the "Second Motion"). (Dkt. No. 48.) In this Second Motion, Defendants request that the Court modify "the scope of the [Preliminary Injunction] in order to permit Mele to work as head of sales for Champion ... with responsibilities for all jurisdictions except for the United States and Canada." (*Id.*) On February 4, 2020, Plaintiff filed a brief Letter Response, (Dkt. No. 50), and Defendants immediately filed a brief Letter Reply, (Dkt. No. 51). On February 6, 2020, the Court held a Pre-Motion Conference, and Plaintiff was directed to file any further opposition to both Motions by February 11, 2020. (*See* Dkt. (minute entry for February 6, 2020)). Plaintiff then filed a lengthier Letter in Opposition on February 11, 2020, (Dkt. No. 55), and the next day, Defendants filed a Letter Reply,

("Defs.' Feb. 12, 2020 Letter" (Dkt. No. 56)). On February 20, 2020, Defendants filed an additional Letter urging the Court "to rule on Defendants' request" without delay. (Dkt. No. 57.) On February 21, 2020, Plaintiff filed a Letter responding to Defendants' Letter of the day before. ("Pl.'s Feb. 21, 2020 Letter" (Dkt. No. 58).)

II. Discussion

A. Standard of Review

***2** Federal Rule of Civil Procedure 62(d) provides in pertinent part:

> While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

Fed. R. Civ. P. 62(d).

In determining whether to issue a stay, courts in the Second Circuit consider the following four factors:

> (1) whether the movant will suffer irreparable injury absent a stay[;] (2) whether a party will suffer substantial injury if a stay is issued[;] (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal[;] and (4) the public interests that may be affected.

Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir. 1993) (citation and quotation marks omitted); *see also United States v. Visa U.S.A., Inc.*, No. 98-CV-7076, 2007 WL 2274866, at *1 (S.D.N.Y. Aug. 7, 2007) (same). In weighing these factors, courts should adopt "a sliding scale," such that "the necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors." *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) (alteration and some quotation marks omitted). For example, the "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." *Id.* (citation, alteration, and quotation marks omitted); *see also Hayes v. City Univ. of N. Y.*, 503 F. Supp. 946, 962 (S.D.N.Y. 1980) (noting that the "[i]ssuance of a stay pending appeal is discretionary and equitable"), *aff'd* 648 F. 2d 110 (2d Cir. 1981).

A district court's power to modify or clarify a preliminary injunction once an appeal has been taken appears to be somewhat limited. Thus, although the plaint text of Rule 62(d) suggests that district courts retain the power to modify a preliminary injunction even after it has been appealed, "[t]his rule has been narrowly interpreted to allow district courts to grant only such relief as may be necessary to preserve the status quo pending an appeal where the consent of the court of appeals has not been obtained." *Vasile v. Dean Witter Reynolds, Inc.*, 205 F.3d 1327 (Table) (2d Cir. 2000) (citation omitted). This is so because once an appeal is taken, "jurisdiction passes to the appellate court." *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962). Accordingly, where an appeal has been taken, "the appellant is not usually entitled as of right to present new evidence or argument to the trial court, which ... will exercise jurisdiction only to preserve the status quo as of the time of appeal." *Id.*; *see also Flatiron Health, Inc. v. Carson*, —— F. Supp. 3d ——, 2020 WL 416423, at *3 (S.D.N.Y. Jan. 27, 2020) (explaining that because a district court's "may not alter the posture of the case on appeal," clarifications of injunctions during the pendency of an appeal must be "consistent with the spirit of the original injunction such that they do not materially alter the status of the case on appeal." (citations and quotation marks omitted)). Thus, district courts will modify and clarify a preliminary injunction pending appeal only to "ensure preservation of the status quo pending appeal." *Broker Genius, Inc. v. Seat Scouts LLC*, No. 17-CV-08627, 2019 WL 5203474, at *3 (S.D.N.Y. Sept. 23, 2019) (citation and quotation marks omitted). When, however, a request for clarification or modification is properly presented, "a court is charged with the exercise of the same discretion it exercised in granting or denying injunctive relief in the first place." *Sierra Club v. U.S. Army Corps of Engineers*, 732 F.2d 253,

256 (2d Cir. 1984); *see also Dist. Attorney of New York Cty. v. Republic of Phil.*, 681 F. App'x 37, 41 (2d Cir. 2016) (explaining that "[t]he same standard applies to modification of an injunction" as to the initial granting of a preliminary injunction (citation omitted)).

B. Analysis

***3** Defendants' Letters and Memoranda advance a panoply of overlapping arguments in support of the both Motions. The Court discusses each argument in turn.

1. The Propriety of Preliminary Injunctions Pending Arbitration

Defendants first argue that the Court lacked jurisdiction to issue a preliminary injunction because, as the Court decided in its January 23, 2020 oral ruling, Plaintiff and Mele have a contract which assigns questions of arbitrability to an arbitrator. This argument is without merit.

a. Circuit Precedent

Defendants' argument is at odds with the black-letter law of the Circuit. The Second Circuit has repeatedly held that courts retain the power, and the responsibility, to consider applications for preliminary injunctions while a dispute is being arbitrated: "Where the parties have agreed to arbitrate a dispute, a district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration. The standard for such an injunction is the same as for preliminary injunctions generally." *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 894–95 (2d Cir. 2015) (citations omitted); *see also Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 238 (2d Cir. 2016) ("Generally, courts should consider the merits of a requested preliminary injunction even where the validity of the underlying claims will be determined in arbitration." (citation and quotation marks omitted)). In the Second Circuit, this principle dates back decades, and district courts have been reversed where they have adopted the erroneous view that the "decision to refer the dispute to arbitration strip[s] the court of power to grant injunctive relief." *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N. Y.*, 749 F.2d 124, 125 (2d Cir. 1984); *see also Am. Exp. Fin. Advisors Inc. v. Thorley*, 147 F.3d 229, 231 (2d Cir. 1998) ("[T]he expectation of speedy arbitration does not absolve the district court of its responsibility to decide requests for preliminary injunctions on their merits." (citation omitted)).

Moreover, the Second Circuit has explained the clear rationale behind this settled principle. "[P]ro-arbitration policies reflected in ... Supreme Court decisions are furthered, not weakened, by a rule permitting a district court to preserve the meaningfulness of the arbitration through a preliminary injunction. Arbitration can become a 'hollow formality' if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute." *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1053 (2d Cir. 1990) (citations omitted). This rationale applies with particular force in the instant case. Plaintiff seeks to enforce a contractual provision that bars Mele, a former senior executive with extensive knowledge of Plaintiff's strategic plans, operations, and other proprietary information, from working for its direct competitor for a single year. Were the Court to decline enjoining Mele pending arbitration (first of arbitrability, and perhaps of the merits), much of the damage Plaintiff seeks to prevent will occur in the time it takes for the arbitrator to be appointed, consider the issues, and deliver a final ruling. Such a delay would indeed render arbitration a "hollow formality." *Blumenthal*, 910 F.2d at 1053 (quotation marks omitted).

b. The Effect of *Henry Schein*

***4** In the face of clear Second Circuit precedent, Defendants argue that a recent Supreme Court case, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), (silently) overruled the longstanding law of the Second Circuit. In particular, Defendants point to language in *Schein* declaring that once parties have agreed to submit a dispute to arbitration, a court "has no business weighing the merits of the grievance." 139 S. Ct. at 529 (citation and quotation marks omitted).

Defendants' invocation of *Henry Schein* fails for several reasons. First, Defendants misapprehend the nature of a preliminary injunction. The granting of a preliminary injunction is *not* a decision on the merits; rather "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be

held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Bay Ridge Diagnostic Lab., Inc. v. Dumpson*, 400 F. Supp. 1104, 1105 (E.D.N.Y. 1975) (explaining that a decision with respect to an application for a preliminary injunction "is not a decision on the merits in any respect"). Thus, for example, district courts freely confirm arbitration awards where state courts have previously denied preliminary injunctions in aid of arbitration. The reason is straightforward. "A court's decision that a party has not demonstrated a likelihood of success on the merits is not itself a decision on the merits." *TapImmune, Inc. v. Gardner*, No. 14-CV-6087, 2015 WL 4111881, at *6 (S.D.N.Y. July 8, 2015). The same distinction—between rulings on a preliminary injunction and those on the merits of an underlying claim—applies here. [1]

Defendants nevertheless argue that certain statements in *Henry Schein* should be interpreted broadly, not simply as precluding determinations on the merits pending arbitration, but even as precluding determinations of the *likelihood* of success on the merits pending arbitration. Such an interpretation cannot withstand scrutiny. First, as the Court observed during oral argument, the *Henry Schein* decision was "noticed to the world" as a narrow decision. (Jan. 23, 2020 Hr'g. Tr. 12.) Indeed, the *Henry Schein* Court defined the scope of its analysis precisely:

> Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is "wholly groundless." The question presented in this case is whether the 'wholly groundless' exception is consistent with the Federal Arbitration Act.

Henry Schein, 139 S. Ct. at 528. Needless to say, the viability (or lack thereof) of a "wholly groundless exception" to the delegation of arbitrability has nothing to do with the propriety of preliminary injunctions pending arbitration. [2]

***5** Moreover, nothing in briefing submitted to the Supreme Court in *Henry Schein*, nor its analysis of the issues before it, suggests that the Supreme Court considered—much less decided to overturn—the Second Circuit's longstanding rule in favor of preliminary injunction pending arbitration. Nor is the Second Circuit unique in endorsing preliminary injunctions in such circumstances. On the contrary, the substantial majority of Circuits do so. *See* *Blumenthal*, 910 F.2d at 1052–53 (listing several circuits that "have endorsed a district court's power to issue an injunction pending arbitration" (collecting cases)); *see also Wine Not, Int'l v. 2atec, LLC*, No. 06-CV-117-T-23, 2006 WL 1766508, at *12 (M.D. Fla. June 26, 2006) (analyzing caselaw in each circuit and finding that, with the exception of the Eighth Circuit, all courts of appeals to address the issue have concluded that "notwithstanding a provision that all disputes will be settled by arbitration, a court has authority to issue a preliminary injunction pending arbitration" (citation omitted)). It strains credulity to imagine that the Supreme Court would overturn the established practice of the overwhelming majority of circuits without even saying so. The Supreme Court "does not ... hide elephants in mouseholes." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (citations omitted).

Defendants' interpretation also leads to absurd results. In *Henry Schein*, the Supreme Court considered the possibility that the absence of a "wholly groundless exception" might incentivize "frivolous motions to compel arbitration." *Henry Schein*, 139 S. Ct. at 531 (quotation marks omitted). Nevertheless, the Supreme Court explained that such concerns "overstate[ ] the potential problem" because "[a]rbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable" and can "respond to frivolous arguments for arbitration by imposing fee-shifting and cost-shifting sanctions." *Id.* at 531. The Supreme Court further explained, "[w]e are not aware that frivolous motions to compel arbitration have caused a substantial problem in those Circuits that have not recognized a 'wholly groundless' exception." *Id.*

The above analysis would make little sense if *Henry Schein* simultaneously eliminated preliminary injunctions pending arbitration. First, the imposition of "fee-shifting and cost-shifting sanctions" are, by definition, inadequate in cases of "irreparable harm," i.e., the very cases in which preliminary injunctions are issued. *Id.* Second, one of the likely reasons that frivolous motions to compel arbitration have not "caused a substantial problem in those Circuits that have not recognized a 'wholly groundless' exception," *id.*, is that many

of these same Circuits permit preliminary injunctions pending arbitration, *see Wine Not*, 2006 WL 1766508, at *12 (listing Circuits that permit these injunctions). Such relief ensures that parties who file frivolous motions to compel arbitration do not benefit by inflicting irreparable harm in the interim. The Supreme Court would not invoke these Circuits' experience while simultaneously (and silently) eliminating the very tool that has made that experience possible. And third, without the possibility of preliminary injunctions, groundless "motions to compel arbitration" would not simply be "frivolous;" *Henry Schein*, 139 S. Ct. at 531, they would, rather, be transformed into a frighteningly effective tactical tool for creating a *fait accompli.* On Defendants' reading, a party with an irrelevant arbitrability provision would be free to inflict irreparable harm while filing a groundless motion for arbitration in a tactical scheme to preclude redress. That party would then be entitled to reap the benefits of its bad faith, and the opposing party would be wholly without recourse. This is not a plausible interpretation of *Henry Schein.*

Finally, decisions since *Henry Schein* by courts in the Second Circuit have continued to grant preliminary injunctions pending arbitration, and have continued to recognize *Benihana* and its progenitors as governing law. *See, e.g.*, *Integro USA, Inc. v. Crain*, No. 19-CV-8752, 2019 WL 6030100, at *2 (S.D.N.Y. Nov. 14, 2019) (declining to enter a preliminary injunction, but explaining that "[b]y entering a preliminary injunction in aid of arbitration, a district court may ... ensure that the parties get what they bargained for — a meaningful arbitration of the dispute" (citation and quotation marks omitted)); *Citizens Secs., Inc. v. Bender*, No. 19-CV-916, 2019 WL 3494397 *5 n.1 (N.D.N.Y. Aug. 1, 2019) (following *Benihana* in granting a temporary restraining order pending arbitration in a breach of contract and trade secrets misappropriation case, and noting that "the Court has jurisdiction to issue a temporary restraining order/ preliminary injunction to preserve the status quo pending arbitration" (citation omitted)); *Leber v. Citigroup, Inc.*, No. 07-CV-9329, 2019 WL 1331313, at *3 (S.D.N.Y. Mar. 25, 2019) (declining to enter a preliminary injunction, but explaining that "[a] review of relevant Second Circuit case law reveals that district courts may indeed grant pre-arbitration relief ... in the form of an injunction to preserve the status quo when a dispute is subject to mandatory arbitration pursuant to the Federal Arbitration Act" (citations omitted)). Thus, even if Defendants' interpretation of *Henry Schein* was plausible, these precedents would cut against adopting that interpretation.

***6** Naturally, Defendants labor mightily to distinguish relevant precedent. They therefore point out that the arbitration rules and contract at issue in *Bender* expressly permitted the parties to seek temporary relief from the federal courts. (Defs.' Mem. 8.) This argument misses the point. First, as the Second Circuit has explained, such contractual provisions simply confirm an already extant, independent legal right. *See* *Thorley*, 147 F.3d at 231 (explaining that because "courts do have the authority to consider the merits of requested injunctions [pending arbitration], a contractual provision stating that plaintiffs may seek such relief in a court of competent jurisdiction amply reaffirms what the law already directs."). More importantly, however, it remains an unalterable fact that the district court in *Bender* invoked neither the details of the arbitration rules nor the particularities of the relevant contract in explaining its authority to grant a temporary restraining order pending arbitration. Rather, the court explained the basis for its authority as follows:

> Although Plaintiff's claims against Defendant are subject to final disposition in arbitration, the Court has jurisdiction to issue a temporary restraining order/ preliminary injunction to preserve the status quo pending arbitration.

Bender, 2019 WL 3494397, at *2 n.1 (citing *Benihana*, 784 F.3d at 894–95). There is simply no way to read this statement other than an acknowledgment that *Benihana* remains good law. Moreover, Defendants have advanced no arguments to explain away other clear statements from post-*Henry Schein* decisions indicating that preliminary injunctions are proper during the pendency of arbitration.

In the face of this apparent consensus within the Second Circuit, Defendants invoke only a summary decision from the District of Delaware. *See* *Vertiv Corp. v. Svo Building One, LLC*, No. 18-CV-01776, 2019 WL 1454953, at *2–3 (D. Del. Apr. 2, 2019) (explaining "I am entirely without authority to resolve whether I have authority to resolve Plaintiff's request for a preliminary injunction"). This Court harbors doubts about whether the *Vertiv* decision is consistent with Third Circuit precedent. *See* *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989) ("[W]e do not

construe [an arbitration] agreement as constituting a 'waiver' by either party of the right to seek preliminary injunctive relief necessary to prevent one party from unilaterally eviscerating the significance of the agreed-upon procedures.... [A] district court has the authority to grant injunctive relief in an arbitrable dispute, provided that the traditional prerequisites for such relief are satisfied."); *see also Scaba v. Jetsmarter, Inc.*, No. 18-CV-17262, 2019 WL 3947510, at *7 (D.N.J. Aug. 21, 2019) ("The [FAA] does not deprive the district court of the authority to grant interim relief in an arbitrable dispute, provided the court properly exercises its discretion in issuing the relief." (alteration in original) (citation and quotation marks omitted)). Regardless of the correctness of *Vertiv*, however, this Court is not obligated to follow it in the face of overwhelming competing authority, both within the Second Circuit (as discussed) and beyond. *See Optum, Inc. v. Smith*, 360 F. Supp. 3d 52, 56 (D. Mass. 2019) ("At least seven Courts of Appeals ... have held that a district court has the inherent equitable power to issue a preliminary injunction to preserve the status quo pending arbitration in order to protect the ability of the arbitrator to provide meaningful relief if the plaintiff prevails in the arbitration.... The Supreme Court was not presented with this issue in *Schein*. There is, however, no reason to expect that it would disagree with the nearly uniform view of the Courts of Appeal that have addressed this issue...." (collecting cases)), *appeal dismissed*, No. 19-1149, 2019 WL 3564709 (1st Cir. Feb. 27, 2019). This substantial consensus of authority offers additional reason to reject Defendants' novel reading of *Henry Schein*.

c. Preserving the Status Quo

***7** Beyond reliance on *Henry Schein*, Defendants advance an additional argument for why this Court lacked authority to issue the preliminary injunction. In particular, Defendants argue that (1) the only permissible preliminary injunctions pending arbitration are those that preserve the status quo, and (2) that the Preliminary Injunction granted here changed the status quo and is therefore impermissible. (*See* Defs.' First Mem. 7 n.3, 12–13).

The Court rejects both elements of this argument. First, Defendants do not, and cannot, identify any authority holding that preliminary injunctions pending arbitration are so limited. Certainly, several precedents emphasize that preservation of the status quo is an important goal of many preliminary injunctions pending arbitration. *See Benihana*, 784 F.3d at 894–95 ("[A] district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration." (citation omitted)); *Blumenthal*, 910 F.2d at 1053 ("Arbitration can become a 'hollow formality' if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute." (citation omitted)). That cases contain such language is unsurprising given that the "typical preliminary injunction is prohibitory and generally seeks only to maintain the status quo pending a trial on the merits." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995) (citation omitted). These precedents, however, provide no indication that preservation of status quo is a *requirement* for preliminary injunctions pending arbitration.

Moreover, several precedents suggest precisely the opposite. For example, in *Nicosia*, the Second Circuit considered a request for a preliminary injunction pending arbitration where the relief sought consisted of "remedial notices be sent to past purchasers" of certain products and "measures be put in place to prevent Amazon from unwittingly selling" similar products. 834 F.3d at 238. Needless to say, such a request is not simply a preservation of the status quo. Nevertheless, the Second Circuit considered the requested relief on the merits, explaining that "courts should consider the merits of a requested preliminary injunction even where the validity of the underlying claims will be determined in arbitration." *Id.* (citation and quotation marks omitted). Similarly, in *Thorley*, the Second Circuit directed the district court to consider a preliminary injunction enjoining defendants from "soliciting their former clients in violation of their contractual obligations" even though they had already been doing so for several weeks. 147 F.3d at 230–31. That injunction is quite similar to the one entered here. Accordingly, this Court declines to adopt Defendants' novel limitation on courts' authority to grant preliminary relief pending arbitration. [3]

Second, even if such a limitation was the law, the instant Preliminary Injunction would still be appropriate. At Oral Argument, the Court accepted *arguendo* that Plaintiff's requested injunction was a "mandatory injunction," and found that Plaintiff had met the higher, "substantial likelihood of success on the merits," threshold necessary for such injunctions. *See N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (explaining that "[b]ecause mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing a clear or substantial likelihood of success on the

merits" (citation and quotation marks omitted)). [4] The Court did not, however, *decide* that the requested injunction was a disruption on the status quo. Here, on consideration of the issue, the Court concludes that the instant preliminary injunction, in fact, *preserves* the status quo.

***8** The Second Circuit has repeatedly explained that, for purposes of granting a preliminary injunction, the "status quo" is not simply the status quo in the moment before relief is granted. Rather, it refers to "the last actual, peaceable uncontested status which preceded the pending controversy." *Id.* at 37 (citation and quotation marks omitted). In other words, "[t]he 'status quo' in preliminary-injunction parlance is really a 'status quo ante.' This special 'ante' formulation of the status quo in the realm of equities shuts out defendants seeking shelter under a current 'status quo' precipitated by their wrongdoing." *Id.* n.5 (citations omitted); *see also Mastrio v. Sebelius*, 768 F.3d 116, 120–21 (2d Cir. 2014) ("Preserving the status quo is not confined to ordering the parties to do nothing: it may require parties to take action."). [5]

Under these legal standards, Defendants' characterization of the instant Injunction is incorrect. Defendants have indeed asserted, and Plaintiff does not dispute, that Mele began "active employment with Champion on December 2, 2019." (Def. Mele's Decl. in Supp. of Mot. To Stay ("Mele Decl.") ¶ 6 (Dkt. No. 22).) And to be sure, Plaintiff did not seek a temporary restraining order (and preliminary injunction) until January 9, 2020. (*See* Dkt. No. 1.) However, Plaintiff wrote to Defendants as far back as November 12, 2019, informing them "of Mr. Mele's non-compete and confidentiality obligation to General Mills" and expressing concern that "it currently appears to us that it would be impossible for Mr. Mele to perform the role of Chief Customer Officer for Champion Petfoods without violating his agreements with and obligations to General Mills." (Pl.'s Decl. in Supp. of Mot. for Preliminary Injunction ("Pl.'s Decl") Ex. A (Dkt. No. 18-1).) Moreover, Mele's position was not publicly announced nor its details explained until January 8, 2020, (Dkt. No. 18-2), the day before Plaintiff filed suit and sought interim relief. In light of these facts, it can hardly be said that the six weeks in which Mele was employed were an "actual, peaceable uncontested status which preceded the pending controversy." *N. Am. Soccer League*, 883 F.3d at 37 (citation and quotation marks omitted). On the contrary, the "controversy" was already well under way at least as far back as Plaintiff's November 12, 2019 letter of protest. Thus, because the relevant "status quo" is "the situation that existed between the parties immediately prior to the events that precipitated the dispute," *Asa v. Pictometry Intern. Corp.*, 757 F. Supp. 2d 238, 243 (W.D.N.Y. 2010), the proper status quo ante is the period prior to Mele's employment. [6]

Moreover, characterizing the instant Injunction as a preservation of the status quo comports with the general approach of district courts in similar cases. Indeed, "courts in this Circuit routinely apply the ordinary standard [rather than the heightened, mandatory injunction standard] when deciding whether to issue an injunction in connection with an employment contract." *Solomon Agency Corp. v. Choi*, No. 16-CV-353, 2016 WL 3257006, at *2 (E.D.N.Y. May 16, 2016); *see also New Horizons Educ. Corp. v. Krolak Tech. Mgmt. of Syracuse, LLC*, No. 18-CV-1223, 2018 WL 5253070, at *6 (N.D.N.Y. Oct. 22, 2018) (characterizing the plaintiffs' request for an order directing the defendants to stop using plaintiffs' trademarks and enforce the parties agreements as a request for traditional, "prohibitory relief"); *Devos, Ltd. v. Record*, No. 15-CV-6916, 2015 WL 9593616, at *9 (E.D.N.Y. Dec. 24, 2015) (granting a preliminary injunction based on the traditional (rather than heightened) standard even though defendants were already competing with, and soliciting business from customers of, the plaintiff). The logic behind this approach is simple: doing otherwise would permit defendants to "seek[ ] shelter under a current 'status quo' precipitated by their wrongdoing." *N. Am. Soccer League*, 883 F.3d at 37 n.5. The same principle applies here. Accordingly, even were preliminary relief pending arbitration to be limited to orders preserving the status quo, the Preliminary Injunction entered here would be proper.

2. The Enforceability of the Contract and the Balance of Harms

***9** Defendants also briefly argue that while Defendants would suffer "irreparable harm" absent a temporary stay, Plaintiff "will not be substantially injured by a temporary stay." (Defs.' First Mem. 10–12.) In particular, Defendants note that "the current Order ... restricts [Mele's] ability to earn a living and provide for his family," (*id.* 10); and that "Defendants have already put in place voluntary restrictions on the kind of work activity Mele will be permitted" that will sufficiently protect Plaintiff's "legitimate" interests, (*id.* 11).

In large part, these arguments rehash those that were already before the Court when it considered, and granted,

Plaintiff's Application for a Preliminary Injunction. The Court recognizes, of course, the hardship associated with enforcement of a non-compete obligation. However, Plaintiff was "free to accept employment in a non-competitive industry," *Capstone Logistics Holdings, Inc. v. Navarrete*, No. 17-CV-4819, 2018 WL 6786338, at *27 (S.D.N.Y. Oct. 25, 2018) (citation and quotation marks omitted); it was his own decision to accept employment in precisely the industry in which he worked, and with a direct competitor of his previous employer. Moreover, courts regularly enforce such obligations when freely entered into and when limited to a single year. *See id.* (explaining that "Delaware courts have consistently held that two-year covenants not to compete are reasonable in duration," and that where Plaintiff's business is nationwide, "covenants not to compete and not to solicit without a geographic scope may be enforced" (citation omitted)); *Cardwell v. Thermo Fischer Sci.*, No. 09-CV-7809, 2010 WL 3825711, at *7 (S.D.N.Y. Sept. 23, 2010) (enforcing a one-year non-compete agreement against a project manager employed for over four years); *Weichert Co. of Pa. v. Young*, No. C.A. 2223-VCL, 2007 WL 4372823, at *3 (Del. Ch. Dec. 7, 2007) ("Covenants of two-years' duration are consistently held to be reasonable. Those few cases holding that two years is an unreasonable duration involve unskilled workers who received no specialized training—clearly not the type of employee in this case." (citations and footnotes omitted)). [7]

Moreover, as this Court discussed in its oral ruling, numerous courts, both in New York and Delaware, have found irreparable harm where a senior executive with proprietary knowledge of a company's inner workings violates a non-compete agreement. For example, in *Sensus USA, Inc. v. Franklin*, No. 15-CV-742, 2016 WL 1466488 (D. Del. Apr. 14, 2016), the court reasoned,

> [The defendant's] employment history with [the plaintiff] supports a finding of irreparable harm. The record indicates that [the defendant] has in-depth knowledge regarding several key elements of [the plaintiff's] business operations. As a former executive ..., [the defendant] is intimately familiar with [the plaintiff's proprietary system.] The Parties recognize that [the defendant] worked on some of [the plaintiff's] biggest projects, ... [and] both acknowledge [the defendant's] familiarity with [the plaintiff's] internal policies regarding pricing and contract negotiation.... [The plaintiff] is actively competing directly with [the defendant's new employer] for some contracts.... Due to [the defendant's history] with [the plaintiff], as well as his former and prospective relationships with [his new employer], it is likely that [the plaintiff] will suffer irreparable harm if [the defendant] is not enjoined.

***10** 2016 WL 1466488, at *8; *see also* *Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158, 176 (S.D.N.Y. 2006) (finding that the plaintiff established irreparable harm where that defendant with knowledge of trade secrets violated a restrictive covenant and was presently working for a direct competitor); *Tristate Courier & Carriage, Inc. v. Berryman*, No. C.A. 20574, 2004 WL 835886, at *13 n.147 (Del. Ch. Apr. 15, 2004) ("The harms resulting from competition by someone bound by a noncompetition agreement are frequently found to be irreparable." (citation omitted)); *cf. Tasktop Techs. US Inc. v. McGowan*, No. 18-CV-1075, 2018 WL 4938570, at *7 (D. Del. Oct. 11, 2018) (holding that a non-compete was likely unenforceable because the defendant lacked " 'in-depth knowledge' of [the plaintiff's] business operations" and was not " 'intimately familiar' with [the plaintiff's] proprietary information." (citation omitted)).

While Defendants' briefing repeatedly seeks to obscure, or preclude consideration of, the harms associated with Mele's breach of his agreement, such arguments lack merit. For example, Defendants assert that "the threat of inevitable disclosure, by itself, is not a basis under either federal law or Delaware law to keep an individual out of a job." (*See* Defs.' Feb. 12, 2020 Letter at 3). Similarly, Defendants argue that any harms associated with such disclosures should not be considered because they are "purely speculative." (Defs.' First Mem. 11.)

These statements are misleading, both because they conflate contractual obligations and the DTSA, and because they misrepresent Delaware law. It is true that the DTSA does not authorize injunctions to "prevent a person from entering into

an employment relationship," and only authorizes injunctions that place conditions on employment where the injunction is based on "evidence of threatened misappropriation and not merely on the information the person knows." 18 U.S.C. § 1836(b)(3). But the instant Preliminary Injunction was not granted based on Plaintiff's DTSA claim; it was granted based on Plaintiff's contract claims. (*See* Jan. 23, 2020 Hr'g Tr. 16.) As the caselaw discussed above makes abundantly clear, when addressing violations of non-compete agreements, courts—including in Delaware—commonly consider the harm arising from the likely, even if inadvertent, misuse of confidential information or customer relationships. *See* *Capstone Logistics*, 2018 WL 6786338, at *27 (explaining that "restrictive covenants on 'key employees' with proprietary information serve legitimate business interests" (citation omitted)); *Sensus*, 2016 WL 1466488 at *8 ("Due to [the defendant's] history with [the plaintiff], as well as his former and prospective relationships with [his new employer], it is likely that [the plaintiff] will suffer irreparable harm if [the defendant] is not enjoined."); ("suffer irreparable harm if [the defendant] is not enjoined."); *Estee Lauder*, 430 F. Supp. 2d at 176 ("[E]ven assuming the best of good faith, it is doubtful whether the defendant could completely divorce his knowledge of the trade secrets from any work he might engage in." (alterations, citation and quotation marks omitted)). [8]

3. The Impact of Plaintiff's Delay in Filing Suit

***11** Defendants also argue, as they have before, that Plaintiff's claim of substantial harm is undermined by the fact that Mele "had already been working at Champion for five weeks with [voluntary] restrictions in place prior" to the entry of a temporary restraining order. (Defs,' Mem. 11.). To be sure, delays in seeking relief may sometimes undermine a party's claims of irreparable harm. *See* *Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 144 (2d Cir. 2005) ("We have found delays of as little as ten weeks sufficient to defeat the presumption of irreparable harm....." (citation omitted)). Generally, however, such delays are significantly longer than the six-week delay here. *See* *Silber v. Barbara's Bakery, Inc.*, 950 F. Supp. 2d 432, 439 (E.D.N.Y. 2013) (noting that "months-long delays in seeking preliminary injunctions have repeatedly been held by courts in the Second Circuit to undercut the sense of urgency accompanying a motion for preliminary relief" (citations omitted)); *Habitat for Horses v. Salazar*, 745 F. Supp. 2d 438, 449 (S.D.N.Y. 2010) ("[N]one of the cases relied on by [the defendant] found that a delay of as few as thirty days can negate a finding of irreparable harm." (citations omitted)); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) (delay of nine months negates a presumption of irreparable harm).

Moreover, courts have consistently held that when a brief delay is caused by "good faith efforts to investigate" the violation, such delay is not fatal to a claim of irreparable harm. *Tough Traveler*, 60 F.3d at 968; *see also* *Marks Org., Inc. v. Joles*, 784 F. Supp. 2d 322, 333 (S.D.N.Y. 2011) (noting that a "plaintiff's making good faith efforts to investigate" may justify delays in seeking relief (citation and quotation marks omitted)). Here, Plaintiff has explained that while it "knew that Mr. Mele had been planning to or had, in fact, gone to Champion Petfoods[, Plaintiff] did not know what he was doing there and had not been given any details about his job." (Jan. 9, 2020 Hr'g. Tr. 4.) Indeed, the very day Mele's employment was announced publicly and described in any detail, Plaintiff's counsel notified opposing counsel that he would be seeking a temporary restraining order the following day. (*Id.* at 5.) Accordingly, Plaintiff's brief delay between December 2, 2019 and January 9, 2020 indicates responsibility, not a lack of urgency, on the part of Plaintiff. The Court therefore concludes that Plaintiff's claim of irreparable harm is not undermined by the brief period in which Mele was employed by Champion prior to Plaintiff's seeking relief.

4. Purported "Credibility Determinations"

In a brief footnote, Defendants argue that "the Court impermissibly made findings on the merits, at least with respect to the credibility of Plaintiff's claims ... concerning the risk of disclosure and misappropriation of its confidential trade secret information ... despite the fact that [Defendants'] declarations were uncontroverted on the record before the Court." (Defs.' First Mem. 5 n.2.) This is incorrect. As the Court emphasized repeatedly in its ruling, it had no need to evaluate—let alone decide—the merits of Plaintiff's DTSA claim. (Jan. 23, 2020 Hr'g. Tr. 16.) Rather, the Court determined that Plaintiff was overwhelmingly likely to succeed on its contract claims, and that the imminent harm from Defendants' conduct with respect to those claims would be irreparable absent preliminary relief.

To be sure, part of that harm is based on the likelihood (if not inevitability) that Mele's intimate knowledge of Plaintiff's confidential information would influence (even inadvertently) his decisions as a Champion senior executive —and that the influence would operate to Champion's unfair advantage and Plaintiff's unfair detriment. But for the purposes of a preliminary injunction, Plaintiff need not establish whether such conduct amounts to "disclosure and misappropriation" of confidential information under DTSA, nor whether Mele has already ventured beyond such conduct, or even if he is likely to do so. It is enough that Plaintiff has established that Mele (with Champion's willing assistance) breached his contract with Plaintiff, and that that the harm from allowing the breach to continue is likely to be irreparable. Defendants do not, and indeed cannot, dispute this.

***12** Defendants also suggest that the Court "committed further error" by failing "to hold[ ] an evidentiary hearing to weigh the credibility of the parties' respective witnesses." (Defs.' Mem. 5 n.2.) This is sheer shamelessness. Defendants declined to make Defendant Mele available for a deposition in advance of the Court's January 23, 2020 proceeding (despite a Court Order), and then sought a protective order preventing his deposition, stating to the Court, "Defendants do not propose any testimony or the presentation of additional evidence at the PI Hearing other than what has already been submitted to the Court." (Dkt. No. 29.) Shortly thereafter, Defendants again represented to the Court "there is no need for Mr. Mele's deposition – or for any discovery – to take place prior to the hearing on January 23, 2020." (Dkt. No. 33.) Of course, the Court did not make any credibility determinations in deciding to grant the Preliminary Injunction. But for Defendants to resist the taking of depositions and discovery, oppose the use of witnesses, represent to the Court that the factual issues material to the granting of a preliminary injunction were not in dispute, and *then* complain about the lack of an evidentiary hearing is not a winning argument.

5. The Public Interest

Defendants' argument that the public interest weighs in favor of granting a stay is wholly without merit. Courts routinely hold "[t]here is undoubtedly a public interest in enforcing valid contracts including such restrictive covenants as they may contain." *HRB Res. LLC v. Schon*, No. 19-CV-339, 2019 WL 4015256, at *3 (N.D.N.Y. Apr. 25, 2019); *see also Empower Energies, Inc. v. SolarBlue, LLC*, No. 16-CV-3220, 2016 WL 5338555, at *13 (S.D.N.Y. Sept. 23, 2016) ("There is a well-recognized public interest in enforcing contracts...." (citations omitted)); *Sensus*, 2016 WL 1466488, at *8 ("It is in the interest of the public to hold parties to the very terms upon which they negotiated and agreed to be bound.").

Defendants, by contrast, can point to no competing public interest. Instead, Defendants recycle two authorities, neither of which is on point. (Defs.' First Mem. 11.) The first, a decision from the District of Delaware, simply explains that a particular contract was "not the kind of agreement that was entered into by two competent, business-savvy parties," because the defendant was "far from an experienced business professional" who began working with a "comparatively low starting salary of $40,000." *Tasktop*, 2018 WL 4938570, at *7 (citation, alteration, and quotation marks omitted). Defendants do not even try to argue that Mele was similarly situated. Second, Defendants invoke the general public policy in favor of arbitration, *see e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (explaining that the FAA requires courts to enforce arbitration agreements "according to their terms" (citation omitted)). That public policy, however, is not harmed by the issuing of a preliminary injunction pending arbitration. The opposite is true, as noted above. *See supra* Section 1; *see also Blumenthal*, 910 F.2d at 1053.

6. Requested Clarifications and Modifications

Defendants' First Motion concludes by requesting that the Court "clarify its Order" in two respects: (1) by "clarifying" that the Preliminary Injunction "remains in place only until the [P]arties' disputes are presented to the AAA for resolution[,] and not, as the Order could be read to mean, until the arbitrator renders a decision on the arbitrability of the dispute"; and (2) by "clarifying" that the Preliminary Injunction "restricts Mele only from using or disclosing any of GMI's confidential trade secret information, and he is not otherwise restricted from working at Champion entirely." (Defs.' First Mem. 12.) Defendants' Second Motion adds a third request: that the Court "modify the scope of scope of the restraint to permit Mele to work as head of sales for Champion ... with responsibilities for all jurisdictions except for the United States and Canada." (Defs.' Sec. Mem. 1).

The Court address Defendants' first request (regarding the duration of the Preliminary Injunction), and then turns to their latter two requests (regarding the scope of the Preliminary Injunction).

a. The Duration of the Preliminary Injunction

***13** Defendants argue that Preliminary Injunction may "remain[ ] in place only until the [P]arties' disputes are presented to the AAA for resolution," because anything further would exceed the Court's power. The argument is both illogical and unsupported by relevant authority.

As explained at length in Section 1 of this Opinion, longstanding precedent permits (indeed compels) district courts to consider motions for preliminary relief even where an arbitrator will consider the merits of an underlying dispute. *See* *Nicosia*, 834 F.3d at 238 ("Generally, courts should consider the merits of a requested preliminary injunction even where the validity of the underlying claims will be determined in arbitration."). Moreover, it is commonplace for such preliminary injunctions to continue throughout the pendency of the arbitration proceedings. *See, e.g.*, *Rex Med. L.P. v. Angiotech Pharm. (US), Inc.*, 754 F. Supp. 2d 616, 620 (S.D.N.Y. 2010) (granting "a preliminary injunction enjoining [the defendant] from terminating [an a]greement pending the conclusion of arbitration proceedings"). In fact, sometimes, preliminary injunctions are even issued during the course of such arbitration proceedings. *See Arnold Chase Family, LLC v. UBS AG*, No. 08-CV-581, 2008 WL 3089484, at *3 (D. Conn. Aug. 4, 2008) ("[A]t least in the Second Circuit, courts have historically entertained requests for provisional remedies during the pendency of arbitrations").

Here, of course, neither this Court nor an arbitrator has yet determined *whether* the arbitrator will even decide the underlying claims. On the contrary, in its January 23, 2020 ruling, this Court found only that the issue of arbitrability—not the underlying claims themselves—had been assigned to the arbitrator. (*See* Jan. 23, 2020 Hr'g. Tr. 10–13.) Whether the underlying claims will be decided by the Court or by the arbitrator remains, at present, an undecided question. If, however, the arbitrator decides that it, rather than the Court, has jurisdiction over the underlying dispute (a conclusion which is far from obvious), the Parties will simply be left in precisely the situation governed by the line of cases from *Roso-Lino* to *Benihana*: awaiting the results of an arbitration on the merits. The continuation of a preliminary injunction during the course of such arbitration proceedings on the merits would, therefore, be entirely natural. *See* *Benihana*, 784 F.3d 902 (affirming the grant of a preliminary injunction enjoining defendant from selling certain items "pending *resolution* of the arbitration"). It is also intuitive. After all, the purpose of such preliminary injunctions (like all preliminary injunctions) is to prevent irreparable harm pending resolution of the dispute on the merits. *See* *Blumenthal*, 910 F.2d at 1053. It would make little sense to dissolve a Preliminary Injunction and permit that same irreparable harm simply because an arbitrator has *begun* to consider the merits.

In support of their request to limit the duration of the Preliminary Injunction, Defendants invoke a First Circuit case, *Next Step Med. v. Johnson & Johnson Int'l.* In that case, the First Circuit explained that "where preliminary relief is for the arbitrator, a district court retains power [only] to grant an *interim* preliminary injunction ... for the interval needed to resort to the arbitrator—that is, for the period between the time the district court orders arbitration and the time the arbitrator is set up and able to offer interim relief itself." 619 F. 3d 67, 70 (1st Cir. 2010) (emphasis in original). There are, however, several problems with Defendants' reliance on this case here. First, it is far from clear that, in the instant dispute, "preliminary relief is for the arbitrator." Indeed, at the present moment, all that is before the arbitrator is the issue of arbitrability. Thus, the arbitrator may well decide that the underlying claims are not covered by the relevant arbitration agreement. Moreover, even if the arbitrator were to assert jurisdiction over the merits, it may (and likely will) decide that it has no authority to offer preliminary relief because the Parties' arbitration clause did not adopt the AAA Optional Rules for Emergency Measures of Protection. (*See* Pl.'s Feb. 21 Letter.) Thus, even if this Court were to adopt the First Circuit rule, it would not apply here.

***14** Second, the Second Circuit has apparently already rejected the First Circuit's limitation on injunctive relief pending arbitration. In *Thorley,* for example, the district court declined to consider offering preliminary relief on the grounds that the parties could "just as quickly obtain the same temporary equitable relief from the arbitrator as from a court." *See* *Thorley*, 147 F.3d at 230–31. The Second Circuit reversed, explaining that "the expectation of speedy arbitration does not absolve the district court of its responsibility to decide requests for preliminary injunctions

on their merits." (citation omitted); *see also Disc. Trophy & Co. v. Plastic Dress-Up Co.*, No. 03-CV-2167, 2004 WL 350477, at *8 (D. Conn. Feb. 19, 2004) ("[T]he Court has both the power and duty to entertain a motion for a preliminary injunction pending the results in the arbitration ... even though, as is the case here, the parties are entitled under the rules of the arbitral tribunal they have chosen to seek *pendente lite* relief directly from the arbitrator.")

Accordingly, the Court declines to modify the Preliminary Injunction Order, and the instant Preliminary Injunction shall remain in effect until resolution of the merits of the dispute, either by the arbitrator or this Court. [9]

b. The Scope of the Preliminary Injunction

As a threshold matter, because Defendants have already taken an appeal, the Court currently lacks jurisdiction with respect to both of Defendants' requests to modify the scope of the Preliminary Injunction. While "absent an appeal, a district court has complete power over its interlocutory orders," where an appeal has taken, a district court may act "only to preserve the status quo as of the time of appeal." *Ideal Toy*, 302 F.2d at 625. Here, Defendants filed their notice of appeal prior even to seeking a stay from this Court. (*See* Dkt. No. 40.) Therefore "jurisdiction [has] passe[d] to the appellate court," and this Court retains power only to clarify and preserve the status quo, not to substantively modify its order. *Ideal Toy*, 302 F.2d at 625; *see also Flatiron Health*, 2020 WL 416423, at *3 (explaining that a district court "may not alter the posture of the case on appeal"). Defendants' requests that Mele be permitted to work for Champion, either generally (as in Defendants' First Motion) or by coordinating sales outside of North America (as in Defendants' Second Motion), is wholly inconsistent with the text and spirit of the Preliminary Injunction Order. (*See* Dkt. Nos. 6, 10 (enjoining Mele from working for Champion and Champion from employing Mele) and 39 (adopting and converting the restraints in Dkt. No. 6 into a Preliminary Injunction)). Accordingly, the Court is precluded from granting the present appeal.

In the alternative, Defendants' requests to narrow the scope of the Preliminary Injunction are rejected on the merits as well. Defendants' first request, that Mele be permitted to work for Champion while being restrained "only from using or disclosing any of GMI's confidential trade secret information," (Defs.' First Mem. 12), wholly ignores the existence of Mele's contractual non-compete obligations. It therefore fails to prevent the irreparable harm associated with Mele's violation of those obligations. *See Sensus*, 2016 WL 1466488 at *8 (finding irreparable harm based on the violation of a non-compete obligation). As this Court has explained at length above, the instant contract prevents more than the conscious misappropriation of what Mele understands to be confidential trade information. It also protects Plaintiff from unfair competition generated by a direct competitor's hiring of Plaintiff's former senior executive while that executive retains current, proprietary knowledge of Plaintiff's operations and strategies. Indeed, even the best-intentioned former senior executive will likely fail in "completely divorc[ing] his knowledge of ... trade secrets from ... work he might engage in." *Estee Lauder*, 430 F. Supp. 2d at 176 (citation, alteration, and quotation marks omitted).

***15** Although slightly more sensible than their first request, Defendants' second requested modification is similarly inadequate. Defendants argue that Mele should be permitted to work as Champion's head of sales "with responsibilities for all jurisdictions except for the United States and Canada" because Plaintiff's subsidiary (for which Mele previously worked) is now limiting operations to the United States and Canada only. (Defs.' Sec. Mem. 1.) Thus, by working in this confined role, Defendants argue, Mele would not be directly competing with Plaintiff. (*Id.*)

The argument fails, however, because Defendants cannot explain how they would (or could) prevent Mele's conduct in this role from assisting, even indirectly, Champion's competitive efforts against Plaintiff in North America. Unless Defendants propose to set up a perpetual firewall that bars American employees from ever accessing Mele's coming year of work, communicating with Mele about this work, or absorbing the knowledge gleaned from this work into its domestic arm, Defendants' proposal is simply inadequate to ameliorate the concerns that Mele's agreement was designed to address. Of course, such a firewall is difficult to imagine, and likely impossible to implement.

The bottom line is this: a one-year restriction barring a senior executive from working for a direct competitor on the very product categories on which he previously worked is a sensible and reasonable restriction designed to prevent irreparable harm. Plaintiff appears to have bargained for, and received, Mele's commitment to abide by such

a restriction. Defendants' proposals do not, and cannot, adequately substitute for that restriction. Accordingly, the Court declines to modify the scope of its Preliminary Injunction.

III. Conclusion

For the foregoing reasons, Defendants' Motion to Stay the Court's Preliminary Injunction Order Pending Appeal and their Motion to Modify the Preliminary Injunction are both DENIED.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 915824

Footnotes

1 At Oral Argument, Defendants appeared to base their interpretation of *Henry Schein* in part on the fact that the underlying action in *Henry Schein* included a request for injunctive relief. Such an argument fails, however, because it ignores the critical distinction between permanent injunctions (which require a determination on the merits) and preliminary injunctions (which do not). *See* *Camenisch*, 451 U.S. at 396 (contrasting a motion for a permanent injunction, when "the parties will already have had their trial on the merits," with a preliminary injunction).

2 Recent Second Circuit precedent has also emphasized the narrow holding in *Henry Schein*. In *Metro. Life Ins. Co. v. Bucsek*, 919 F.3d 184 (2d Cir. 2019), *cert. denied,* 140 S. Ct. 256, 205 L. Ed. 2d 134 (2019), the Second Circuit rejected an expansive interpretation of *Henry Schein*—"that a court considering whether the arbitration agreement confers authority over arbitrability on the arbitrators may not consider whether the agreement calls for arbitration of the dispute." *Id.* at 195. As the Second Circuit explained, "[t]hat argument misunderstands the point of *Henry Schein.*" *Id.* Rather, "[t]he point of the *Henry Schein* opinion was that, where the parties *have agreed* to submit arbitrability to arbitration, courts may not nullify that agreement on the basis that the claim of arbitrability is groundless. The fault found by the Supreme Court in the lower court opinions was not that they failed to send the question of arbitrability to arbitrators. It was that the lower court, applying what the Supreme Court called a 'wholly groundless exception,' failed to make a finding on whether the arbitration agreement called for sending arbitrability to the arbitrator." *Id.* (emphasis in original).

3 The Court also notes that, in the past, the Second Circuit has expressly declined to create special standards for preliminary injunctions pending arbitration. *See* *Blumenthal*, 910 F.2d at 1054 ("A new 'rule of necessity' is unnecessary. At present, the parties are free to litigate the necessity of an injunction under traditional principles."). It is, therefore, unlikely to do so here.

4 As the Court explained in its oral ruling: "Now, a plaintiff seeking a preliminary injunction has to establish ... irreparable harm and a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary injunctive relief. And then, of course, there is the mandatory injunction test where GMI has to establish a substantial likelihood of success on the merits. And that is the test that certainly should have been applied and was applied. In the TRO context, you could argue that the status quo is the TRO, but I will apply the higher standard here because it's the prudent thing to do." (Jan. 23, 2020 Hr'g. Tr. 14.)

5 The Court acknowledges, of course, that these standards are not easily applied: "The distinction between mandatory and prohibitory injunctions is not without ambiguities or critics. Determining whether the status quo is to be maintained or upset has led to distinctions that are more semantic than substantive.... A plaintiff's view of the status quo is the situation that would prevail if its version of the contract were performed. A defendant's

view of the status quo is its continued failure to perform as the plaintiff desires." *Tom Doherty Assocs.*, 60 F.3d at 34 (citations, alteration, and quotation marks omitted).

6 To the extent that Defendants argue Plaintiff ceded the "status quo" by delaying the filing of its Complaint and Motion until January 9, 2020, the Court rejects that argument because the delay was both brief and explained. *See* Section 3, *infra.*

7 Both Plaintiff and Defendants have litigated the case on the assumption that Plaintiff's contract claims should be analyzed under Delaware law because at least some of Plaintiff's and Mele's contractual agreements incorporate Delaware law. (*See* Pl.'s Mem of Law in Supp. of Mot. for Preliminary Injunction (Dkt. No. 14.) 11; Defs.' Mem. of Law in Opp'n. to Mot. for Preliminary Injunction (Dkt. No. 31) 15 n.5.). Accordingly, the Court applies Delaware law on this issue. *See* *Texaco A/S (Denmark) v. Commercial Ins. Co. of Newark, NJ*, 160 F.3d 124, 128 (2d Cir. 1998) ("[W]here the parties have agreed to the application of the forum law, their consent concludes the choice of law inquiry.")

8 Defendants claim that "the threat of inevitable disclosure, by itself, is not a basis under ... Delaware law to keep an individual out of a job" is somewhat mystifying. Insofar as Defendants seek to describe independent actions under Delaware law for the theft of trade secrets, the statement is irrelevant to the instant claim, which sounds in *contract.* Insofar as Defendants suggest that the threat of inevitable disclosure is not sufficient harm in a breach of contract case, the assertion is belied by the clear caselaw discussed above. *See e.g.,* *Sensus*, 2016 WL 1466488 at *8. While Defendants purport to rely on *W.L. Gore & Assocs., Inc. v. Wu*, No. CIV.A. 263-N, 2006 WL 2692584, at *17–18. (Del. Ch. Sept. 15, 2006), *aff'd,* 918 A.2d 1171 (Del. 2007), nothing in that case even remotely supports the asserted statement.

9 Of course, the Preliminary Injunction shall not extend, in any event, beyond August 1, 2020, when Mele's relevant contractual obligation expires.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BUREAU OF CONSUMER FINANCIAL,

Petitioner,

-against- 20 Civ. 3240(KMK)

LAW OFFICES of CRYSTAL MORONEY,

Respondent.

----------x

United States Courthouse
White Plains, New York

August 18, 2020

HONORABLE KENNETH M. KARAS,
District Court Judge

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THE CLERK: Consumer Financial Protection versus Law Offices of Crystal Moroney PC, 20CV3240.

Counsel, please state your appearances for the record.

MS. ASSAE-BILLE: E. Vanessa Assae-Bille for CFPB.

MS. PATTERSON: Jehan Patterson, also for the CFPB.

MR. FRIEDL: And Kevin Friedl, also for the CFPB.

MR. DeGRANDIS: Michael DeGrandis, for Law Offices of Crystal Moroney PC.

MR. McCLAIN: Jared McClain, also for the Law Offices of Crystal Moroney PC.

THE COURT: All right, so we are gathered here for the oral argument on the CFPB's petition to enforce its CID that was issued back in November. So I have read the papers, but I certainly don't want to deny anybody the opportunity to supplement them. So I'll let you, CFPB, go first.

MS. ASSAE-BILLE: Thank you, your Honor. On behalf of CFPB today I will address the issues that squarely relate to the enforceability of the CID; however, my colleague, Kevin Friedl, is available to answer any questions your Honor may have regarding the constitutionality or ratification argument.

The central question before this Court is whether the Bureau has met the four criteria that determine the enforceability of a CID. We contend that it has.

First and foremost, the Bureau has a legitimate

purpose for conducting this investigation. As described in the CFPB's notification of purpose, this investigation concerns whether the respondents violated provisions of the Consumer Financial Protection Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act.

The CID, which we submitted as Exhibit A, is narrowly focused on the company's performance of debt collection and credit recording activities. For instance, it requests information concerning the respondent's operations, names of companies for which it collects debt, consumer disputes and complaints, policies and procedures, debt-collection phone scripts, and importantly, recordings of debt-collection calls with consumers.

The CID does not, however, ask for information protected by the attorney-client privilege nor does the privilege automatically attach simply because the respondent is a law firm. As the Second Circuit has articulated, documents attain no special protection just because they are housed in a law firm. On the contrary, it attaches only once the party asserting it has shown that the communications at issue occurred between a lawyer and their client or potential client and that the communication was for the purpose of securing an opinion of law, legal services, or assistance in some legal proceeding. None of the Bureau's requests seek communications protected by the attorney-client privilege. And in fact, the

only communications sought by the CID are call recordings in which the respondent was collecting or attempting to collect debts from consumers.

Now, the Bureau is subject to Section 5517 of the Consumer Financial Protection Act which prohibits the Bureau from exercising its enforcement authority over the practice of law. We note here that the exclusion contains important qualifications that we believe take this CID out of danger, so to speak, but the Court need not even reach this qualification because Section 5517(n) authorizes the Bureau to issue a CID to any person exempted by the practice of law exclusion where the person is a service provider and the Bureau is carrying out its responsibilities and function under Section 5562 of the statute which applies to investigation and administrative discovery. That Section, 5562, authorizes the Bureau to issue a CID to any person that it has reason to believe may be in possession, custody, or control of evidence that is relevant to a violation of Federal Consumer Financial Law. So, here the respondent is a proper recipient of the CID because it is such a person.

Beyond demonstrating that its investigation has a legitimate purpose and that the inquiry is relevant to that purpose, for the CID to be enforceable, the Bureau must also not have the information sought in its possession. This is very much the case here. As the Court is aware, the Bureau issued a CID to the respondent in June 2017, but the

respondent's production in response to that CID was woefully deficient. For instance, as respondent concedes in its opposition, it's withheld information responsive to at least 15 requests and some of their subparts. The privilege log that the respondent submitted in response to the 2017 CID asserts that the respondent withheld 569,862 phone recordings that were responsive to that first CID. And in addition, respondent withheld, by our count, at least 144 dispute letters from consumers in part because these letters allegedly identified the respondent's clients. And that's before we even get to the many pages that the respondent clawed back.

To the extent the respondent did produce documents, that production was overwhelmingly in an improper format. The Bureau's regulation at 12 C.F.R. 5562 requires that responses to the Bureau's CID be submitted in a medium requested by the Bureau. To that end, the first CID was issued with clear and detailed instructions regarding the formatting, including the requirement that information be produced to the Bureau in original or native files. All in all, the only document that the respondent produced in the correct format was a data dictionary in Excel format.

Furthermore, none of the 2017 production was certified, and so the Bureau has no guarantee that the answers or documents that were produced at the time were and continue to be true and accurate.

Lastly, we want to stress that the two CIDs are not identical. Crucially, the applicable period of the CID before this Court is longer and covers a more recent span of time. In other words, it seeks information that did not exist in 2017 or that changed in the years since. And so it is the Bureau's position that it is indeed requesting information that is not in its possession.

Lastly, your Honor, the Bureau has followed the administrative steps required to issue the CID. The CID contained the proper notification of purpose that informs the respondent of the purpose of the investigation, it was issued by a deputy assistant director in the Office of Enforcement, and it was served to the respondent by certified U.S. Mail. Therefore, the four elements of enforceability are met here, and the Bureau's CID should be upheld.

I also want to touch on the Federal Rule of Civil Procedure Rule 19 argument. We believe that Rule 19 does not require the joinder of FedChex in this matter. Respondent has provided no case law supporting the application of Rule 19 to a miscellaneous proceeding like this one to enforce an administrative CID, but even if the rule applied, joinder is not needed to protect FedChex's interests because, again, the CID does not seek communications between the respondent and FedChex or any other information protected by the attorney-client privilege. And even if it did, the Second

Circuit has made clear that the attorney-client privilege can be asserted by the client or by one authorized to do so on the client's behalf. There's no reason here that respondent could not assert the attorney-client privilege over communications they had with FedChex, and ostensibly respondent has attempted to do so, although, again, the Bureau believes that respondent has ultimately failed to meet its burden.

For these reasons, your Honor, the Bureau believes joinder is unnecessary and that this Court should enforce the CID.

THE COURT: All right, thank you. I know you had mentioned that Mr. Friedl is available to answer questions on the constitutional issues.

I don't know, Mr. Friedl, if you want to add anything to what was said in your papers on those issues or you just want to be reactive.

MR. FRIEDL: Kevin Friedl here, your Honor. I would just say something brief at the outset about the funding argument and the argument concerning the ratification, and I'll take them in that order, unless the Court would prefer a different approach.

With respect to funding, the Court is, of course, aware of this argument already having seen it in respondent's lawsuit against the Bureau where the respondent sought a preliminary injunction, essentially shutting down this

investigation. In denying that request, this Court specifically considered the argument that the Bureau's statutory method of funding somehow violated the Constitution and found that there was -- excuse me, the respondent had not shown any likelihood of success on the merits of that claim.

I would just highlight one thing which was the Court's observation of the "overwhelming weight of the case law which rejects plaintiff's claim." The Court cited district court decisions from Central District of California, Middle District of Pennsylvania, District of Montana, as well as the DC Circuit sitting *en banc*, all of which looked at the Bureau's funding specifically and rejected the argument that there was any constitutional problem there.

We also cite a Third Circuit decision in our reply which did not look specifically at the Bureau's statute but does speak to the broader issue of Congress' flexibility in exercising its power of the purse to fund in different ways federal initiatives or federal agencies.

We submit that nothing in respondent's opposition in this case warrants revisiting the Court's earlier, albeit preliminary, conclusion with respect to this claim.

I'm happy to say more about this argument now if your Honor has questions or potentially wait until after respondent has had a chance to --

THE COURT: Yes, I don't have any questions now, so

if you want to turn to ratification, you can.

MR. FRIEDL: Okay, and I'll try to be brief with this one as well. The ratification by Director Kraninger after the Supreme Court held invalid but severable this removal provision fully remediates any objection that respondent might have to the removal provision, the ratification really confirms that this removal provision has played no role in the Bureau's decision to issue and seek to enforce this CID.

I'd just say very briefly that ratification is a well-established remedy drawn from principles of agency law and it works retroactively to cure defects in an agency's initial action by rendering that action valid. Here, as I said, respondent's objection has been that the CID was issued without sufficient presidential oversight through an official who the President could fire at will. That objection has now been fully addressed by the director's affirmation while she was removable at will that the CID should be enforced.

Respondent objects in its opposition that while this would really leave it with no remedy at all, but that's just not the case. The Supreme Court has emphasized, including in the *Seila Law* decision itself where it was quoting its earlier removal provision case *Free Enterprise Fund*, that in these kinds of cases, the remedy has to be tailored to the constitutional problem, and that here you have really a very neat one-to-one match between the scope of the problem alleged

and the scope of the remedy. And that remedy I would point out is also one that is well tailored to take into account the other interests at stake here, including the interests of the Bureau in pursuing its legitimate law enforcement investigation, and the interests of those consumers who may have been harmed by the suspected violations of law under investigation here.

THE COURT: On that point though, that's just kind of an ends-justifies-the-means argument, but I think the counterargument is that what incentive is there for somebody to challenge something based on an unconstitutional structure is what the argument is here, respondent's argument here, as it was in *Seila Law*, and if ratification is this sort of the rubber-stamp exercise, then why would anybody bother.

MR. FRIEDL: Well, I think that, you know, the court in *Lucia* mentioned that in appointment clause cases it tries to craft remedies that do create an incentive for bringing these challenges. It's notable that the court in that case did not dismiss the enforcement action at issue. It remanded for another hearing before a properly appointed ALJ, the problem with the appointment, of the first ALJ who had heard the SEC's case. The court didn't think there that it was necessary to actually dismiss that action. It didn't think in *Seila Law*, it gave no indication in *Seila Law* that it thought dismissal or denial of that CID petition was necessary to incentivize to

bring such claims. It remanded for further proceedings. Surely it could have, if it thought it was necessary, simply denied the CID petition.

So it's true that the court has talked about creating incentives, but I think it has to also be read in light of the court's other statement that these remedies have to be tailored. And, again, the basis of the objection here is we shouldn't have to comply with the CID because we don't know that the Bureau would have wanted to pursue it if the director was under the President's plenary supervision. That's what makes the removal provision at all relevant to a CID proceeding in the first place, and that objection has been squarely answered by the director's confirmation after she became removable at will that the CID should be enforced and this case should move forward.

And, you know, I would also point out that the Bureau certainly wouldn't recognize this as sort of a legitimate incentive, but it is also the case that the respondent has won significant delay in this, in the prosecution of the CID just by raising this issue. *Seila Law* itself, that involved a CID that was issued in February 2017.

Clearly, I would submit that the on-the-ground experience suggests that there is some sort of incentive to raising these kinds of claims.

THE COURT: Okay. Anything else on this point?

MR. FRIEDL: I would leave it there, your Honor. Thank you.

THE COURT: All right, anything else from the Bureau?

MS. ASSAE-BILLE: Nothing else, your Honor.

THE COURT: Thank you both very much.

Who wants to speak on behalf of the respondent?

MR. DeGRANDIS: I would like to, your Honor, Michael DeGrandis of the New Civil Liberties Alliance, appearing on behalf of the respondent.

THE COURT: (Indiscernible)

MR. DeGRANDIS: I'm sorry, you're breaking up, sir.

THE COURT: I just said good afternoon.

MR. DeGRANDIS: Oh, thank you, good afternoon.

I'm joined, too, by Crystal Moroney and my colleague at NCLA, Jared McClain.

Your Honor, the petition should be denied because the Bureau manifests a structural or constitutional defect that the Supreme Court in *Seila Law* didn't cure, and that's the funding mechanism. It violates Article I of the United States Constitution.

Now, the Bureau tries to downplay its funding structure as commonplace, but make no mistake, in the history of United States, Congress has never before divested itself of the power of the purse such that one agency can requisition on-demand funding outside the appropriations process from a

second agency. Moreover, the President has never had this plenary authority over an agency where the funding is not appropriated by Congress and not reviewed by Congress.

And so it's the respondent's position that this is a threshold issue upon which all the other issues in this case rely. The Court can't enforce a second CID if the Bureau doesn't have the authority to bring an enforcement action under the CFPA. So to be clear, this is a non-delegation doctrine issue. Because last year the Supreme Court explained that Congress can't transfer to another branch powers which are strictly and exclusively legislative. And that's their words, the *Gundy* case, strictly and exclusively legislative.

And so what we see with Title X is that Congress isn't seeking assistance from a federal agency with implementing law. That's not how it structured the funding. Congress is instead divesting itself of its strict and exclusive legislative duties to make appropriations through law. That's the issue here.

The whole point of the appropriations clause was directed for fear that the executive would possess unbounded power. That's decidedly what the founders did not want, and in fact, then Judge Kavanaugh raised that issue in I think it was *US Department of Navy versus FLRA*.

So today's Bureau embodies that fear though, the fear that an executive would have control not just over executing

the law but also over determining what his or her funding should be in executing the law.

What I really want to impart to the Court is this is a case of first impression. Contrary to the Bureau's assertion, *Seila Law* did not bless the CFPB'S funding structure. In fact, it made the nondelegation problem even worse. The President now exercises complete financial and strategic dominion over the Bureau. And I'll also note he exercises this power that he doesn't even enjoy with respect to his own agency, the Executive Office of President of the United States. That receives funding in review from Congress, but the CFPB does not.

So this issue of first impression is, of course, then one that no court has ever ruled on because every single case before this was one in which the director was not dependent on the President for authority, and now the President has this total control.

And in fact, I'd like to quote the *Seila Law* court here, this should raise some red flags. The *Seila Law* court said, "Perhaps the most telling indication of a severe constitutional problem with an executive and state is a lack of historical precedent to support it."

Contrary to the Bureau's brief in this case, CFPB's funding is not commonplace. While certainly in rare instances not applicable to the Bureau some courts have held that there

are appropriations clause exceptions of sorts for self-funding, self-funding is limited, and the Bureau is not self-funding. It doesn't collect fees. It doesn't collect assessments. Instead, it goes to another governmental entity and demands funding that that governmental entity can't even refuse.

Just one of the examples that the CFPB gives for what a similar, what it perceives to be similar agency, is the Fed itself. But the Fed gets assessments from large banks that are regulated by the Fed. There's a direct relationship there, and that's an entirely different circumstance than the Feds going somewhere else.

And I will also add, we noted this in our briefing, so unless you want to get into the details, we don't necessarily need to get into the details, but the self-funded agency examples that do exist out there don't have the broad investigative and enforcement authority as the CFPB does. And *Seila Law* made that clear just how extraordinary the CFPB is. It is unique. And I believe it called it, said that it had knee-buckling penalties that it could assess against private citizens. And on top of all that, Title X prohibits the appropriations committee to the House and Senate from reviewing CFPB funding.

Now, perhaps Congress can appropriate through a formula where an agency receives funding based upon receipts for the agency's operation, and those are typically user fees.

But what it certainly cannot do is allow an agency or the President to determine its own level of funding. That's rank divestment of Congress's strict and exclusive duty to appropriate funding. Congress has never done this before. And no court has ever reviewed this type of action before.

There's absolutely no historical analogue here. And I think that that should be a telling indication of a severe constitutional problem. And so I would say that with absolute control over the CFPB funding, the President has nearly doubled his funding resources just on top of the executive Office of President funds while Congress hasn't lifted a finger. But it could also go the other way around, couldn't it? I mean, the President could instead of seeking 690 plus million dollars for CFPB, couldn't the President just pick one dollar? Couldn't the President just end CFPB operations for the year or for the rest of his term or however that works out? He certainly could. That's the nature of this non-delegation problem. That's what happens when Congress divests itself of this funding authority, and I think that it's an important point to make.

One last thing that I would add to this is that we also see that most of the time when courts, when the Supreme Court is comfortable with a certain divergence from strict appropriations clause funding for agencies, I'm talking about usually a -- I shouldn't just say funding for agencies, any

sort of structural nuance to an agency, court tends to be less understanding of that when there's more than one layer. We see that in *Free Enterprise Fund*. *Free Enterprise Fund* was dealing with a different issue as in it was the vesting power of the President. Here we're dealing with the vesting power of Congress. I think those two points are related, and the *Free Enterprise* court was particularly disturbed by two levels of tenure protection. Here, we have two levels of appropriations protection. This instance, the Fed, who gives money, gives money when demanded by the CFPB, gives money to the CFPB, the Fed itself doesn't receive regular appropriation, it is appropriated through a funding formula that Congress has set up for its operations. So there's a double layer there as well. So I think that that's important.

So this unchecked authority is inconsistent with constitutional design and purpose. The founders, it was very important to them they vest control over spending and lawmaking with Congress. And again, just to quote *Seila Law*, quoting Federalist 58, they warn that "The power over the purse is the most complete and effectual weapon in representing the interests of the people." And so, Title X violates nondelegation doctrine, does not fund the CFPB through the constitutionally prescribed process of congressional enactment via bicameralism and presentment. I think those are important issues here. And I say that it is a threshold question because

we have to answer that question, is the CFPB constitutionally funded, before we can get to the vacation issue because the Supreme Court was clear in *Seila Law* explaining that, well, we can't answer the ratification problem because, first of all, it wasn't a question presented. Second of all, because it wasn't a question presented, it was not thoroughly briefed.

Moreover, the court said, and you know what, ratification turns on case-specific factual and legal questions, so this is a better question to ask lower courts. Well, this Court won't be able to get to the factual and legal question surrounding the nuances of this particular case without first determining whether the CFPB is, in fact, a valid entity as it is currently funded. And so, when we look, if we get to that point where we can look at ratification, I think this also highlights why this is important, I believe the CFPB and the law office agree on the baseline principle upon which agency law is founded. I think Judge Preska said it well in the *RD Legal Funding* case, I'll quote her here, "Ratification addresses situations in which an agent was without authority at the time he or she acted and the principal later approved the agent's prior unauthorized acts."

So to the extent that ratification is ever available, the ratifier must be able to do the act at the time the ratification is made. The Supreme Court has talked about this in *FEC versus NRA Political Fund*. This is black letter agency

law, if the Bureau's funding is unconstitutional, Director Kraninger can't ratify anything, so that the Court won't be able to reach the factual or legal issues.

The Supreme Court has explained that remedies for separation of powers violations must advance the Constitution's structure and purpose, but also create incentives to bring such challenges.

And one thing that I would like to highlight here, I don't think we should forget where we came from. I don't think we should forget what Ms. Moroney has gone through to get to this point with respect to the stress and strain of close to $80,000 worth of attorneys fees in defending, but also in compliance fees in attempting to comply with the CFPB's first CID. This isn't nothing. This is real harm to her, her inability -- she's the only lawyer in her law firm. The inability of her to expand her firm, even engage in projecting for her business, being able to develop new business, being able to control costs, and so on and so forth. I won't belabor that point. We discussed that in greater detail during the preliminary injunction hearing. I do think it's important that we keep in mind where we've come from. And that if the CFPB can just come back and say, never mind, I know we were unconstitutionally structured before, we're just going to ratify it, you were conducting that investigation, and Ms. Moroney suffered all of those costs, all of those harms

while you were unconstitutional. That is hardly fair.

And I'll also add that the cases that the Bureau cites here to support its position regarding ratification involve appointments clause violations. So there is a difference between say Director Cordray, who is invalidly appointed, then becoming validly appointed, and then ratifying his prior act. There's a difference between that and Director Kraninger who was validly appointed. No one questions her appointment. What we question, actually, we don't question, what *Seila Law* told us was that she was unauthorized in the first place, she lacked the authority because she's unconstitutionally insulated from presidential control. She lacked the very authority to make the decisions in the first place. I think that's a very important point here. And to rule otherwise, to rule that the separation of powers violation of the CFPB, of the director's position with the CFPB, I should say, that it can simply be ratified by the very director who was unauthorized to act in the first place, would render the Supreme Court's *Seila Law* decision merely advisory and really enable Director Kraninger to perpetuate the separation of powers violation. There must be a remedy here, and that remedy should be dismissal. She can't ratify this.

I will add that ratification is an actionable remedy, the purpose of which is to convert unlawful acts, such as the director's in this case, into lawful ones. But there's also a

doctrine of unclean hands. You can't benefit from an equitable defense. If the party has acted in a way that's unfair, has gained an advantage, and I think that would certainly be the case here, because at all relevant times, Director Kraninger knew that her position was unconstitutionally empowered. She told Congress that in September 2019. This CID was issued in November 2019. This is a blatant exercise of power that she knew she did not have. So this is not a good faith mistake. This a deliberate constitutional violation.

To the extent the Court finds any of the citations that the CFPB brings forth to suggest that the ratification is valid, none of those apply because none of those are circumstances in which the governmental agent that acted unconstitutionally knew it was acting unconstitutionally at the time, and that's the case here.

So the funding defect must be resolved before reaching the issue of whether Director Kraninger can ratify the this enforcement action because she has to make a showing, and she hasn't made a showing, that the CID, that when issuing the CID in the first instance, that she had the power to do so. And it seems that she's already admitted, that she admitted in September she didn't have the power to do so, and that the Supreme Court has agreed that she did not have the power to do so.

Now, I will say that, if we get past the

constitutional issue, and if the Court disagrees with the respondent, if the Court believes that the CFPB is constitutionally funded and then the Court says, you know what, Director Kraninger can ratify her own prior bad action, then we get to the issue of enforcing the second CID.

THE COURT: Before we get to that, just one quick question.

MR. DeGRANDIS: Sure.

THE COURT: What if the CFPB decided, what if the director decided, okay, ratification is a tricky issue for us, so withdraw the CID and I'm just going to issue a new one. Is there anything that could stop the director from doing that?

MR. DeGRANDIS: Assuming that the CFPB is constitutional, I think the only --

THE COURT: Obviously, right. Right, right. You're right, that question assumes, and I understand the argument that that may very well be a prerequisite determination that has to be made, but just with respect to the ratification issue, and in particular, addressing your argument regarding the stripping your client of a remedy here, what would stop the director from doing that?

MR. DeGRANDIS: Nothing would stop the director from doing that. The director could -- the director is now validly in charge of the CFPB. Again, assuming all of the other assumptions here. So, yes, she could say, you know what, let's

just go ahead and take a look at this issue again and reissue the CID, which would be the next discussion, there would be certain limitations there based on the facts of this case, I believe.

Ms. Moroney isn't here to say to the CFPB, were it the constitutional, cannot demand certain documents from her. That's not her position.

So with respect to those limitations, there are problems with the CID in whole or in part that prohibit the CFPB from seeking its full enforcement here. And as I say, I said before, I think the parties are in agreement regarding the four elements that the CFPB must meet, but the CFPB has failed to meet these four elements. So first and foremost, the demands are not for a legitimate purpose.

So going back to your question, your Honor, if Director Kraninger said, never mind, I'm just going to go ahead and issue a third CID, that would be fine, but the third CID must be for a legitimate purpose. There are legitimate reasons why the CFPB may want information from a law firm that collects debt, but it can't impact the practice of law. The CFPB itself says, and I'm going to quote here, "The Bureau may not exercise any supervisory or enforcement authority with respect to the activity engaged in by an attorney as part of the practice of law under the laws of the state in which the attorney is licensed to practice law." And that's exactly what's happening

here. Ms. Moroney bent over backwards to comply with all demands for documents and information related to a third-party contact regarding debt collection. She drew the line at client confidences and privileged information as required by New York and New Jersey State bars.

THE COURT: Why not do a privilege log?

MR. DeGRANDIS: They have done a privilege log, and we did attach it to our brief. Mr. Canter had provided an extensive list of the documents provided and not provided and explained why those documents weren't provided. To the extent that the privilege log, the CFPB finds the privilege log insufficient, I'll say, we need at some point a mediator to help out with that. The impasse was over this information. And when Ms. Moroney said I'm not going to provide you with client confidences or privileged material, the CFPB -- I should say after that she said I will try to get waivers from my client, and the client said something to the effect of, oh, heck no. And so she couldn't do that. She was duty-bound not to turn that over. The CFPB told her, well, then we're going to enforce. And so at that point there was nothing more to negotiate with the CFPB on this issue and that -- to the extent that the privilege log provided is in any way insufficient, that should have been litigated at the November 2019 show cause hearing, but the CFPB chose not to do that.

And I'll say, this is also related to CFPB's argument

that, hey, gee, we don't have documents in our possession. Not true. You have the documents in your possession. They make these feeble process arguments. It's not in the format that we requested. Well, okay, it's not in the format that you requested, but it's perfectly readable, and if you had any sort of formatting objection, you waived that as soon as you mooted the first show cause hearing.

So now that you issue a second CID it was incumbent upon you to review those documents, narrowly tailor your second CID for those documents you don't have.

It at least appears to Ms. Moroney that they haven't looked at those documents. You think if they were really interested in -- and I think Mr. Friedl was saying that there are suspected violations of law under investigation. Well, if they're suspected violations of law, my goodness, I certainly would hope that the CFPB would have gone through the information that it had in its possession. It just seems strange that they wouldn't do that.

I also take issue with how narrowly the CFPB is viewing an attorney's responsibility to his or her client. It's not just about privileged documents, and I appreciate CFPB isn't specifically asking for privileged documents. It's also about confidentiality. Attorneys have an equally important responsibility in protecting privilege as it does in protecting confidentiality. That is a very important issue here that

implicates Ms. Moroney's license to practice law in New York and New Jersey. And the requests do implicate confidential information that the attorney has that she received from her client which is why we're now, I guess we're moving on three plus years, we've been saying to the CFPB, I have and Ms. Moroney's other attorneys have been saying, if you need this information, go ahead and go to the client and seek that information. And we know the CFPB knows how to do this, and we know that because they've got a case in California against one of her clients, against FedChex. That is the appropriate path, not going through the attorney because going through the attorney ends up interfering with the attorney-client relationship.

So I will say this, too, I think the Supreme Court case of *Endicott Johnson Corp. versus Perkins* really lays out the question that the Court should ask of itself when trying to determine whether the scope of an administrative subpoena like a CID is reasonable, whether the CFPB is stepping outside its statutory authority in trying to regulate the practice of law. I'm slightly restating this for our purpose here, but the Supreme Court essentially said the question is can the CFPB fully perform its statutory duty without the attorney-client confidences and privileged materials that it's demanding from the law firm? And I think the question has to be yes. To the extent that there are client confidences, there's no reason,

it's plainly irrelevant because the client confidences can be discovered, can be acquired from the clients themselves. And I think that's an important point here.

And another thing, the CFPB glosses over all of the interrogatories that Ms. Moroney's law firm answered. There are over 80 interrogatories that she answered. There's no explanation as to why she would have to reanswer those questions, why even the format was something that the CFPB didn't like. It's just not clear why the CFPB is issuing a second CID that doesn't take into account the information it already has.

And I think the second point here though, and I think I've probably have covered the issue a little bit, so I won't belabor the point, is that the CFPB hasn't followed a lot of the required administrative steps. Again, some of this is related more to the ratification argument. There is a question regarding the timing of ratification, of regulations, and guidance, along with when this particular enforcement action was ratified, but I want to highlight the Bureau is being a bit disingenuous here. They claim that the authority to issue and enforce CID comes directly from the Consumer Financial Protection Act rather than any Bureau regulation. An element of that is true, but that's not the complete truth. In fact, the amended petition to enforce the CID and the memorandum in support cite to Code of Federal Regulations not fewer than nine

times, and the attachments not fewer than 18 additional times. There's a whole host of implementing regulations and the CFPA gives the CFPB the authority to implement those regulations regarding investigations and CID enforcement and so on and so forth.

So I think I would like to just reiterate one point, and that is objections to the formalities, the extent CFPB is claiming they don't have these documents. I think those are waived when it voluntarily dismissed the 2019 enforcement action. And I think for that reason the CFPB needs to go back to the drawing board regarding its CID if it has the authority to issue one in the first place.

The only last point I'd like to make here is related to Rule 19. I think the one thing, and I'm sure the Court is aware of this but I think I should say it here, non-joinder isn't a defense to an enforcement action. The respondent is not seeking relief here. She merely asserts that if this Court finds, obviously, the Bureau's funding structure doesn't violate nondelegation doctrine, that the Bureau properly ratified its unlawful acts, that in order to -- to the extent that the CID implicates FedChex's interests, and only to that extent, that FedChex must be joined to that portion so that they can defend their interests, or the CFPB should amend the petition to enforce to specifically exclude documents related to FedChex.

Again, this implicates Ms. Moroney's ethical obligations, and the concern is, what if California denies a petition to enforce against FedChex? Ms. Moroney already asked FedChex if they would waive confidential privilege here, and they said no. So she's under instructions from her client, don't provide those documents. What if the California court says, that's right, you don't have to provide those documents, but this Court is free to say, yes, Ms. Moroney, you do have to provide those documents. Well, that puts Ms. Moroney in a very awkward spot. It also, as a practical matter, impedes FedChex's ability to protect its interests. There are inconsistent obligations here for Ms. Moroney with respect to what she is supposed to do in protecting her client's confidential and privileged information.

So I think that's really all I have, and obviously I'm happy to answer any questions you have, your Honor.

THE COURT: You've covered a great deal of material, and as I said, I've read the papers which were quite comprehensive, so I very much appreciate your efforts, and I'm sure your client does as well.

Thank you very much, Mr. DeGrandis.

MR. DeGRANDIS: Thank you.

THE COURT: All right, does anybody else from the Bureau want to reply?

MS. ASSAE-BILLE: Yes, your Honor. I'd like to

respond to a few points that are not related to the constitutionality or ratification points.

THE COURT: Okay.

MS. ASSAE-BILLE: So, first, the respondent brings up *Endicott Johnson Corporation v. Perkins*. Respondent cites this 1943 Supreme Court case and states on its brief on page 30 that in that case the court concluded that the government could issue an administrative subpoena because the evidence sought was not plainly incompetent or irrelevant to any lawful purpose. Confusingly, however, the respondent then concludes that the essential question is whether the Bureau can fully perform its statutory duty without the information demanded. That interpretation distorts the very standard that respondent quotes in its own brief. The central question is simply whether the evidence sought is not plainly incompetent or irrelevant, and that standard is certainly part of what is one of the elements that is articulated in *United States Construction Products*, which is the case that outlines the four criteria for enforcing a CID. We believe that distinction to be meaningful because it is typical in these investigations for the government to collect a number of documents that are certainly plainly relevant and not incompetent but that the government may not necessarily rely upon to prove its case down the line. We doubt that the *Endicott* court intended to tie the Bureau's hands in the way that the respondent attempts to do

now. What matters here is relevance. And as I said earlier, nothing the Bureau has requested is irrelevant.

I also want to touch on the privilege log question. We are fairly confused here because the respondent asserts that they have provided a privilege log. The CID before this Court was issued on November 14, 2019. The respondent has produced nothing since that date. They have not produced documents, they have not produced answers. And certainly they have not produced a privilege log as required by -- and as is their right under 12 C.F.R. 1080.8, which provides that if a respondent is withholding information on the basis of attorney-client privilege, then they must produce the privilege log.

Again, respondent has not done so here, nor do they identify any request to which they believe the attorney-client privilege should attach in their opposition brief. Instead, they vaguely reference that there are concerns about -- that the Bureau has sought information relating to their representation of their client and that we have sought information regarding their contacts with their clients, but those allusions do not meet the burden in the legal standard. And in the Second Circuit case of *United States versus Construction Products Research* where an administrative subpoena was challenged based on the attorney-client privilege, failure to provide an adequate privilege log was sufficient for the

court to uphold the subpoena.

In this, the respondent suggests that perhaps a mediator could help us resolve the issues down the line, but in our view, your Honor, the respondents have had plenty of opportunity to provide a privilege log, not only in response to the CID, but after the director denied its petition to set aside or modify the CID, the respondent could have provided a privilege log and did not do so. They could have attempted to provide a privilege log while opposing this very petition and they have not done so. So in our view, the time to submit a log has passed, and respondent's failure to do so weighs in favor of upholding and enforcing the CID.

I also want to touch on this confidentiality argument that the respondent has referred to in, again, fairly vague terms in their brief and again today in this hearing. What they're referring to is New York of Professional -- New York Rule of Professional Conduct 1.6. We contend that that rule does not render the purpose of the CID illegitimate, nor does it preclude enforcement of the CID. We underscore again that we are not seeking information related to the practice of law, as is plain from the CID that is attached as Exhibit A. And Rule 1.6 applies to legal clients.

Here, any information the Bureau seeks about the respondent's relationship to its client is limited to the debt-collection services and credit-furnishing services that

the respondent provide. So we contend that Rule 1.6 is not triggered, but even if it were, a number of courts have recognized that Rule 1.6 does not prevent a government agency from obtaining certain client information through an administrative subpoena.

In any event, the respondent appears to concede that an order from this Court would fall under the exception to Rule 1.6 which permits disclosures of confidential information to comply with other law or a court order. The Bureau's position is that this subpoena already brings, already triggers this exception, but certainly a court order from the Court would absolutely remove any Rule 1.6 concerns.

I also want to go back to this argument about what the Bureau has in its possession. The respondent characterizes its production as perfectly reasonable. While that may be their view, that is not the standard that applies here. Again, the Bureau's regulation at 12 C.F.R. 5562(c)(1)(A) require that responses to our CID be submitted in the medium requested by the Bureau, pardon me, and that's also 12 U.S.C. (c)(10). So both the statute and the regulation permit us to ask for information in a certain format, and that is not a cosmetic concern. A client's production would contain metadata that provides additional information about documents such as their source, their dates of creation, their custodian, and so forth, things that you cannot simply get from taking a look at a

document and seeing it as readable. But, of course, all of that is secondary to the fact that, again, the Bureau's statute and regulation are fairly clear on what the respondent's obligations were here. And we also do not follow the argument, nor has the respondent provided any legal authority to support its argument, its contention, pardon me, that in withdrawing its first petition the Bureau somehow waived its objections to the production's format. That is certainly not our position. We have never conceded such a thing, and we continue to maintain that the production was improper and that we should not have to rely on it in response to the second CID.

Now, the respondent with respect to Rule 19 has brought up that the Bureau could simply obtain the information that it seeks from Moroney, from the respondent from its client. Even if FedChex -- even if the Bureau has issued a CID to FedChex, and they had, and FedChex were to comply, the respondent would still have to produce information in response to each of the other -- to each of the requests in the CID which asks for information relating to services that it offers to other clients. And, again, information that is not in the Bureau's possession and information that is solely in the custody or control of the respondent.

We also want to note that, as the respondent has refused to comply with the CID, the Bureau does not have in its possession information, complete information about who the

respondent's clients are. So perhaps FedChex complies, but the Bureau is interested in having a sense of the identity of those other clients on whose behalf the respondent performed debt-collection and credit-furnishing activities. So that argument to us again really does not -- should not exempt the respondent from having to comply with the CID.

And I also want to add on that point that, again, suggesting that the Bureau can obtain some of the information from another party isn't -- it's not -- it doesn't resolve the fact, it doesn't contradict the fact that the respondent is a person under, as defined in the Bureau's organic statute, is a person from which the Bureau can seek information.

So we just don't believe that it makes any difference that the Bureau could hypothetically obtain a modicum of information from other parties.

And the last thing I'll say here is I just want to go back to the practice of law exclusion that is in Section 5517 of the Consumer Financial Protection Bureau. It's certainly true that the Bureau cannot exercise supervisory and enforcement authority over the practice of law, but as I mentioned at the outset of this hearing, the exclusion contains an important qualification, and we did not, for space-related reasons, we did not outline those qualifications in our reply, but I'll do so here to clarify this issue for the Court.

First, the law exclusion provision permits the Bureau

to bring lawsuits against any law firm engaged in the provision of consumer financial services where the services are not part of the legal representation. And that's codified in 12 U.S.C. 5517(e)(2)(A). This is in line with case law that says that where an attorney acts as a collection agent, the communications between him and his client are not protected by the privilege.

Second, the limitation does not apply to a consumer financial service that is offered or provided by an attorney to any consumer who is not receiving legal advice or services from the attorney in connection with such a financial service. And that's under (e)(2)(B) of the same statute.

So this exemption, for instance, clearly entitles the Bureau to those debt-collection calls between the respondent and consumers, presuming that the respondent is not providing legal advice or opinions of law to the same consumers from whom it is collecting facts.

And third, third and lastly, the limitation, the statute says that the limitation is not to be construed to limit the Bureau's authority with respect to any attorney to the extent the attorney is otherwise subjected to any of the enumerated consumer laws. And here we want to point out that the Federal Debt Collection Practices Act and the Fair Credit Reporting Act are enumerated consumer laws.

So, again, we firmly believe that the practice-of-law

exclusion does not foreclose the enforcement of the CID before this Court.

THE COURT: All right. Thank you very much, Ms. Assae-Bille.

Mr. Friedl, did you want to address the constitutional issues? Again, I've read all the papers, but if there's anything in particular that was said by Mr. DeGrandis, feel free.

MR. FRIEDL: Absolutely, your Honor. I think Mr. DeGrandis did cover a lot of ground. It won't surprise you to hear we disagree with it, but I will stand on the papers and just highlight a few brief points out of respect for the Court's time, which I recognize the Court has already been very generous with this afternoon.

With respect to funding, Mr. DeGrandis said that this is a nondelegation doctrine issue, but in all these filings and in the presentation today, it's never -- it's such a challenge, it has never actually articulated that doctrine requires certain delegations of congressional authority to be guided by an intelligible principle. And so long as they are, there's not a constitutional problem.

It's not even clear here exactly what the delegation is that's under attack. I presume it's the -- really the main funding provision in 12 U.S.C. 5497(a) and (b), but that just authorizes the transfer of a certain amount up to a capped

amount of funds from the combined earnings of the Federal Reserve System as determined by the director to be reasonably necessary to carry out the authorities of the Bureau under the federal consumer financial law, and it actually goes on, I won't read the whole thing. But these provisions include, you know, actually a far clearer and more definite principle to guide the director's decision-making on that point as compared to others that the Supreme Court has upheld against nondelegation challenges.

The respondent also highlights that the Bureau draws funds from the combined earnings of the Federal Reserve System, such as one agency taking money from another as a factual matter. I don't know if this was in our brief, I want to be clear that the Bureau is formally part of the Federal Reserve System. That's in 12 U.S.C. 5481(a). But more to the point, the factual distinction that respondent wants to draw between the Bureau and other agencies really don't make a difference under either the nondelegation doctrine or other framing of this challenge under the appropriations clause. That clause requires that payment of money from the Treasury must be authorized by statute. That was the Supreme Court's holding in the *Office of Personnel Management* case we cite and, of course, that is the case here. The Bureau's method of funding is authorized by its organic statute and Congress remains free at any time to amend that statute to do so.

And so the comparison to *Free Enterprise Fund* where there were sort of two stacked removal restrictions really is completely inapposite. The problem there was that double layers of removal provision made a difference for the President's ability to oversee the members of the accounting board that was at issue there. He couldn't remove those officials even for cause, he had to work through the FEC commissioners who the court assumed for purpose of that case were removable only for cause. So there was a double layer that made a difference.

The Bureau's funding, whether it is drawing money from Federal Reserve System, from its own imposition of fees or from some other method, it really doesn't make any difference, it's an appropriation made by statute and it is something that Congress could revisit at any time if it sees fit.

Unless your Honor has questions on this, I would just turn to ratification and address two or three points quickly.

The respondent says the cases we cite on ratification involve appointments clause violations. That's not true. We cite a case from the DC Circuit, *FEC v Legi-Tech*, which involves what the court called a structural separation of powers problem where there were potentially congressional appointees were part of that commission at that point in a nonvoting capacity but were appointments clause issue. Nor is there any reason that this Court should ignore the cases that

approved ratification in the appointments clause context such as the just a Ninth Circuit's decision in *Gordon*. In this case, as in cases like *Gordon*, the initial problem is with the exercise of authority by an agent, the head of the agency. In *Gordon*, the problem is that official had not been properly appointed. Here the problem was that official is not properly -- was not properly removable. But in both cases that initial defect in the agent's authority is cured by subsequent ratification once the problem is solved. There's no reason to discount those cases just because they involve the appointments clause.

Respondent also invokes the doctrine of unclean hands and suggests the Bureau couldn't ratify any bad actions. But what bad action? The Bureau hasn't done anything in this case beyond come to this Court seeking a judicial resolution of the dispute over the CID in an attempt to carry out its congressionally mandated mission. And nothing in the *Seila Law* decision suggests that -- undermines that or suggests that the Bureau was engaged in some sort of bad conduct requiring overly broad remedy to deter that conduct going forward. It was the Bureau's position that prevailed in *Seila Law*, that the removal provision is unconstitutional but severable. So I had to address that point. And the final -- I'll just rest there, unless your Honor has any other questions, we would just stand on our briefs.

THE COURT: I have no other questions. Thank you for making those points.

All right, we've been at this for a while, but I don't want to deny respondent a chance. If there's anything else you want to say, by all means.

MR. DeGRANDIS: Thank you, your Honor, very quickly then. What I'd like to point out regarding the constitutional issue is that the delegation problem is Congress divesting itself trying to delegate its authority to make appropriations through law. So I would like to sort of answer or address that concern that the CFPB stated there. And regardless of its place, the CFPB's place in federal agency hierarchy of things, it's still deciding some funding. It doesn't matter what its relationship is to the Federal Reserve, what matters is that the President or the director can demand of the Federal Reserve payment instead of going to Congress and getting Congress to appropriate those funds.

The next point I'd like to make with respect to ratification is only that when I use the word bad, this wasn't a moral argument. I am not saying that the director is a bad person or anyone at the CFPB is bad. The bad acts are the unconstitutional acts, and the director at all relevant times knew that what she was doing was unconstitutional. She knew that she didn't have the constitutional authority, she previously admitted that, and the *Seila Law* court confirmed

that for us.

I have two points that I'd like to close with which are related to the CID itself.

First of all, with respect to waiver of any formatting objection, my grounds for saying that are the same reasons that I would think the CFPB is saying that it didn't receive a privilege log with the second CID. They're 100 percent correct, there is no privilege log with the second CID. Ms. Moroney has not complied with the second CID in any way, shape, or form, so there is no privilege log. But there is also -- they still have documents in their possession from the first CID. So if they wanted, if the CFPB wanted to make those objections, the right time to make those objections would have been at the November show cause hearing, not now. And I'm a little confused by the CFPB's statement that the time to submit a privilege log in this particular case has passed. CFPB has jumped up and down and all around promising that there is absolutely no harm in ignoring a CID until it comes time for a court to order enforcement. So it surprises me that they would suggest the time has passed. But we will admit that there has not been a privilege log to this point for the second CID.

And lastly, regarding the *Endicott* case, I would agree the *Endicott* case doesn't tie the CFPB's hand. I don't think that's the right way to look at it. The *Endicott* case

does deal with plainly incompetent or irrelevant information. What makes information plainly incompetent or irrelevant is where that information isn't targeted toward a legitimate purpose, doesn't advance the exploration of issues related to the CFPB's statutory duty, and that's our position here with respect to the client confidences and names of clients and so on and so forth.

So that's really the issue and why we think that while we are subject certainly to CFPB inquiries regarding just the collection of debt we'll say, that inquiry is limited to third-party documents, it is limited to those sorts of things. And Ms. Moroney, while she has turned over the vast majority of that information, to the extent that there is more that's required because the second CID has an additional two-year timeframe roughly thereabouts, that would be an adjustment that would have to be made if this Court decides to enforce a second CID. She's objecting to those legitimate portions of the CID.

That's all I have to say.

THE COURT: All right.

Anything else from anybody? Okay.

Well, what's the band say, a long strange trip it's been. So here we are.

Seila Law comes down which provides some illumination, but what I want to do is give you a ruling now, because if you wait for me to write an opinion, I think this

will not be in anybody's interest. So I'm going to go through some factual background. Obviously what I relate to you here is taken from submissions from both respondent and the Bureau.

Now, according to the Bureau, respondent is a law firm that collects on delinquent or defaulted consumer debt on behalf of various creditors. Respondent also provides information to credit reporting agencies about consumers from whom it is seeking to collect debt, but respondent does clarify and consistent themes throughout its position here in this case that it is a law firm that provide legal advice and services to clients. Indeed, there's no disputing that, nor is there any disputing the fact that Ms. Moroney is licensed to practice law in this state and in New Jersey, and that her firm is regulated by the New York and New Jersey Rules of Professional Conduct, and of course her continued ability to practice as a licensed attorney is conditioned upon strict adherence to those rules.

We all know the first CID was issued to respondent back in June of 2017. According to the Bureau, this CID sought "substantially similar" information to the 2019 CID but it's not identical. What's more, the Bureau claims that respondent produced a partial response to the 2017 CID but it withheld and "clawed back a significant amount of material." And there's also a claim that some of the documents were not produced in compliance with the Bureau's standards regarding electronically stored information, that there was no certification, that their

responses to the 2017 CID were true and complete.

Now respondent counters by noting that it did provide written responses to the interrogatories, produced thousands of pages of documents and other data, and to the extent that there was a decision to not produce certain documents, that was based on the attorney-client privilege and other nondisclosure principles, or because the material, the responsive materials might have been inextricably intertwined with privileged material. But in particular what the Bureau contends is that respondent originally identified about 1793 pages of responsive material, along with 1150 pages of which was comprised of data dictionary tables that were duplicative of Excel spreadsheets that the respondent also produced, and that the respondent also withheld responses to at least 15 of the Bureau's requests, including 144 letters of dispute that it deemed to be responsive to the Bureau's request for legal actions and administrative proceedings filed against respondent or its principals relating to the company's debt or information furnishing activities.

Now respondent does claim that, well, first of all, respondent has made the point that it retained ethics counsel for independent advice, and relied on that advice in evaluating its duty under Rule 1.6 of the New Jersey and New York Codes of Professional Conduct to protect the information it deemed to be covered by attorney-client privilege. There was a request for

waiver from clients, which was declined. And so from respondent's perspective, the Bureau was putting respondent in a position to violate ethical obligations regarding asserted confidences.

There was correspondence that explained some of these points and then ultimately what happened was is that in November of 2019 the Bureau withdrew the 2017 CID. That was on November 4.

On November 14, the Bureau had issued the 2019 CID, and all of what was requested is spelled out in the petition at paragraph 1. It's also Exhibit A to Ms. Assae-Bille's declaration. The respondent takes the view that the two CIDs are not initiated due to any consumer complaints regarding any of the purposes listed in the Notice of Purpose because otherwise the Bureau would have indicated as such.

The CID was issued by a deputy assistant director of the Office of Enforcement and was served on respondent by way of certified U.S. Mail, return receipt requested. The materials were due by December 16 of 2019. On December 2, respondent and counsel for the Bureau met and conferred in accordance with 12 C.F.R. 1080.6(c).

There was some discussion about modification, but that was never forthcoming. Instead, respondent filed a petition requesting that the director set aside or modify the CID which stayed the deadline for respondent to actually answer

the CID. And this request is made both on constitutional and statutory grounds and sought a modification to excuse respondent from producing any material that had previously been submitted in connection with the 2017 CID.

That petition was denied. There was a request to have respondent fully comply with the 2019 CID within ten days. Also, the director determined that the respondent's petition was untimely.

The bottom line here is that by March 19 of 2020, counsel for respondent indicated that respondent did not intend to comply with the 2019 -- not comply, respond to the 2019 CID.

So there's been no production of materials in response to the CID, and as has been acknowledged, there's been no privilege log with respect to the 2019 CID, but respondent does aver that the only documents that have been withheld from its response to the 2017 CID were those related to the practice of law, not documents exclusively related to third-party debt collection, and that respondent has produced all policies and procedures that the Bureau had requested in the 2017 CID.

There's also, I mean I'll note this because respondent makes this point in its papers, there is a pending petition to enforce a CID against FedChex Recovery, which I'll just call FedChex today, which is another one of respondent's clients, which is out in the Central District of California. From respondent's perspective, that CID seeks the same

information sought in the CID at issue here regarding respondent's contacts with that client.

So the 2019 CID does contain notification of purpose. According to the Bureau, the CID sought from respondent materials that may be relevant to the Bureau's investigation that were not already in its possession, including certain interrogatories, written reports, documents, et cetera.

The requests in the CID include, among other things, respondent's organizational structure, its employees, business activities, debt-collection activity, identities of creditors or third parties for whom respondent performed debt-collection activities, information on consumer complaints and disputes, policies and procedures, handbooks, guidance, and training materials, and recordings and calls between respondent and consumers or third parties related to debt-collection attempts.

All right, so just for the record, in terms of some background of CFPB, it was created in 2010 by Congress as an "independent financial regulator within the Federal Reserve System." The statute that enables the Bureau is the CFPA, or Title X, of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Bureau is tasked with implementing and enforcing financial consumer protection laws. This is all laid out, of course, in *Seila Law*.

Now, upon its creation, Congress transferred the

administration of 18 federal statutes to the Bureau and enacted a new prohibition on any unfair, deceptive, or abusive act or practice by certain participants in a consumer finance sector. Also, the Bureau is able to implement this standard and the statutes under its purview through binding regulations.

Also, along with its rule-making authority, the Bureau also has adjudicatory authority, as it's allowed to conduct certain administrative proceedings.

Congress vested the Bureau with certain enforcement powers which allows it to conduct investigations, issue subpoenas, and CIDs, initiate administrative adjudications, and prosecute civil actions in federal court.

The Bureau is authorized to seek restitution, disgorgement, injunction, and civil penalties up to $1 million for each day that a violation occurs.

As part of its enforcement authority, the Bureau can issue CIDs, which are a type of investigative administrative subpoena. In fact, the CFPA provides the Bureau with its authority to issue the CIDs and enforce them in federal court. For that I'm citing 12 U.S.C., Section 5562(c)(1) and (e)(1).

So under the CFPA the Bureau can issue a CID when "it has reason to believe that any person...may have information relevant to violation of federal consumer financial law." That's from 5562(c)(1).

The Bureau can initiate a proceeding to enforce the

CID in federal court by filing a petition, which is what we're dealing with here.

The director has the five-year term. The director is appointed by the President and does require Senate approval.

Until the Supreme Court's decision in *Seila Law*, the President was able to remove the director only for "inefficiency, neglect of duty, or malfeasance in office." But in *Seila Law*, the Supreme Court determined that the Bureau's leadership by a single independent director violated separation of powers, as it vested "significant governmental power in the hand of a single individual accountable to no one," and that the director's "insulation from removal by an accountable President...rendered the agency's structure unconstitutional." That's from 140 Supreme Court at pages 2203-4. But the Supreme Court did determine the removal restriction was severable from the other provision of the law that established the Bureau. So the Court ruled that the agency may continue to operate, but its director must be removable by the President at will. Page 2192.

In terms of funding, the Bureau does not receive direct appropriations from Congress. Instead, each quarter the Bureau receives funding directly from the Federal Reserve, which transfers funds to finance the Bureau from "combined earnings from the Federal Reserve System." That's from Section 5497(a). The Federal Reserve itself is funded outside the

appropriations process through bank assessment, as noted in *Seila Law* at page 2194.

Each year the Bureau's director determines the amount of funding "reasonably necessary to carry out" the duties of the Bureau up to a cap of 12 percent of the combined earnings annually adjusted for inflation. In recent years, that budget has exceeded a half a billion dollars.

To exceed the cap, the Bureau has to obtain additional funding in the ordinary appropriations process.

The funding is not reviewable by Congress, including the committees on appropriations in both the House and the Senate, but the director does report annually to the House and Senate appropriations Committee about the Bureau's "financial operating plans and use of funds." And that's spelled out in 5497(e)(4).

All right, so we got here because of the petition, but also it's worth noting that the respondent brought an action against the Bureau and against the director in her official capacity seeking declaratory judgment and injunctive relief against the bureau.

On January 22nd of this year, the Court did issue an order to show cause. Oral argument was held on February 27 where the Court from the bench denied the motion. And then an amended complaint was filed on April 30th.

The instant petition was filed April 24, which was

accepted by this Court as related, and then we've had really very thorough and comprehensive briefing through the early part of the summer and here we are.

In terms of legal standard, it is well established "that an agency can conduct an investigation even though it has no probable cause to believe that any particular statute is being violated." That's what the Second Circuit said in *US versus Construction Products Research Inc.*, 73 F.3d 464, 470. For example, administrative agencies can investigate merely on suspicion that the law is being violated.

The Court's role in a proceeding to enforce an administrative subpoena, which is basically what we're dealing with here, is very limited, what the Second Circuit noted in *NLRB versus American Medical Response, Inc.*, but of course the agency's efforts have to be reasonable. Whatever information they're seeking by way of the compulsory process has to be reasonable, which is satisfied if an agency demonstrates that the investigation is being conducted for a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already in the administrative agency's possession, and that the administrative steps required have been followed. That's all from *American Medical Response* at page 192.

If a subpoena satisfies these requirements it's typically enforced unless the party opposing it demonstrates

that the subpoena is unreasonable or issued in bad faith or for some other improper purpose, or that compliance would be unnecessarily burdensome.

In terms of the respondent's attacks on the subpoena, I'll start with the funding structure, and respondent argued that the Bureau itself is unconstitutional because it doesn't receive appropriations from Congress, instead ceding Congress's funding authority to the Bureau itself and to the President, which violates, in respondent's view, the appropriations clause and the vesting clause. And this is all spelled in pages 14 through 19 of respondent's memorandum of law. And what respondent specifically argues is that in the wake of *Seila Law*, that *Seila Law* ostensibly rendered the Bureau's funding structure "inconsistent with the congressional statutory design and purpose," and also is inconsistent with the constitutional design and purpose given that it permits the President to determine and direct the Bureau's funding and budget. Of course, the Bureau disagrees, and even goes so far as to say that *Seila Law* resolved the issue of the CFPB's constitutionality.

Article I, sections 1 and 9, provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law," and that "all legislative powers herein granted shall be vested in a Congress of the United States."

So with respect to the Appropriations Clause, the Supreme Court has underscored its straightforward and explicit command, "it simply means that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." That's from *Office of Personnel Management versus Richmond*, 496 U.S. 414, 424.

Here, the Bureau is funded from the earnings of the Federal Reserve which Congress has, in fact, authorized by statute. I've already discussed 5497. And that's important here because 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," which is, in the Court's view, exactly what Congress has done here. That's a quote from *AINS Inc. versus United States*, 56 Federal Court of Claims 522, 539, I'll note a case that was affirmed by the Federal Circuit but abrogated on other grounds by the Federal Circuit. Other cases that have addressed this issue is *CFPB versus Think Finance, LLC*, 2018 WL 3707919 at *2, the District of Montana there determined that the CFPB's funding does not violate the Appropriations Clause; ditto the Central District of California in two cases, *CFPB versus D&D Marketing*, 2016 WL 8849698, and *CFPB versus Morgan Drexen, Inc.*, 60 F.Supp. 3d 1082, 1089. Indeed, although the Supreme Court referenced the Bureau's funding structure in *Seila Law*, it did so to point to

the level of power vested in a director removable only for cause not to independently suggest that the funding mechanisms were somehow unconstitutional. For example, on page 2203, the Supreme Court noted "the CFPB's single-director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The director does not even depend on Congress for annual appropriations." So I think it's fair to say that although 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.

It's also important to note that the courts have held that Congress may "choose to loosen its own reins on public expenditure. Congress may also decide not to finance a federal entity with appropriations." This was noted in the *Morgan Drexen* case at 1089. Indeed, as the Bureau points out, Congress has provided similar independence to other financial regulators, like the Federal Reserve, the FDIC, the OCC, the National Credit Union Administration, and the Federal Housing Finance Agency. And this was all discussed in *PHH Corp. versus CFPB*, 881 F.3d 75, 81. Also, *CFPB versus Navient Corp.*, 2017

WL 3380530 at *16, which lists these and some other agencies as independent agencies that operate completely outside the normal appropriations process. Indeed, these other agencies have been deemed to have complete, uncapped budgetary autonomy, as noted in *PHH II*, 881 at page 81. Indeed, the Federal Reserve has been around for over 100 years, and like the CFPB, has broad investigative and enforcement authority, including the power to conduct on-site examinations of banks under its purview and to impose certainly monetary penalties.

Also, I just find it unconvincing, although it's certainly stridently argued that this is a narrow exception limited to agencies that receive funding from fees and the like. There's really no authority to support this narrow exception theory of the self-funded governmental entities. I think *PHH II*, the case, in fact, respondent cites for the proposition, the DC Circuit found "the way the CFPB is funded fits within the tradition of independent financial regulators" and does not violate the Constitution. In fact, the DC Circuit totally *en banc* found that "the requirement that the CFPB seek congressional approval for funding beyond the statutory cap makes it more constrained in this regard than other financial regulators."

Plus, Congress hasn't relinquished control over all the agency's funding, so although the CFPA restricts the House and Senate Appropriations Committees from reviewing the

Bureau's primary funding source, it doesn't strip Congress as a whole of its power to modify appropriations as it sees fit. That's from *CFPB versus ITT Educational Services*, Inc., 219 F.Supp. 3d 878, 896, that's A Southern District of Indiana decision from 2015. In fact, the *CFPB* has a formula-based spending cap on the amount that the Bureau's director can derive from the Fed, and the CFPA further "imposes a number of other conditions on the director's use of the funds so derived." And that's from the *ITT* case page 896 n.12.

What's more, Congress "might not have exempted the CFPB from congressional oversight via the appropriations process if it had known the CFPB would come under executive control." But it "remains free to change how the CFPB is funded at any time." That's noted by *Navient Corp.*, 2017 WL 3380530 at *16. And in fact, the *PHH I* case, which is *PHH Corp. versus CFPB*, reported at 839 F.3d 1, at page 36 n.16, "Congress can always alter the CFPB'S funding in any appropriations cycle or at any other time. Section 5497 is not an entrenched statute shielded from future congressional alteration, nor could it be."

And to the extent that the argument is that the nondelegation doctrine applies because Congress has transferred its authority to another branch of government, which in fact is the argument that's made at page 15, the Supreme Court has indicated that "in our increasingly complex society replete

with ever changing and more technical problems...Congress simply cannot do its job absent an ability to delegate power under broad general directives." That's from *Gundy versus United States*, 139 Supreme Court at 2123. Thus, "a statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." And that's from the same page. As such, "the constitutional question is whether a Congress has supplied an intelligible principle to guide the delegee's use of discretion," and there's really been no explanation of what aspect of the funding structure lacks that intelligible principle. In fact, by limiting the funding that the director may request from the Fed, with a formula-based spending cap on the amount, it seems clear that the CFPB does not lack for a principle or have some sort of unguided or unchecked authority granted to the CFPB. So the Court finds that Title X does not violate the appropriations and vesting clauses in the Constitution.

Turning to the ratification issue, on July 2nd, the Bureau filed a notice of ratification issued by the director. She noted that "in her capacity as the director, she considered the basis for the CFPB's decision to issue the CID to respondent, to deny respondent's request to modify or set aside the CID, and to file a petition requesting that the District

Court enforce the CID." She also noted that she ratified this decision on behalf of the Bureau and that she understood that the President may now remove her with or without cause." And that's from paragraph three, four and five of her declaration.

The argument is that the 2019 CID is invalid because it's the product of an unconstitutionally structured federal agency, and when Director Kraninger acted prior to *Seila Law*, she was an invalid agent acting without any authority, thus, any actions taken by her were basically null and void and can't be saved by ratification. The second point is that even if Director Kraninger was able to ratify her previous actions as an unconstitutionally insulated director, the 2019 CID would still be unenforceable because the ratification does not cure the structural constitutional defect identified by the Supreme Court, only the President himself can ratify the director's prior acts. The third argument is that even if a director had validated her prior acts, she did not purport to ratify the regs until the week after she ratified the enforcement action. And finally, that the director failed to perform a detached and considered judgment of the act that she ratified.

Now, *Seila Law* left open the question of validity of a ratification by the director, but of course, the circumstances there were different, as the CID had been issued by a different director, Director Cordray, the first director, and was subsequently ratified by Acting Director Mulvaney, who

the CFPB argued could be removed at will by the President because of his status as an acting director. The Supreme Court found that the question of whether the alleged ratification, in fact, occurred and whether it is legally sufficient to cure the constitutional defect, the original demand...turned on case-specific factual and legal questions not addressed below and not briefed before the court. So the court remanded that question finding the appropriate course was for the lower court to consider those questions in the first instance. Of course, the Court recognizes that Justice Thomas had a different view, and it speaks for itself. I'm sure you all have read it.

All right, so addressing sort of the arguments in turn. The first argument is, as I mentioned, that the actions taken by the Bureau prior to *Seila Law* are nullities that cannot be ratified. And because the court's severance of the removal provision in Title X was prospective, respondent argues that when the director acted, she was an invalid agent, as such, her acts are void *ab initio*. And there's the other argument, the related argument, that the ratification would deprive the respondent of any remedy for the constitutional violation, the separation of power violation, and vindication for her claim that the Bureau was unconstitutionality ratified to begin with.

And as I said, the other argument is that even if the earlier actions could be ratified, only the President can do

ration, because the President was the Bureau's only lawfully acting principal prior to severing the for-cause removal provision.

Now, I think we all agree, and I think it was said so during the argument, that the Supreme Court has made clear that on the question of authorization or ratification, that this is something that's typically governed by principles of agency law. And this is discussed in the *Political Victory Fund* case, 513 U.S. 88, 98, and lower cases precisely dealing with challenges to the CFPB structure have noted such, among others, the *Gordon* case, which is a Ninth Circuit case, reported 819 F.3d 1179, 1191, and then *RD Legal Funding*, 332 F.Supp. 3d 729, 785.

In *political Victory Fund* the Supreme Court has looked to the restatement of agency to determine whether an after-the-fact authorization by the Solicitor General related back to the date of an unauthorized filing by the FEC such that the authorization would make the filing timely. The court found that it didn't because under the restatement, "if an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time." That's at page 98. The Court stated that the rationale behind the rule was that it was "essential that the party ratifying should be able not merely to do the

act ratified at the time the act was done, but also at time the ratification was made." The emphasis is on the but-also phrase, same page. Thus, because the filing deadline would have already passed at the time the Solicitor General authorized the act, the authorization in that case was invalid.

Now, courts have interpreted this as really amounting to addressing a timing issue. So, for example, *Advance Disposal Services Eastern, Inc. versus NLRB*, 820 F.3d 592, 603, and they utilized the principles of agency law to determine whether a later ratification authorizes an earlier action by an agent particularly with respect to appropriations clause violations. So what the Third Circuit said in the *Advance Disposal* case is that the timing problem in *Political Victory Fund* has since been read to require that the ratifier had the power to reconsider the earlier decision at the time of ratification. And so there the Third Circuit considered three general requirements for ratification in determining whether a properly constituted NLRB and its regional director could ratify an action taken by the regional director at a time where the board lacked a valid quorum given invalid recess appointments of several members. So the three requirement are: "First, the ratifier must, at 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." So there the Third Circuit ultimately found that the requirements were satisfied, and that's the bottom line.

Now in *Gordon*, which is the Ninth Circuit case, the parties agreed that although Director Cordray's initial recess appointment was invalid and did not satisfy the requirements of the appointments clause, later renomination and confirmation was valid. So based on that, the Ninth Circuit determined that a ratification issued by Director Cordray with respect to enforcement action at issue in that case, paired with a subsequent valid appointment, cured any initial Article II deficiencies. In reaching that conclusion, the Ninth Circuit reasoned that "under the second restatement, if the principal, [the](CFPB), had authority to bring the action in question, then the subsequent ratification of the decision to bring the case is sufficient." That's from 1191. It bears noting that the Ninth Circuit did cite the "less stringent" third restatement of agency, Section 4.04 comment B., which "advises that a ratification is valid even if principal did not have capacity to act at the time, so long as the person ratifying had capacity to act at the time of ratification." So the Ninth Circuit found that because Congress statutorily authorized the Bureau to bring the action in question through the CFPA, the Bureau had authority to bring the action at the time the enforcement action was initiated, and thus, the director's

ratification, Director Cordray's ratification, after his proper appointment resolved any appointment clause deficiencies.

So, as in *Advance Disposal* here, the Court's view is that there appears to be no limitation that would prevent Director Kraninger from bringing an enforcement action against respondent at the time, given that she is now removable at will by the President. Indeed, I think that was conceded during argument. Furthermore, if the director is considered to be both the agent and the principal, like the regional director in *Advance Disposal*, she better than anyone else had full knowledge of her earlier action. And, as in *Gordon*, here, if the CFPB, if the Bureau is to be considered the principal, and Congress authorized the Bureau to issue CIDs and bring the actions in federal court to enforce consumer protection statutes and regulations.

Now, it's true that some courts have distinguished between ratification and cases involving appointments clause violations and those involving structural defects. So this is, of course, discussed and argued in *RD Legal Funding* by Judge Preska where she thought the distinction was dispositive. But unlike in the *RD Legal Funding* case, here the for-cause removal provision has been severed and the structure of the Bureau is no longer in contravention of the Constitution. So the constitutional deficiency issue doesn't exist here anymore. Of course, Judge Preska didn't have the benefit of the *Seila Law*

decision, which we obviously have here. As such, the relevant question seems to be whether the constitutional violation has been remedied and whether the remedy was effective and adequately addressed the prejudice to respondent from the constitutional violation. And that's the framing that was set forth by the DC Circuit in the *Legi-Tech* decision, 75 F.3d 704, 708. If that's true, then dismissal of the enforcement action is neither necessary nor appropriate.

And I think *Legi-Tech* is instructive here as one of the few cases where a court examined whether ratification of a previously brought enforcement action, in light of a structural constitutional defect that had been cured, was sufficient to remedy respondent's claimed injury against whom the enforcement action was taken. In that case, what the DC Circuit did is it handled a challenge to litigation brought by the FEC after the circuit had determined that the agency's structure violated the Constitution in the case called *FEC versus NRA Political Victory Fund*, given the presence of two congressional officers as non-voting *ex officio* members of the FEC. As in *Seila Law*, however, the DC Circuit determined that the provision was severable and the FEC thereafter voted to reconstitute itself, excluding those *ex officio* members from all proceedings and ratified former actions, including the agency's previous probable cause finding and civil enforcement action.

Just as has happened here, the respondent in that

case argued that separation of powers is a structural constitutional defect that made the entire investigation void and that the FEC's later ratification of the PC finding couldn't cure the constitutional violation given that the vote at the end of the administrative process doesn't the remove the taint, the structural taint, from the sequence of the decision.

And there the DC Circuit even acknowledged the respondent was, in fact, prejudiced given the structural defect in place at time, but the court framed the question as "the degree of continuing prejudice after the FEC's reconstitution and ratification," at page 708.

The DC Circuit assumed that no matter what course was followed, other than a dismissal with prejudice, some effects of the unconstitutional structure of the FEC are to be presumed to have impacted on the action. The court nonetheless determined there was no ideal solution to that problem because "even were the commission to return to square one, it is virtually inconceivable that its decisions would differ in any way the second time from that which occurred the first time." And that's what I think we have here, and that's what I mentioned during argument. But even if the Court were to dismiss this enforcement action, there's really no reason to believe that the Bureau's decision to issue the CID to bring an action would differ another time around. And I think that's been acknowledged here. So, as in *Legi-Tech*, where there is no

significant change in the membership of the commission, there's been no significant change in the leadership here, forcing the Bureau to start at the beginning of the process, given what the DC Circuit described as human nature, "promises no more detached and pure consideration of the merits of the case than in this case the Bureau's ratification decision reflected." So the 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."

Indeed, ratification has similarly been found to be an effective cure in cases involving appointments clause violations that were later resolved, particularly when a dismissal would likely result in a similar administrative procedure. So one case is the DC Circuit's decision in *Wilkes Barr Hospital Company LLC versus NLRB*. There's the *Doolin Security Savings Bank* case, 139 F.3d 214, *Intercollegiate Broadcast Systems*, 796 F.3d at 117.

Also, it's bears noting that before *Seila Law*, at least two courts determined that even if the CFPA's for-cause removal provision was severable, the enforcement action would still being effective. And I'll note both a *PHH I* and *II* cases where then Judge Kavanaugh determined that the for-cause removal provision was, in fact, unconstitutional but that it

was severable from the rest of the CFPA. Judge Kavanaugh then considered the petitioner's statutory objections to the enforcement action and vacated the action on statutory grounds but not based on the structural constitutional violation, "because the constitutional ruling would not halt the CFPB's ongoing operations or the CFPB's ability to uphold the order against the petitioners."

And a similar decision was reached by Judge McMahon in *CFPB versus NDG Financial Corp.*, 2016 WL 7188792.

Now, to the extent that there's the argument that not only would this ruling deprive respondent of a remedy in this case but also in the related case, the Court does not agree. In the related case, the respondent seeks a declaratory judgment that the CFPB'S single-director structure violates the Constitution, but that's precisely the remedy that the conclusion in *Seila Law* provides.

With respect to *Lucia versus SEC*, I think that case is just different. The Supreme Court there determined that the appointment of an ALJ who presided over an enforcement proceeding did not comport with the appointments clause. The court found that under its precedent, "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." That's from page 2055. The court determined that the appropriate remedy for an adjudication tainted with

appointments violation is a new hearing before a properly appointed official. But, here, as the Bureau points out, the adjudication of the CID is before this Court, as is the adjudication in the related case. So it's an apples-and-oranges comparison. What's more, in *Lucia*, the court found that another ALJ or the SEC itself would need to hold a new hearing because the previous ALJ already both heard the petitioner's case and issued an initial decision on the merits. But here, there's been no "adjudication," by the Bureau or the director, with respect to the enforcement action and also there's no substitute decision-maker to revisit the decision such as another ALJ.

To the extent that the respondent argues that the Supreme Court determined in *Seila Law* that the only lawfully acting principal is the President, I just don't think that's a fair reading of *Seila Law*. Although the court, the Supreme Court cited the well-established principle that the executive power belongs to the President, it didn't issue any sort of ruling on ratification in fact stating that "because it would be impossible for one man to perform all the great business of the state, the Constitution assumes that lesser executive officers will assist the supreme magistrate in discharging the duties of his trust." Quoting from the writing of George Washington. Can you get a better source than that. There really isn't any other authority to support this proposition,

as clever as it is.

So the Court finds that where the for-cause removal provision has been severed, and thus, the constitutional violation has dissipated, the ratification of the prior action is valid.

Now there's the other argument, as I said, there's the argument that the director has not validly ratified the Bureau's regulations and its related guidance documents that her ratification of this action is invalid. In fact, what the respondent argues is because Director Kraninger ratified the investigation and the enforcement on July 2 and regulations on July 10, that she could not have attained the regulatory authority to ratify this case until July 10 at the earliest. And the respondent further argues that the ratification was, in any event, ineffective, as "if anyone can ratify prior invalid Bureau regulations, guidance documents, and enforcement activities, only the President can."

The Court does not agree. The Bureau's authority to issue and enforce CIDs is derived not just from the CFPB but from the CFPA, and in deciding that the Bureau was unconstitutionally constituted, the Supreme Court determined that the removal provision was severable from any other statutory provision relating to the Bureau's powers and responsibilities. So the provisions related to the Bureau's authority to issue CIDs, they remain valid based on *Seila Law*.

To the extent that there's this argument that the director failed to perform a detached and considered judgment of the actions she ratified, this argument is based on the assumption that she couldn't have given the prior acts more than a passing glance because it would have had to have been done within a matter of days after *Seila Law*.

While it's certainly true a ratifier must make and detached and considered judgment and not simply rubber-stamp an earlier action, there's really no actual evidence to establish that the director failed to conduct an independent evaluation or make a detached considered judgment, it's merely speculation based on sort of timing, but that's just, at the end of the day, that's just not enough authority that says that somehow that's enough. So, for example, in *Advance Disposal Services*, the Court noted that mere lack of detail in the director's express ratification is not sufficient to overcome the presumption of regularity. In fact, elsewhere in that decision the Third Circuit noted that the presumption of regularity applied to the actions of an agency, and finding that those opposing ratification, in that case, had "not produced evidence that cast doubt on the agency's claim that the board of director properly ratified the earlier actions." And the party argued only that ratification was a "rubber-stamp." And also *Legi-Tech*, the DC Circuit said that it couldn't examine the internal deliberations of the commission, at least absent the

contention that one or more commissioners was actually biased.

Here, the ratification states that the director considered the basis for the Bureau's decisions to issue the CID, to deny respondent's request to modify or set aside the CID, and to file a petition requesting that the district court enforce the CID, and she ratified those decisions on behalf of the Bureau. In the Court's view, that is sufficient under the circumstances.

All right, now in terms of the enforceability of the CID, as noted, the Court's role here is extremely limited, but of course the information being sought has to be reasonable. I've gone through all this. An agency does have to make only a *prime facie* showing that the four requirements I discussed earlier had been met.

In terms of the purpose of the investigation, the CID indicates the purpose. It's all laid out in the CID. In the Court's view, this reflects a legitimate, investigatory purpose, as the CFPA expressly authorizes the Bureau to investigate suspected violations of consumer protection laws, such as the FDCPA and the FCRA, which is what is the purpose here, among others. I'll just note a couple of cases that have come to similar conclusions, *CFPB versus Heartland Campus Decisions, ESCI*, 2018 WL 1089806, as I said, among others.

Now the argument here is that respondent sort of states the purpose of the CID, arguing that it falls under the

practice-of-law exception, acknowledging that although the respondent's services include debt-resolution activities that might be regulated by the Bureau as the third party, the Bureau is prohibited from regulating the practice of law and that the Bureau has "pressed its obstinate demand for information and documents, including those created in respondent's practice of law that respondent is duty-bound to protect from disclosure." The practice-of-law exclusion instructs the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of the state in which the attorney is licensed to practice law. So though while it's true the CID sought information that regulated the practice of law and that that would be impermissible on its face, that's not the purpose of the CID. In fact, the Bureau has made this quite clear that that is not the purpose of the CID.

The nature of the CID and the investigation falls under an exception to the practice-of-law exclusion. Section 5517(e)(2) states that the exclusion "shall not be construed as to limit the authority of the Bureau with respect to any attorney to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or authorities transferred." So here the Bureau seeks information about possible violations, as I said, of the FDCPA and the FCRA, both of which respondent is subject to and the Bureau represents

that the purpose of the CID is not to investigate in the actual practice of law but is instead meant to gather information about respondent's debt-collection activity, which the CID specifically defines as activities, including attempts to collect a debt, either directly or indirectly, excluding the provision of legal services. I think respondent acknowledges that that's not an impermissible purpose. I think there's just a question of the extent to which the documents themselves that are being sought, for example, might implicate attorney-client privilege. And I will certainly talk about that in a minute. But on its face, the Court finds that the purpose is legitimate.

In terms of relevance, that could be broadly interpreted, and the courts are supposed to defer to an agency's appraisal of relevance. And so, unless it's obviously wrong, the Court's not going to question it. Again, this gets into the attorney-client confidences issue. And the Bureau obviously disagrees that it is trying to seek or retain information that is covered by the privilege because, for example, the communications being sought do not reflect communications by clients seeking an opinion of law, legal services, or assistance in some legal proceeding involving respondent. Instead, the CID seeks information related to respondent's debt-collection business and specifically defines debt-collection activities as excluding the provision of legal

services and directs respondent that if any responsive materials were held on the basis of privilege that respondent should submit a schedule of the documents and information withheld that includes details, such as the subject matter, dates, names, address, et cetera.

And any party asserting attorney-client privilege has to demonstrate: The asserted holder of the privilege is or sought to become a client; that the person to whom the communication was made is the member of a bar or a court, or that person's subordinate; in connection with this communication is acting as lawyer; the communication relates to a fact the attorney was informed, A, by a client, B, without the presence of strangers, C, for the purpose of securing primarily an opinion of law or legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or tort, and the privilege has been claimed and not waived by the client. That's all spelled out in *SEC versus Yorkville Advisors, LLC* 300 F.R.D. 152, 161.

As I said, it's pretty clear that the material that the Bureau seeks is relevant in terms of how it relates to the investigation and the statutory violations that the Bureau is statutorily charged with investigating, and on the face the requests appear to be related to debt-collection services provided by respondent, and so they are relevant to the investigatory purpose.

To the extent that there are broad assertions of attorney-client privilege, that's really not going to get it done. So, for example, to the extent that there is a claim that the Bureau seeks attorney-client confidences and privileged documents and information, those are not really detailed at all, there's no specific examples given, there's nothing about relating to specific legal advice the respondent had given. So, for example, some of the documents that the Bureau seeks, information on consumer complaints in recordings of calls between respondent and consumers, that's not embodied by the attorney-client privilege. Just on its face it's just not.

And it also should be I think undisputed territory that to the extent an attorney acts as a collection agent, any communications between that attorney and the client are not protected by the attorney-client privilege. Among other cases that was noted in *Avoletta versus Danforth*, 2012 WL 3113151. Again, the Bureau is saying that all it wants is information related to respondent's activity and debt-collection activities.

To the extent that there is information that is privileged, then respondent can submit a privilege log, which has not been done in connection with the CID.

And I think there's also, I think, force to the Bureau's argument that Rule 1.6 specifically exempts an

attorney from any sort of responsibility to the extent the information is required by an order of the Court. Among other cases, *In re Alghanim*, 2018 WL 2356660.

Thus, because the Court's view is that the Bureau is not seeking privileged information, it's conducting an investigation, and the respondent hasn't shown that the Court should otherwise refuse to enforce the CID on the basis of relevance, the Court finds that the Bureau has demonstrated that the information it seeks is relevant.

Again, to the extent there are specific objections because there are specific documents or portions of documents that are privileged, then a privilege log can be submitted.

In terms of what's already in the Bureau's possession, the Bureau I think persuasively makes the point that the previously identified pages from the 2017 CID, there were some issues about formatting which that was provided, there was clawback. So there was a clawback and redaction of many of the pages that were responsive. And to the extent respondent generally has said, hey, I produced thousands of pages in response to the 2017 CID, that's not sufficient to rebut the Bureau's representation, its showing as to what it has not been given. Plus the 2017 and 2019 CIDs are not identical. And so absent more specific detail, the Court finds this objection not to be persuasive.

In terms of the administrative steps taken, the only

argument here has to do with the ratification, but the Court has already ruled on that.

With respect to FedChex issue, the Court agrees that Rule 19 is essentially not applicable here, not applicable to enforcement proceedings, and I don't think respondent has made the showing that, even if it somehow did apply, that it should apply here. I'll note that the Court hasn't been able to find a case within the Second Circuit regarding the applicability of Rule 19 to enforcement proceedings, but there have been, certainly are decisions that in the context of the SEC and CFTC proceedings, that Rule 19 is not dispositive, among other cases *SEC versus Princeton Economic International Limited*, 2001 WL 102333, at *1.

Even if it did apply, it's far from clear FedChex is a necessary party. To the extent that the respondent has information that is responsive to the CID that might tangentially relate to FedChex, then respondent should produce that material. To the extent that they are privileged, then respondent can submit a privilege log, as previously discussed.

So for these reasons the Court grants the petition to enforce the 2019 CID. To the extent, as I said, that there are objections, specific objections regarding privileged material, respondent should submit a schedule of that material as directed by the CID to the Bureau. To the extent that the respondent seeks modifications based on what it produced in

response to the 2017 CID, it can discuss this with the Bureau and write specific details on the material if it feels satisfied the requests from the 2019 CID that are duplicative of the 2017 CID.

Sorry to keep you so long, is there anything else?

MS. ASSAE-BILLE: Not from the Bureau, your Honor.

MR. DeGRANDIS: For the respondent, we have nothing further. Thank you, your Honor.

THE COURT: All right. Have a pleasant afternoon. Everybody stay healthy.

MR. DeGRANDIS: Thank you, you, too.

MS. ASSAE-BILLE: Thank you, your Honor.

(Proceedings concluded)

CERTIFICATE: I hereby certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

Angela A. O'Donnell, RPR,Official Court Reporter, USDC, SDNY

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

IN RE LAW OFFICES OF CRYSTAL MORONEY, P.C.,	)
2019-MISC-Law Offices of Crystal Moroney, P.C.-0001	)

DECISION AND ORDER ON PETITION BY LAW OFFICES OF CRYSTAL MORONEY, P.C. TO SET ASIDE OR MODIFY CIVIL INVESTIGATIVE DEMAND

The Law Offices of Crystal Moroney, P.C. ("LOCM") has petitioned the Consumer Financial Protection Bureau for an order to set aside or modify a civil investigative demand (CID) issued to it by the Bureau. For the reasons set forth below, the Petition is denied.

FACTUAL BACKGROUND

This Petition concerns the second of two CIDs the Bureau issued to LOCM, a debt-collection law firm, as part of an investigation into potential violations of the Consumer Financial Protection Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act and its implementing regulation.

The Bureau issued the first CID in June 2017. As provided for in the Bureau's rules governing investigations, *see* 12 C.F.R. 1080.6(c), LOCM met and conferred with staff from the Bureau's Office of Enforcement about the CID. Enforcement staff agreed to modify the CID in certain respects in response to LOCM's requests and to extend the deadlines for compliance. LOCM made a partial production in response to the CID but then refused to provide any further information. After efforts to resolve the disagreement failed, the Bureau filed a petition to enforce the CID in federal district court in New York. *See Bureau of Consumer Financial Protection v. Law Offices of Crystal Moroney, PC*, No. 7:19-cv-1732 (S.D.N.Y.).

In that litigation, LOCM argued that the CID could not be enforced because, among other reasons, it failed to satisfy the statutory requirement that CIDs issued by the Bureau "shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2). The Bureau withdrew that CID and on November 14, 2019 sent LOCM a second, revised CID that provided additional information about the scope and purpose of the Bureau's investigation. (The Bureau's petition to enforce the first CID was properly denied as moot after the Bureau informed the district court

that the CID had been withdrawn.) The second CID seeks much the same information as the first one, but many of the specific requests in the CID have been amended for clarity or to narrow their scope, or simply renumbered.

After meeting with Enforcement staff about the second CID, LOCM filed this Petition to set aside or modify the CID on December 5, 2019.[1]

LEGAL DETERMINATION

LOCM's central argument concerns the provision in the Consumer Financial Protection Act that purports to limit the grounds on which the President can remove the Bureau's Director to "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). LOCM contends that because this provision violates the constitutional separation of powers, and because the Supreme Court has granted certiorari in a case that raises that issue, *see Seila Law LLC v. CFPB*, No. 19-7 (U.S.), the CID should be set aside, or at least modified so that the response deadlines are stayed pending the Supreme Court's decision. LOCM also argues that the CID should be modified (1) to provide the same modifications that Enforcement staff previously agreed to with respect to the first CID, (2) to state that LOCM need not re-produce any material it submitted in response to the first CID, and (3) to limit the time period applicable to the requests in the CID to November 2017 through November 2019.

For the reasons set forth below, the Petition is denied.

1. The administrative process for petitioning to modify or set aside CIDs is not the proper forum for raising and adjudicating challenges to the constitutionality of provisions of the Bureau's statute. LOCM contends that I should set aside the CID because the removal restriction in Section 5491(c)(3) is unconstitutional and thus renders the CID invalid. Pet. at 5–13. In the alternative, LOCM asks that I defer the deadlines in the CID until after the Supreme Court has decided the constitutionality of the removal restriction in *Seila Law*. *Id.* at 14–16. The Bureau, however, has consistently taken the position that the administrative process set out in the Bureau's statute and regulations for petitioning to modify or set aside a CID is not the proper forum for raising and adjudicating challenges to the constitutionality of the Bureau's statute. *See, e.g.*, *In re Equitable Acceptance Corp.*, 2019-MISC-Equitable Acceptance Corp.-0001 (Dec. 26, 2019)[2], at 2; *In re Kern-Fuller and Sutter*, 2019-MISC-Candy Kern-Fuller and Howard

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[1] It appears that LOCM did not timely file its Petition within 20 days of service of the CID, as required by statute and the Bureau's rules governing investigations. *See* 12 U.S.C. § 5562(f)(1); 12 C.F.R. § 1080.6(e); *see also* 12 U.S.C. § 5562(c)(8) (service of a CID may be made by "depositing a duly executed copy in the United States mails, by registered or certified mail, return receipt requested"). Nevertheless, I will exercise my discretion in this matter and under the circumstances presented here to resolve the Petition on the merits.

[2] *Available at* https://files.consumerfinance.gov/f/documents/cfpb_equitable-acceptance-corp__decision-and-order-on-petition.pdf.

E. Sutter III-0001 (Apr. 25, 2019)[3], at 2; *In re Nexus Servs., Inc.*, 2017-MISC-Nexus Services, Inc. and Libre by Nexus, Inc.-0001 (Oct. 11, 2017)[4], at 2. In the event that the Bureau determines at a later date that it is necessary to seek a court order compelling LOCM's compliance with this CID, *see* 12 U.S.C. § 5562(e), the firm can raise its constitutional objection as a defense to that proceeding in district court.[5]

2. LOCM seeks modifications that it should have negotiated in the first instance with Enforcement staff. LOCM next argues that the CID should be altered to provide the same modifications that Enforcement staff previously agreed to with respect to the first CID. Pet. at 16. Although this request is reasonable on its face, LOCM failed to meaningfully pursue it during the meet-and-confer process before filing its Petition and, even now, has not explained just how it believes the second CID—the language of which does not precisely track the language of the first CID—should be modified.

Petitioners who seek an order to modify or set aside a CID must certify that they first took part "in a good faith effort to resolve by agreement the issues raised by the petition." 12 C.F.R. § 1080.6(e)(1). The Bureau "will consider only issued raised during the meet and confer process." *Id.* § 1080.6(c)(3). Here, LOCM did raise the possibility of seeking modifications along these lines during the meet and confer. But it also agreed to memorialize its specific requests for modifications in a follow-up letter to Enforcement staff. Rather than sending that letter, LOCM filed this Petition. (LOCM did not seek an extension of time to file its Petition, as it could have under 12 C.F.R. § 1080.6(e)(2).) LOCM thus denied staff an opportunity to consider its requests for modifications in an efficient manner. It now seeks instead to raise those fact-specific determinations for my resolution in the first instance. That is not appropriate under the rules governing the Bureau's investigations. *See id.* § 1080.6(c)(3), (e)(1).

Nor am I in a position to grant Petitioner's request in any event because the Petition itself does not specify which requests should be modified and in what way. For these reasons, I must deny Petitioner's request. As noted below, however, LOCM is invited to properly present to Enforcement staff its requests to modify the second CID in order to bring it into line with the modified first CID. The Office of Enforcement should consider (and, as appropriate, adopt) these requests.

3. LOCM must respond appropriately to this CID. The Petition also argues that LOCM should be excused from producing any materials it previously submitted in its partial

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[3] *Available at* https://files.consumerfinance.gov/f/documents/cfpb_petition-to-modify_candy-kern-fuller-and-howard-e-sutter_decision-and-order.pdf.

[4] *Available at* https://files.consumerfinance.gov/f/documents/cfpb_petition-to-modify_nexus_decision-and-order.pdf.

[5] The Bureau has adopted the view in its ongoing litigation that the removal restriction is unconstitutional but that its invalidity does not affect the remainder of the Bureau's statute, including the provisions authorizing the Bureau to issue and enforce CIDs. *See* Br. of Resp't. *Seila Law*, 2019 WL 4528136 (U.S.).

response to the first CID. Pet. at 17. This request must also be denied because LOCM failed to properly submit those documents in response to the first CID. Both the first and second CIDs set out instructions for complying with the Bureau's standards for submitting electronically stored information. *See generally* 12 C.F.R. § 1080.6(b) (electronic information must be produced "in accordance with the instructions provided by the Bureau regarding the manner and form of production"). Yet LOCM's production fell far short of these standards, as it acknowledged at the time. Nor did LOCM pursue offers by Enforcement staff to try to alleviate the potential burden of complying with the submission standards. Such standards exist not as mere formalities but to ensure that the Bureau receives the information necessary to carry out its statutory responsibility to investigate potential violations of federal consumer financial law. LOCM's failure to meet those standards, or in the alternative to try to negotiate a reasonable accommodation with Enforcement staff, forecloses its argument here. In accord with the Bureau's regulations, LOCM must provide information responsive to the CID in accordance with the instructions provided by the Bureau regarding the manner and form of production, or seek appropriate modifications from Enforcement staff.

4. The CID seeks information relevant to potentially actionable violations of law. Finally, LOCM asks that I modify the CID to seek information only from the period between November 2017 and November 2019, arguing that the Bureau is barred from seeking earlier material by the statutes of limitations in the FDCPA and FCRA. Pet. at 17–18. But in conducting an investigation of potential violations of federal consumer financial law, the Bureau is not limited to gathering information only from the time period in which conduct may be actionable. Instead, what matters is whether the information is relevant to conduct for which liability can be lawfully imposed. *See, e.g.*, *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 969 (C.D. Cal. 2017), *order vacated in part on other grounds*, 2018 WL 7502720 (C.D. Cal. Dec. 18, 2018); *CFPB v. Harbour Portfolio Advisors, LLC*, No. 16-14183, 2017 WL 631914, at *5 (E.D. Mich. Feb. 16, 2017). Even assuming that the CID sought information regarding conduct outside the statute of limitations, such information may be essential to the Bureau's ability to develop a complete understanding of the relevant facts about violations that would be actionable.

CONCLUSION

For the foregoing reasons, the petition to set aside or modify the CID is denied. LOCM is directed to comply in full with the CID within 10 days of this Order. LOCM is welcome to engage in discussions with Bureau staff about any specific suggestions for modifying the CID, which may be adopted, as appropriate, by the Assistant Director or Deputy Assistant Director of the Office of Enforcement.

Kathleen L. Kraninger, Director

February 10, 2020

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

BUREAU OF CONSUMER FINANCIAL PROTECTION, Petitioner, v. LAW OFFICES OF CRYSTAL MORONEY, P.C., Respondent.	Case No. 7:20-cv-03240-KMK

[PROPOSED]
ORDER TO STAY PENDING APPEAL

Having considered Respondent's request for a stay pending appeal pursuant to Rule 62 of the Federal Rules of Civil Procedure and this Court's inherent authority to preserve the *status quo* during the pendency of an appeal, and having considered Petitioner's opposition, and upon the entire record herein, it is

ORDERED, that this Court's August 19, 2020 Order (ECF No. 29) is hereby stayed and temporarily unenforceable, pending disposition of Respondent's forthcoming appeal to the U.S. Court of Appeals for the Second Circuit.

SO ORDERED:

Dated: _____
White Plains, New York

_____
Hon. Kenneth M. Karas
United States District Judge