CASE NO. 18-2743(L)
18-3033(CON), 18-2860 (XAP), 18-3156 (XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU; PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General for the State of New York

Plaintiffs, Appellants, and Cross-Appellees,

v.

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

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

Appeal From The United States District Court,
for the Southern District of New York

OPPOSITION TO MOTION TO ADJOURN ORAL ARGUMENT

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I. INTRODUCTION

RD Legal Funding Partners, LP, RD Legal Finance, LLC, RD Legal Funding, LLC, and Roni Dersovitz (collectively, "RD") oppose the Consumer Financial Protection Bureau's ("CFPB") Motion to Adjourn Oral Argument ("Motion") in this appeal, which has been fully briefed for months, and is scheduled for oral argument on November 21, 2019.

After having insisted for years in this case that it is constitutionally structured, and after the completion of briefing in this appeal, the CFPB recently notified the Court that that it "has changed its position" and conceded that the "for –cause [removal] provision" in the Consumer Financial Protection Act, 12 U.S.C. § 5491(c)(3) ("CFPA"), "is unconstitutional." (Dkt. 187-1 at 1.) Leaving aside the resulting prejudice to RD from having spent considerable time and money litigating an argument the CFPB now acknowledges was correct, no extraordinary circumstances exist to justify postponing oral argument until after the United States Supreme Court issues a decision in *Seila Law, LLC v. CFPB*, No. 19-7 (U.S.).

Indeed, the unfounded allegations against RD—which contradict more than 125 years of New York law recognizing that *proceeds* from personal injury claims can be sold and assigned, and ignore federal cases recognizing that such transactions are not extensions of "credit"—do not state a claim for relief. That dispositive issue, which avoids the constitutional questions presented in this case,

should be addressed by this Court without awaiting the Supreme Court's decision in *Seila Law*. Accordingly, RD respectfully requests this Court deny the CFPB's motion and instead hear oral argument as scheduled, and then, only if necessary, postpone any ruling until after a decision is issued in *Seila Law*.

II. ORAL ARGUMENT SHOULD PROCEED AS SCHEDULED

To justify delaying oral argument in this Court, the movant must prove that an "extraordinary circumstance" necessitates the requested continuance.[1] Second Circuit Local Rule 34.1(e). This Court's exacting standard makes good sense; appeals are costly endeavors—especially for a business such as RD that is now entering its fourth year defending this matter and its second trip to the federal circuit courts—that already delay the resolution of groundless cases.[2]

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[1] This standard is more rigorous than those used in almost every other circuit court in the country. *Compare* Second Circuit Local Rule 34.1(e), *with* Third Circuit Local Rule 34.2 (only requiring "good cause" for same), *and* Fifth Circuit Local Rule 34.6 (same) *and* Eleventh Circuit Local Rule 34-4(f) (same), *and* Fourth Circuit Local Rule 34(c) (only stating that prior professional commitments will not justify continuance of oral argument), *and* Seventh Circuit Local Rule 34(b)(4) (noting that "the court will not ordinarily reschedule" oral argument), *and* Sixth Circuit Local Rules (no heightened standard for continuation), *and* Eighth Circuit Local Rules (same).

[2] While counsel is unaware of a case where the Second Circuit has described with specificity what constitutes an "extraordinary circumstance" for purposes of delaying an appeal, that term is used in other legal contexts and carries with it a significant burden. For instance, when requesting relief from a judgment or order under Fed. R. Civ. P. 60(b), a movant must demonstrate that an extraordinary circumstance exists. The Second Circuit, in *Brown v. Enzyme Dev.*, 380 F. App'x 97, 98 (2d Cir. 2010), held that a woman's eviction and intermittent homelessness

A. Resolution of the Merits Avoids Constitutional Questions and Unnecessary Delay

The CFPB has not mentioned, let alone met, the heightened "extraordinary circumstance" standard. According to the CFPB, this Court should adjourn oral argument until an unspecified time after June of 2020, because the Supreme Court may issue an opinion that *could* dispose of *some* of the disputed constitutional rulings in the case before this Court. (*See* Motion at 2-3.)

But this approach ignores that the Supreme Court has urged courts to "not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Bond v. United States*, 572 U.S. 844, 855 (2014) (considering the non-constitutional issues first and noting that such an approach is a "well-established principle governing the prudent exercise of [the] Court's jurisdiction" (citation

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was not an extraordinary circumstance that justified the requested relief. In another context, a habeas petitioner may equitably toll the one-year limitations period for filing a petition upon showing an extraordinary circumstance. *Harper v. Ercole*, 648 F.3d 132, 136 (2d Cir. 2011). The Second Circuit has held that periods of hospitalization, *id.*, solitary confinement, *Hizbullahankhamon v. Walker*, 255 F.3d 65, 76 (2d Cir. 2001), and garden-variety ineffective assistance of counsel, *see Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003), do not amount to such extraordinary circumstances. Although these cases do not concern delays in appeals, they do speak to the gravity that the term "extraordinary circumstance" carries across all contexts.

omitted)); *see also Vives v. City of New York*, 405 F.3d 115, 118 (2d Cir. 2005) (quoting *Ashwander*, 297 U.S. at 347).

As explained in RD's briefing, this case can and should be resolved entirely on the merits. (Dkt. 184 at 1, 3-26.) The CFPB and the New York Attorney General may only pursue their federal claims if RD is a "covered person" under the CFPA. (*Id.* at 7.) But RD has never been a "covered person" because RD does not extend "credit" to its customers; it purchases the proceeds of its customers' claims to be recovered if and when those proceeds become available to the customers themselves. (*Id.* at 7-26.) RD's non-recourse purchase of contingent future proceeds cannot be recharacterized as an extension of "credit" by the CFPB because there is no "right granted" to consumers "to defer payment of a debt." (Dkt. 184 at 3-26.) Indeed, there is no debt, no payment obligation, and certainly no right granted to *defer* payment of a debt. (*Id.*; Dkt. 156 at 61.) Therefore, RD cannot be liable under the CFPA.

The CFPB claims that because RD prevailed below, it should not be able to raise its merits-based arguments at all. (Motion at 3.) That view, however, is inconsistent with established law that (1) a prevailing party may cross-appeal to protect its interests, *Tr. for Certificate Holders v. Love Funding Corp.*, 496 F.3d 171, 173 (2d Cir. 2007); and (2) the Court "may affirm on any grounds that are supported in the record[,]" *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 238

(2d Cir. 2018); *see also* (Dkt. 184 at 1–2.) Here, the Court *may* affirm on the merits, and *should* affirm on the merits, prior to reaching the constitutional issues that will be addressed in *Seila Law*.

B. Supposed Conserving of Judicial Resources

In its Motion, the CFPB also assumes that the Supreme Court's decision in *Seila Law* will have a dispositive effect on the underlying litigation and will thus conserve judicial resources. That assumption is misguided.

First, the CFPB entirely ignores that there are ***additional constitutional issues*** raised in this appeal that do not appear to be encompassed within the grant of certiorari. Specifically, as RD argued here, there are three provisions of Title X of Dodd-Frank that render the CFPB's structure unconstitutional: "(1) the CFPB's single Director removable only for cause," and additionally "(2) its oversight by the [Financial Stability Oversight Council], and (3) its authority to independently obtain funds from the Federal Reserve outside of congressional oversight and control." (Dkt. 156 at 33.) Only the first of these three issues is presented in *Siela Law*, and the question there is expressly limited to separation of powers. *See Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19-7 (U.S. Oct. 18, 2019) (order granting certiorari). Moreover, the third of these issues cannot be resolved by severability. Thus, the scope of constitutional issues raised in this appeal are broader than in *Seila Law*. Indeed, the Supreme Court might

benefit from considering a decision by this Court in this case when it undertakes to review the narrower issues presented in *Seila Law*.

Second, and relatedly, there are several scenarios in which the Supreme Court's opinion in *Seila Law* will bring this Court directly back to the merits of the underlying dispute and thus *waste* resources for all involved. For instance, if the Supreme Court rules that the CFPA's removal provision is constitutionally sound or that the removal provision is unconstitutional but severable, then this Court will have to address RD's additional constitutional arguments, as well as the merits-arguments RD raises in the underlying cross-appeal. In other words, unless the Supreme Court finds the removal provision unconstitutional and unseverable, the Supreme Court's ruling in *Seila Law* will not alleviate the need for this Court to eventually address most of the issues in the underlying case.

Accordingly, the CFPB is incorrect to assume that adjourning oral argument for eight months or more, rather than holding oral argument now, will necessarily conserve resources—especially when the most resources will be conserved if the Court determines that RD is not a "covered person" under the CFPA and is thus not properly subject to any of the claims against it.

III. CONCLUSION

In sum, the CFPB has not demonstrated that any "extraordinary circumstance" warrants adjourning oral argument for eight months or more.

Although *Seila Law* implicates *some* of the constitutional issues that are also before this Court, this Court should hear oral argument as scheduled, consider whether the merits issues will resolve the appeal without the need to pass on the constitutional issues, and then, only if necessary, postpone any ruling until after a decision is issued in *Seila Law*.

DATED: October 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this opposition uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief contains 1,594 words according to the word count provided by Microsoft Word, as required by Federal Rule of Appellate Procedure 27(d)(2)(a).

DATED: October 24, 2019

Respectfully submitted,

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