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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February 2020, I caused a copy of the foregoing Motion to Stay Proceedings to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:)	
)	RESPONDENTS' BRIEF IN SUPPORT
INTEGRITY ADVANCE, INC. and)	OF THEIR MOTION
JAMES R. CARNES,)	TO STAY PROCEEDINGS
)	
Respondents.)	
)	
)	

RESPONDENTS' BRIEF IN SUPPORT OF THEIR MOTION
TO STAY PROCEEDINGS

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I. INTRODUCTION AND SUMMARY

Respondents Integrity Advance, LLC and James R. Carnes (“Respondents”) respectfully submit this brief in support of their Motion to Stay Proceedings. On this same date, Respondents filed a motion to dismiss on the grounds that the Consumer Financial Protection Bureau (“CFPB”) is unconstitutional because its structure violates separation of powers. The Supreme Court has granted certiorari to consider this very question. *See Seila Law LLC v. CFPB*, 140 S. Ct. 427 (Oct. 18, 2019). The Supreme Court also is considering whether this unconstitutional provision of the Dodd-Frank Act can be severed. *Id.*

A stay of the proceedings is appropriate in the interest of judicial economy and to avoid the possibility of a ruling in this matter that is inconsistent with the Supreme Court’s upcoming decision in *Seila Law*. Further, the stay is anticipated to be of limited duration, as the Supreme Court is expected to issue its decision by June of this year. Finally, the CFPB will not be prejudiced by the stay, as evidenced by the fact that the CFPB actually agrees that its structure is unconstitutional and has itself requested a stay in another matter pending the Supreme Court’s decision in *Seila Law*. *See* Affirmation in Supp. of Mot. to Adjourn Oral Arg., *CFPB et al. v. RD Legal Funding LLC et al.*, No. 18-3156 (2nd Cir., Dkt. 129, filed Oct. 22, 2019); *see also* Letter from CFPB at 2, *CFPB v. CashCall, Inc.*, Nos. 18-55407 & 18-55479 (9th Cir., Dkt. 57, filed Sept. 18, 2019); *see also* Brief for the Respondent at 7, *Seila Law LLC v. CFPB*, No. 19-7 (Sept. 17, 2019), 2019 U.S. S. CT. BRIEFS LEXIS 4516, at *11.

The Administrative Law Judge (“ALJ”) should grant this motion and stay proceedings pending the ruling of the Supreme Court in *Seila Law*.

II. PROCEDURAL BACKGROUND

In advance of filing the Joint Proposed Schedule on February 6, 2020, the parties conferred via teleconference on January 30, 2020 and on January 31, 2020 regarding the instant

Motion to Stay Proceedings and other pending matters. On February 7, 2020, ALJ Christine L. Kirby issued a Scheduling Order, directing Respondents to “file their motion to dismiss on the grounds that the CFPB is unconstitutional because it violates the separation of powers, their motion to stay the proceedings, and accompanying brief by February 19, 2020.” Dkt. 251. Respondents now file this Motion to Stay Proceedings, the Motion to Dismiss, and accompanying briefs.

III. LEGAL STANDARD

In general, an ALJ overseeing an administrative proceeding initiated by the CFPB has “all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.” *See* 12 C.F.R. § 1081.104(a). This includes the power to “regulate the course of a proceeding” and the power to “consider and rule upon, as justice may require, all procedural and other motions appropriate in adjudication proceedings.” *See id.* §§ 1081.104(b)(5) and (10). Incident to those powers is the authority to rule on this present Motion to Stay Proceedings.¹

In addition to the powers described in the CFPB Rules, “the power to stay proceedings is incidental to the power inherent in every court to control disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997). Courts “‘have broad discretion’ in deciding whether to stay proceedings ‘pending the resolution of independent legal proceedings.’” *Energy & Env’t (SCA) v. Kingdom of Spain*, 2020 U.S. Dist.

¹ The CFPB Rules of Practice for Adjudication Proceedings (“the CFPB Rules”) address the standard for reviewing a request for a stay at 12 C.F.R. § 1081.407. However, that standard is not applicable to the instant Motion, as it applies specifically to requests to the CFPB Director for stays pending judicial review of final orders.

LEXIS 12794, at *10 (D.D.C. Jan. 27, 2020) (quoting *Landis*, 299 U.S. at 254). When considering a stay, courts must “weigh competing interests and maintain an even balance’ between the court’s interest in judicial economy and any possible hardship to the parties.” *Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 668 F.3d 724, 732-33 (D.C. Cir. 2012) (quoting *Landis*, 299 U.S. at 254-55). This standard also applies to administrative proceedings where “[a]n ALJ should consider a number of factors when deciding whether to grant a stay, including (but not limited to) judicial economy, unnecessary expense or delay, or potential hardship to the parties. Essentially, motions to stay are decided on questions of efficiency and fairness.” *In the Matter of Ray & Jeanette Veldhuis, Respondents*, CWA-9-99-0008, 2002 EPA ALJ LEXIS 47, at *10 (EPA Aug. 13, 2002).

In weighing these factors, courts consider the impact of the resolution of separate proceedings on the resolution of the current matter. *See Seneca Nation of Indians v. U.S. HHS*, 144 Supp. 3d 115, 119 (D.D.C. Nov. 13, 2015) (“Indeed, a trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.”) (internal citation omitted). This includes consideration of whether a stay may prevent inconsistent rulings. *See Fed. Home Loan Mortgage Corp. v. Kama*, No. CV 14-00137, 2016 U.S. Dist. LEXIS 30455, at *32-33 (D. Haw. Mar. 9, 2016) (“The Court is also concerned with the possibility of inconsistent rulings if the proceedings continue prior to resolution of the related appeals.”).

IV. ARGUMENT

All of the relevant factors weigh in favor of granting a stay of the proceedings in this matter pending the Supreme Court’s ruling in *Seila Law*. Indeed, as a district court recently held under equivalent circumstances, “a stay based on *Seila Law* is warranted. This is because

one of the Supreme Court's paths in *Seila Law* may render the CFPB unable to prosecute this action; the stay would not be lengthy; and the interests of judicial efficiency and potential harm to the movants justify the stay." *CFPB v. Access Funding, LLC*, 2019 U.S. Dist. LEXIS 222465, at *18-19 (D. Md. Dec. 23, 2019).

A. The Stay Should Be Granted in the Interest of Judicial Economy and to Avoid Inconsistent Rulings.

On this date, Respondents filed a Motion to Dismiss on the ground that the structure of the CFPB is unconstitutional because it violates separation of powers. On October 18, 2019, the Supreme Court granted certiorari to consider this very issue. *Seila Law*, 140 S. Ct. 427. Specifically, the Supreme Court is considering two key questions:

- (1) Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers;
- (2) If the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. §5491(c)(3) be severed from the Dodd-Frank Act?

Id.

The resolution of these issues goes to the very heart of the CFPB's authority to bring and continue with the charges in this matter. As recognized by one District Court, which certified an interlocutory appeal to the Fifth Circuit Court of Appeals on this same issue, "the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity." *CFPB v. All American Check Cashing, Inc. et al.*, No. 3:16-cv-00356 (S.D. Miss., Dkt. 240 at 3, filed Mar. 27, 2018). Similarly, another District Court held that the CFPB was unconstitutional and thus the CFPB's claims must be dismissed. *CFPB v RD Legal Funding*,

LLC, 332 F. Supp. 3d 729 (S.D.N.Y. June 21, 2018).² Given the likelihood that the Supreme Court’s ruling could be dispositive as to all of the charges in this matter, it is in the interest of judicial economy to stay the proceedings. Additionally, without a stay, the Respondents would be put to the burden and expense of defending against this action. *See Access Funding, LLC*, 2019 U.S. Dist. LEXIS 222465, at *17-18.

Even if the Supreme Court’s ruling in *Seila Law* is not fully dispositive of all of the issues, a stay is still appropriate. “[W]here a stay is considered pending the resolution of another action, the court need not find that two cases possess identical issues; a finding that the issues are substantially similar is sufficient to support a stay.” *Juweiya Abdiaziz Ali v. Trump*, 241 F. Supp. 3d 1147, 1152 (W.D. Wash. Mar. 17, 2017). This allows the court to “simplify issues,” even if it does not resolve all of the issues completely. *See Washington v. Trump*, 2017 U.S. Dist. LEXIS 75426, at *11 (W.D. Wash. May 17, 2017) (citing *Fairview Hosp. v. Leavitt*, No. 05-1065RWR, 2007 U.S. Dist. LEXIS 37296 (D.D.C. May 22, 2007)).

Additionally, if the ALJ was to rule on the instant Motion to Dismiss and the Supreme Court then came to a different conclusion, one or both parties may ask the ALJ to reconsider her ruling. Such a result is not in the interest of efficiency or judicial economy. *See Energy & Env’t (SCA) v. Kingdom of Spain*, 2020 U.S. Dist. LEXIS 12794, at *10 (D.D.C. Jan. 27, 2020) (“Thus, in the short run, while a stay may well delay the resolution of the dispute, in the long run, a stay will still likely be shorter than the possible delay that would occur if this Court were to confirm the award and . . . [another court] then set it aside.”) (internal quotations omitted). Without a stay, there could be further inconsistency in the law, which the ALJ should

² In comparison, the D.C. Circuit Court of Appeals held that the CFPB is not unconstitutional in its structure, so the Court did not rule on the question of remedy. *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018).

seek to avoid. *See Fed. Home Loan Mortgage Corp. v. Kama*, No. CV 14-00137, 2016 U.S. Dist. LEXIS 30455, at *32-33 (D. Haw. Mar. 9, 2016) (“The Court is also concerned with the possibility of inconsistent rulings if the proceedings continue prior to resolution of the related appeals.”). This principle is especially important where, as here, the issue presents a matter of particular public interest. As the Supreme Court held in *Landis*, “[e]specially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.” 299 U.S. at 256.

B. The Stay is of Limited Duration and Does Not Harm the CFPB.

The ALJ also should consider the duration of the requested stay as well as any potential hardship on the non-moving party. In this case, both factors weigh in favor of granting the stay.

First, the stay would be moderate in its duration. The *Seila Law* matter has been set for argument before the Supreme Court within the coming weeks, on March 3, 2020. *See Seila Law LLC v. CFPB*, No. 19-7 (Nov. 26, 2019) (setting oral argument date). The Supreme Court is expected to issue an opinion this term, in or around June 2020. *See Access Funding, LLC*, 2019 U.S. Dist. LEXIS 222465, at *18 (“Given that an answer will be forthcoming in just a few months as to the validity of the [Consumer Financial Protection Act], it seems prudent to await the Supreme Court’s decision.”).

And, the CFPB would not be harmed should the stay be granted. This is evidenced by the fact that the CFPB has itself requested a delay in another proceeding, pending the Supreme Court’s decision in *Seila Law*. *CFPB et al. v. RD Legal Funding LLC et al.*, No. 18-3156 (2nd Cir., Dkt. 129, filed Oct. 22, 2019). In so requesting, the CFPB asserted that “*Seila Law* may obviate the need for this Court to resolve some or all of the remaining issues in

this case.” *Id.* at 4. The CFPB further argued that the delay would “conserve judicial resources” and “aid this Court’s consideration.” *Id.* at 5. These are exactly the reasons that a stay is appropriate in this matter. Additionally, in another CFPB enforcement matter, the CFPB brought the issue to the Court’s attention, writing:

If this Court defers deciding *CFPB v. CashCall* until the Supreme Court issues its decision in *Seila Law*, the Bureau stands ready to provide supplemental briefing on the impact of that Supreme Court decision on this case at the appropriate time.

CFPB v. CashCall, Inc., Nos. 18-55407 & 18-55479 (9th Cir., Dkt. 58, filed Oct. 21, 2019). In response to this filing by the CFPB, the Ninth Circuit stayed the proceedings. *CFPB v. CashCall, Inc.*, 2019 U.S. App LEXIS 31720 (9th Cir. Oct. 21, 2019). The CFPB raised no objection to the stay in that matter.

It also is clear that the CFPB would not be harmed by a stay because the CFPB actually agrees that its structure violates the constitution. *See* Letter from CFPB at 2, *CFPB v. CashCall, Inc.*, Nos. 18-55407 & 18-55479 (9th Cir., Dkt. 57, filed Sept. 18, 2019) (“The Bureau’s Director has now determined that the for-cause removal provision is unconstitutional. Accordingly, the Bureau will no longer defend the constitutionality of that provision in this Court or in any other.”); *see also* Brief for the Respondent at 7, *Seila Law LLC v. CFPB*, No. 19-7 (Sept. 17, 2019), 2019 U.S. S. CT. BRIEFS LEXIS 4516, at *11 (“The United States previously informed this Court that it has also concluded the statutory restriction on the President’s authority to remove the Director violates the Constitution’s separation of powers.” (citing Gov’t Br. in Opp’n, *State Nat’l Bank of Big Spring v. Mnuchin*, No. 18-307 (Dec. 10, 2018))). Thus, the CFPB cannot claim it would be harmed in deferring these proceedings until the Supreme Court rules on the issue. In fact, both parties would be harmed by the potential confusion resulting from inconsistent rulings if the matter is not stayed. *See Juweiya Abdiaziz*

Ali, 241 F. Supp. 3d at 1152 (“[H]ardship or inequity may result to both parties if the [c]ourt does not pause to consider issues . . . because of the potential for inconsistent rulings and resulting confusion to law enforcement agencies and the public.”) (internal citations omitted).

Finally, the alleged conduct that is the basis for the Notice of Charges in this case ceased over seven years ago, in December 2012, and is not currently ongoing. *See* Dkt. 1 at 3. So there is no reason for the CFPB to claim that any consumers would be harmed by the stay.

V. **CONCLUSION**

For the foregoing reasons, the ALJ should grant this motion and stay proceedings pending the ruling of the Supreme Court in *Seila Law*.

Dated: February 19, 2020

Respectfully submitted,

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