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10 and WALTER LEDDA

11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 CONSUMER FINANCIAL  
14 PROTECTION BUREAU

15 Plaintiff,

16 v.

17 MORGAN DREXEN, INC.  
18 and  
19 WALTER LEDDA, individually, and as  
20 owner, officer, or manager of Morgan  
21 Drexen, Inc.

22 Defendants.

23 CASE NO. SACV13-01267 JST  
24 (JEMx)

25 Hon. Josephine L. Staton  
26 Courtroom: 10A (Santa Ana)

27 **DEFENDANTS' *EX PARTE***  
28 **APPLICATION FOR AN**  
**ORDER TO STAY THIS**  
**ACTION**

Action Filed: August 20, 2013  
Trial Date: Not set

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1 **I. INTRODUCTION**

2 Defendants Morgan Drexen, Inc. and Walter Ledda (together “Morgan  
3 Drexen”), move to stay this action (the “California Action”) because it overlaps  
4 with a case pending in the U.S. District Court for the District of Columbia, *Morgan*  
5 *Drexen et al. v. CFPB*, D.C. Civil Action No. 1:13-cv-01112-CKK (the “D.C.  
6 Action”) and a motion to *enjoin* this action is fully briefed and pending in D.C.

7 Morgan Drexen and Plaintiff Consumer Financial Protection Bureau  
8 (“CFPB”) are parties to the D.C. Action, where Morgan Drexen’s motion for  
9 summary judgment is currently pending and fully briefed. Additionally, the parties  
10 are awaiting ruling on Morgan Drexen’s motion for *temporary restraining order*  
11 and preliminary injunction in the D.C. Action to enjoin CFPB from prosecuting the  
12 California Action. This motion is also fully briefed in D.C.

13 As the Supreme Court recognized, “The District Court has broad discretion  
14 to stay proceedings as an incident to its power to control its own docket.” *Clinton*  
15 *v. Jones*, 520 U.S. 680, 706 (1997). Here, Morgan Drexen requests this Court to  
16 stay the California Action pending resolution of the D.C. Action. The stay is  
17 requested by ex parte application to prevent inefficiency, duplication of effort by  
18 the parties, wasteful expenditure of judicial resources, and the risk of inconsistent  
19 decisions.

20 **II. STATEMENT OF PROCEDURAL HISTORY AND PERTINENT**  
21 **FACTS**

22 On July 22, 2013, Morgan Drexen commenced a facial challenge to the  
23 constitutionality of CFPB’s enabling statute in D.C. federal court (*Morgan Drexen*  
24 *et al. v. CFPB*, D.C. Civil Action No. 1:13-cv-01112-CKK). As explained more  
25 fully in the attachments to the Declaration of Celeste M. Brecht, during an initial  
26 conference with the D.C. court, CFPB’s counsel consented to an expedited  
27 summary judgment briefing on the constitutional issue and the D.C. court  
28 committed to an expedited decision. CFPB counsel also represented that CFPB

1 had not decided whether it would bring an enforcement action against Morgan  
2 Drexen. See Brecht Decl. and Exhs. A and B thereto.

3 A month later, in the midst of the expedited summary judgment proceeding,  
4 CFPB filed the instant case in this Court. Morgan Drexen promptly filed an  
5 emergency motion in D.C. to enjoin CFPB from prosecuting this case. The  
6 moving, opposition, and reply papers filed in the D.C. Action are attached to the  
7 Declaration of Randall K. Miller at Exhibits A, B, and C, respectively. Given the  
8 emergency nature of the TRO Motion now pending and fully-briefed in D.C., an  
9 expedited decision can be anticipated. Moreover, the D.C. court has stated that the  
10 summary judgment motion also will be decided with expedition. Brecht Decl. and  
11 Exh. B thereto.

12 Morgan Drexen's response to the Complaint in this case is due Monday,  
13 October 21, 2013. In absence of a stay, the parties will be forced to deal with  
14 duplicative proceedings and two federal courts will be considering the same issue.  
15 The D.C. Court has not yet acted upon Morgan Drexen's request for a TRO and  
16 preliminary injunction to enjoin CFPB from prosecuting the California Action, and  
17 CFPB will not consent to a stay pending that decision. Morgan Drexen therefore  
18 requests that the Court expedite its decision.

19 In a telephone call on Monday, October 14, 2013, between Randall K.  
20 Miller, counsel for Morgan Drexen, and CFPB counsel Gabriel O'Malley, CFPB  
21 indicated that it would consider granting an extension of only a day or two for  
22 Morgan Drexen to respond to the Complaint, but would not consent to stay the  
23 case pending a decision by the D.C. Court. See Miller Decl. Counsel for Morgan  
24 Drexen notified CFPB that it intended to file this ex parte application for an order  
25 to stay the case, and advised counsel for CFPB that any opposition must be filed  
26 within 24 hours of the filing of this ex parte application. *Id.* and exh. D thereto.

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1 **III. ARGUMENT**

2 Morgan Drexen filed its motion for TRO and preliminary injunction in the  
3 D.C. Action under D.C. law that permits the first-filed court to enjoin parties from  
4 proceeding with a second-filed action involving overlapping issues. *Columbia*  
5 *Plaza Corp. v. Security National Bank*, 525 F.2d 620, 627 (D.C. Cir. 1975). The  
6 law of this Court is in accord. *See Bryant v. Oxxford Express, Inc.*, 181 F. Supp.  
7 2d 1045, 1050 (C.D. Cal. 2000) (granting the plaintiff’s motion to enjoin the  
8 defendant from prosecuting its third party complaint against plaintiff in another  
9 forum based on first-filed rule).

10 “The District Court has broad discretion to stay proceedings as an incident to  
11 its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 680, 706 (1997).  
12 In particular, district courts have authority under Federal Rule of Civil Procedure  
13 16(a)(3) to schedule proceedings in a case to “discourag[e] wasteful pretrial  
14 activities.” As the Ninth Circuit has noted, “[a] trial court may, with propriety, find  
15 it is efficient for its own docket and the fairest course for the parties to enter a stay  
16 of an action before it, pending resolution of independent proceedings which bear  
17 upon the case.” *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-  
18 64 (9th Cir. 1979)

19 Morgan Drexen requests that the Court enter an order that stays this case  
20 pending the decision by the D.C. court. In the absence of a stay, the parties would  
21 engage in duplicative briefing of the same issue now pending in the District of  
22 Columbia (the constitutionality of CFPB, which Morgan Drexen would raise in a  
23 motion to dismiss this case absent a stay). Such briefing would lead to  
24 inefficiency, duplication of effort by the parties, wasteful expenditure of judicial  
25 resources, and would place the parties at risk of inconsistent decisions.

26 This ex parte procedure is necessary to safeguard the interests protected by  
27 the first-to-file rule and justified by the procedural circumstances set forth in the  
28 attached declarations. Morgan Drexen was required to file its TRO and

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1 preliminary injunction application in the D.C. court. *See , e.g., Micron*  
2 *Technology, Inc. v. Mosaid Technologies, Inc.*, 518 F. 3d 897, 904 (Fed. Cir. 2008)  
3 (observing the well-established principle that the first-filed court is the forum that  
4 “typically” determines whether to “keep the case” or permit the parties to instead  
5 proceed in the second forum). When a decision on the pending TRO was not yet  
6 issued as the time to respond to the Complaint in this case approached,  
7 undersigned counsel requested an extension of time from CFPB’s counsel to  
8 permit a decision on the pending TRO/preliminary injunction, but such consent  
9 was unreasonably withheld, necessitating this ex parte motion. Notably, no other  
10 extensions of time have been requested or permitted by this Court. Furthermore,  
11 the request is not based on the convenience of counsel but instead based on the  
12 compelling circumstance that a pending TRO application in another federal court  
13 with priority jurisdiction over CFPB – if granted -- would enjoin CFPB from  
14 proceeding in this Court. There is no countervailing urgency justifying a denial of  
15 the request to stay. As explained more fully in the briefings attached to Exhibit A  
16 and C of the Miller declaration, CFPB investigated Morgan Drexen for 16 months  
17 before the D.C. Action was filed; yet, days after Morgan Drexen filed the D.C.  
18 Action in July 2013, CFPB’s counsel represented that it had “not yet determined  
19 whether or not to file an enforcement action” in California. Miller Decl. Ex. A at  
20 3. Given the failure of the parties to provide for a stay to permit that D.C. court to  
21 decide a fully briefed TRO motion, the Court should stay this matter to permit the  
22 orderly administration of justice.

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**IV. CONCLUSION**

Morgan Drexen requests that the Court enter an Order that (a) stays this case pending the decision of the D.C. district court; and (b) requires the parties to jointly move for a scheduling conference after the D.C. court issues its decision so that the parties and the Court can discuss the appropriate next steps in light of the decision of the D.C. Court.

Dated: October 15, 2013

VENABLE LLP

By: /s/ Celeste M. Brecht  
Celeste M. Brecht  
Attorneys for Defendants  
MORGAN DREXEN and  
WALTER LEDDA

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10 and WALTER LEDDA

11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 CONSUMER FINANCIAL  
14 PROTECTION BUREAU

15 Plaintiff,

16 v.

17 MORGAN DREXEN, INC.  
18 and  
19 WALTER LEDDA, individually, and as  
20 owner, officer, or manager of Morgan  
21 Drexen, Inc.

22 Defendants.

23 CASE NO. SACV13-01267 JST  
24 (JEMx)

25 Hon. Josephine L. Staton  
26 Courtroom: 10A (Santa Ana)

27 **DECLARATION OF RANDALL  
28 K. MILLER**

Action Filed: August 20, 2013  
Trial Date: Not set

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**DECLARATION OF RANDALL K. MILLER**

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1. I am a Partner at Venable LLP and counsel to Defendants in this matter.

2. I submit this Declaration in support of Defendants' Ex Parte Expedited Motion to Stay This Action.

3. I am also counsel of record to Morgan Drexen in a related first-filed case against the CFPB, *Morgan Drexen et al. v. CFPB*, D.C. Civil Action No. 1:13-cv-01112-CKK.

4. In that case, we filed an emergency motion for TRO and preliminary injunction to stay this Action. The moving, opposition, and reply papers filed are attached at Exhibits A, B, and C, respectively.

5. On October 14, 2013, I had a telephone call with CFPB's counsel (Gabriel O'Malley) to request a stay of the case pending a decision on a TRO application in the related first filed case in the District of Columbia.

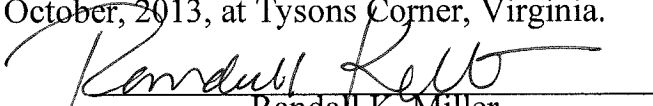
6. CFPB's counsel stated that he would consider a short extension of a day or two as a professional courtesy but that he could not consent to a broader stay based on the related first filed case in the District of Columbia.

7. On October 15, 2013 I sent CFPB's counsel an email stating that Defendants intended to file an Ex Parte Expedited Motion to Stay This Action, explaining that the Motion would require a response within 24 hours.

8. A copy of the email is attached as Exhibit D.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 15th day of October, 2013, at Tysons Corner, Virginia.

  
\_\_\_\_\_  
Randall K. Miller

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# **EXHIBIT A**

TO THE DECLARATION OF RANDALL K. MILLER

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**MORGAN DREXEN, INC. and  
KIMBERLY A. PISINSKI,**

*Plaintiffs,*

v.

**CONSUMER FINANCIAL  
PROTECTION BUREAU,**

*Defendant.*

Civil Action No. 13-01112 (CKK)

**MOTION FOR A TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION  
ENJOINING CFPB FROM  
PROSECUTING ITS  
SECOND-FILED ACTION**

Plaintiffs Kimberly A. Pisinski (“Pisinski”) and Morgan Drexen, Inc. (“Morgan Drexen”) (together, “Plaintiffs”), by and through undersigned counsel, hereby request that the Court issue a temporary restraining order and preliminary injunction to enjoin Defendant Consumer Financial Protection Bureau (“CFPB”) from prosecuting its second-filed action in the U.S. District Court for the Central District of California. A memorandum of points and authorities and proposed Order are attached.

**Meet and confer certification.** Undersigned counsel, Randall K. Miller, hereby certifies that on August 22, 2013, he met and conferred by phone with the following lawyers representing CFPB about this motion, and the parties were unable to reach a voluntary resolution:

- Kristin Bateman
- Shirley Chiu
- John Coleman
- Nandan Joshi
- Gabriel O'Malley
- Cara Peterson

Dated: August 22, 2013

Respectfully submitted,

VENABLE LLP

/s/

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Randall K. Miller

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*Attorneys for Plaintiffs Morgan Drexen, Inc. and  
Kimberly A. Pisinski*

7035882

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**MORGAN DREXEN, INC. and  
KIMBERLY A. PISINSKI,**

*Plaintiffs,*

**v.**

**CONSUMER FINANCIAL  
PROTECTION BUREAU,**

*Defendant.*

Civil Action No. 13-01112 (CKK)

**POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR A  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION ENJOINING CFPB  
FROM PROSECUTING ITS  
SECOND-FILED ACTION**

Plaintiffs Kimberly A. Pisinski (“Pisinski”) and Morgan Drexen, Inc. (“Morgan Drexen”) (together, “Plaintiffs”), by and through undersigned counsel, respectfully submit this Memorandum of Points and Authorities in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction Enjoining Defendant Consumer Financial Protection Bureau (“CFPB”) from Prosecuting its Second-Filed Action.

As explained below, this Court has the authority to enjoin CFPB from proceeding with a lawsuit filed on Tuesday, August 20, 2013 in a California federal court (the “California Lawsuit”) against Morgan Drexen and its Chief Executive Officer pending the disposition of Plaintiffs’ constitutional challenge to CFPB’s structure now moving on an accelerated schedule in this Court. The California Lawsuit overlaps with this case because it necessarily encompasses Plaintiffs’ constitutional challenge. An injunction is necessary to permit the orderly disposition of this case, which is proceeding on an expedited schedule ordered by the Court, and consented to by the CFPB, and to avoid the duplication, inefficiency, and risk of inconsistent decisions on the foundational constitutional issue.

## BACKGROUND

1. This case was commenced on July 22, 2013 when Plaintiffs filed their Complaint and Motion for Preliminary Injunction to challenge the constitutionality of CFPB.

2. Plaintiffs requested expedited proceedings and submitted declarations demonstrating irreparable harm including but not limited to facts showing that CFPB's investigation, civil investigative demands to Morgan Drexen and its business partners, and threats of litigation were impairing Plaintiffs' businesses and reputation.

3. The Court held telephonic hearings on July 24 and July 25, 2013, after which, and upon consent of all parties, the Court ordered expedited briefing on the merits of Plaintiffs' Complaint. *See* Docket No. 8.

4. Briefing is underway on Plaintiffs' motion for summary judgment, with all briefing set to close on September 25, 2013. *See id.* Plaintiffs have already explained in detail Plaintiffs' basis for standing to sue and that CFPB is unconstitutional. In particular, Plaintiffs' summary judgment papers already submitted to this Court explain that CFPB acquired an extremely broad delegation of power (including transferred authority from seven different agencies), yet CFPB lacks constitutionally-required checks, balances, and oversight (including because CFPB's Director has a half billion dollar annual budget but does not serve at the pleasure of the President, is not subject to the congressional appropriations power, and is not required to vote with a panel of commissioners as is the case with agencies with analogous power, such as the Federal Trade Commission and the Securities and Exchange Commission).  
Docket No. 13-2.

5. Despite the fact that CFPB investigated Plaintiff Morgan Drexen for more than 16 months (Docket No. 3-5 at ¶ 4) before the July 25, 2013 teleconference with the Court, CFPB's counsel (perhaps to preserve a standing defense) stated that Morgan Drexen was not under any

compulsory government authority, CFPB's civil investigative demands were "not self-enforcing," that Morgan Drexen did not "have an obligation to comply with them under the law" (7/24/13 Tr. at 5:5-16), and CFPB had "not yet determined whether or not to file an enforcement action" (7/25/13 Tr. at 6:4-5).

6. After setting the expedited schedule, the Court commented:

"I indicated that this would be an expedited schedule and I would make an expedited decision. It would be helpful, probably, not to have an enforcement action, which they're claiming is unconstitutional, going on at the same time."

(7/25/13 Tr. at 5:20-24) (emphasis added).

7. Notwithstanding this statement, CFPB filed the California Lawsuit on Tuesday, August 20, and then filed a Notice with this Court, attaching a copy of its Complaint, and stating that CFPB "will address the significance of its enforcement action in its memorandum of points and authorities opposing Plaintiffs' motion for summary judgment and supporting its cross-motion for summary judgment, which is due on August 27, 2013." Docket No. 14.

8. In the California Lawsuit, CFPB alleges that that it "is an independent agency of the United States" possessing "independent litigating authority." California Compl. ¶ 4; *see also id.* ¶ 2 (alleging that the court has jurisdiction because the "action is brought by an agency of the United States.").

9. Morgan Drexen disputes these allegations based upon the *identical* constitutional argument that is set forth in Plaintiffs' pending motion for summary judgment already filed in this Court. *See* Docket No. 13-2. If the California Lawsuit were to proceed in absence of an injunction, Morgan Drexen would be forced to re-brief this issue in California, and Morgan Drexen would be subject to multiple and potentially inconsistent decisions.

10. CFPB publicized the California Lawsuit by issuing a press release on Tuesday (available at <http://www.consumerfinance.gov/pressreleases/cfpb-files-suit-against-morgan-drexen-inc-for-charging-illegal-fees-and-deceiving-consumers/>). The press release contains an inflammatory headline: “CFPB Files Suit Against Morgan Drexen for Charging Illegal Fees and Deceiving Consumers.” *Id.* The press release also contains quotations from CFPB’s Director accusing Morgan Drexen of “illegal” conduct, and vowing to hold Morgan Drexen “accountable.” *Id.*

### **ARGUMENT**

11. It is well established that a federal court has the authority to enjoin a party from proceeding with a later-filed action in another federal court. *See Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620, 627 (D.C. Cir. 1975). “In determining whether prosecution of a suit in another forum should be preliminarily enjoined pending disposition of the action in which the motion is filed, [the preliminary injunction factors] are of secondary significance.” *Id.* at 622 n.3.<sup>1</sup> “The primary factor to be weighed is the convenience of the parties and the courts.” *Id.*; *see also id.* at 626 (noting the “desirability of deciding common issues in one tribunal rather than two.”).

12. The Court’s power to enjoin CFPB from prosecuting the California Lawsuit is sometimes referred to as the “first-to-file” rule, which creates a presumption that the first-filed case “be allowed to proceed to its conclusion first” before a later-filed case that raises the same issue. *Washington Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980) (affirming dismissal without prejudice of plaintiff’s claim where an earlier lawsuit was

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<sup>1</sup> *See also Truck-Lite Co., Inc. v. Peterson Manufacturing Co.*, 2009 WL 5785138, at \*1 (W.D.N.Y. Nov. 16, 2009) (“Motions to enjoin prosecution of later-filed, parallel litigation are not analyzed under the Preliminary Injunction standard. While such motions are brought pursuant to Fed. R. Civ. P. 65, motions to enjoin prosecution of later-filed actions are analyzed under relevant first-to-file case law”).

proceeding elsewhere). “The court is not to blindly apply the ‘first filed’ rule, but rather is to balance equitable considerations genuinely relevant to the ends of justice.” *United States v. Exxon Corp.*, 1980 WL 1065, \*\*4-5 (D.D.C. Dec. 19, 1980) (citations omitted) (enjoining a defendant from prosecuting a later-filed action). For example, in *Columbia Plaza*, the D.C. Circuit ordered the district court to enjoin the defendant from prosecuting in a separate case what would have been a counterclaim in the first-filed action. *Columbia Plaza*, 525 F.2d at 627. The D.C. Circuit noted that the “problem of whether to enjoin another action involving the same parties and issues . . . requires a balancing not of empty priorities but of equitable considerations genuinely relevant to the ends of justice.” *Id.* at 628.

13. Courts from around the country are in accord. *See Lab. Corp. of Am. Holdings v. Chiron Corp.*, 384 F.3d 1326, 1333 (Fed. Cir. 2004) (affirming motion to enjoin second-filed litigation); *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1025 (2d Cir. 1991) (holding that courts hearing a first-filed action have the authority to enjoin “a later action embracing the same issue”); *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 605 (5th Cir. 1999) (ordering that case be transferred to first-filed jurisdiction); *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1004 (8th Cir. 1993) (observing that the power of a federal court to “enjoin the parties from proceeding with a later-filed action in another federal court is firmly established”); *Monsanto Tech. LLC v. Syngenta Crop Prot., Inc.*, 212 F. Supp. 2d 1101, 1103 (E.D. Mo. 2002) (transferring second-filed action to first-filed jurisdiction and holding that “the two cases do not have to be identical” as long as they present “issues that substantially overlap”); *Bryant v. Oxford Express, Inc.*, 181 F. Supp. 2d 1045, 1050 (C.D. Cal. 2000) (granting plaintiff’s motion to enjoin defendant from prosecuting second-filed case).



14. Here, the “equitable considerations genuinely relevant to the ends of justice,” *Columbia Plaza*, 525 F.2d at 628, overwhelmingly favor enjoining CFPB from prosecuting the California Lawsuit until this Court decides the merits of Plaintiffs’ constitutional argument.

15. First, the Court already has entered a Scheduling Order that will allow the Court to reach the merits of Plaintiffs’ facial constitutional challenge to CFPB’s structure on an expedited basis. Docket No 8. Indeed, all briefing is scheduled to end on September 25, 2013. *Id.* Plaintiff has already submitted its summary judgment papers. Docket No. 13-2.

16. Second, an injunction would avoid duplicative motions practice in California. If the California Lawsuit were to continue, Morgan Drexen would be required to move to dismiss on the identical issue pending before this Court, namely its constitutional challenge to CFPB’s structure, which is now fully developed in Plaintiffs’ summary judgment papers (Document 13-2), and will be fully briefed in short order, *i.e.*, in about 5 weeks. Proceeding in California at the same time would cause Morgan Drexen to incur the unnecessary burden, distraction, and costs related to the duplicative briefing, with end result of wasting judicial resources.

17. Third, without an injunction the California Lawsuit presents Plaintiffs with the risk of multiple and inconsistent decisions on the issue of CFPB’s constitutionality.

18. Fourth, the balance of equities also favors entry of the injunction. Given the expedited schedule, with all briefing to be completed by September 25, 2013, CFPB can make no credible claim to harm; it merely has to wait until this Court resolves Plaintiffs’ constitutional challenge. As set forth above, CFPB had been investigating Morgan Drexen for 16 months at the time of the last teleconference. CFPB did not move for a preliminary injunction in California and can cite no reason for why it cannot wait until this case is complete. On the other hand, requiring Morgan Drexen to defend itself in California before completion of the expedited

briefing already underway is disruptive and diverts focus and attention from the foundational questions presented here.

19. Fifth, Morgan Drexen is facing irreparable harm related to the costs of defending itself in California, the risk of inconsistent procedures, analysis, and decisions on its constitutional claims, and the stigma and reputational harm associated with a lawsuit brought by an agency that it contends is unconstitutional, and which issues press releases trumpeting a conclusion that Morgan Drexen's is acting unlawfully.

20. As set forth in the pending summary judgment papers, serious questions have been raised about the constitutionality of CFPB's structure and absence of checks, balances, and oversight, but no court has yet confronted these issues. There is substantial a public interest in having these issues – regarding this new and unprecedented agency – evaluated by this experienced Court, particularly in the D.C. Circuit, which can pass on the constitutionality of a federal agency headquartered in its jurisdiction.

21. This Court is where the issues have been presented and should be heard, without the distraction of litigating the identical issue almost 3,000 miles away in a different court.

22. This is not a circumstance where Plaintiffs were forum shopping on a garden-variety declaratory judgment claim (where a plaintiff requests a declaration that its conduct is not unlawful). Instead, Plaintiffs in this case raise a foundational threshold issue about the constitutionality of CFPB, in the very Court that has more experience with constitutional issues regarding federal agencies than any other court in the country. In the words of the Supreme Court, Plaintiffs are “entitled to declaratory relief sufficient to ensure that the [rules] to which they are subject will be enforced *only by a constitutional agency . . .*” *Free Enter. Fund v. Pub. Co. Acct'ing Oversight Bd.*, 130 S. Ct. 3138 (2010) (emphasis added).

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a temporary restraining order and preliminary injunction enjoining CFPB from proceeding with its later-filed action in the U.S. District Court for the Central District of California, until such time as this case is fully and finally resolved.

Dated: August 22, 2013

Respectfully submitted,

VENABLE LLP

/s/

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*\*subject to admission*

*Attorneys for Plaintiffs Morgan Drexen, Inc. and  
Kimberly A. Pisinski*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**MORGAN DREXEN, INC. and  
KIMBERLY A. PISINSKI,**

*Plaintiffs,*

**v.**

**CONSUMER FINANCIAL  
PROTECTION BUREAU,**

*Defendant.*

**Civil Action No. 13-01112 (CKK)**

**[PROPOSED] ORDER**

This matter having come before the Court on Plaintiffs’ motion for a temporary restraining order and preliminary injunction to restrain Defendant Consumer Financial Protection Bureau ("CFPB") from prosecuting its second-filed lawsuit in the U.S. District Court for the Central District of California ("the California Lawsuit"); and for good and sufficient cause shown;

It is this \_\_\_\_ day of \_\_\_\_\_, 2013 ORDERED that Plaintiffs’ Motion for Temporary Restraining Order is granted;

It is further ORDERED that CFPB, together with its agents, representatives, and all others in active participation with it, are to refrain from prosecuting any action against Morgan Drexen and/or Kimberly A. Pisinski until such time as this case is fully and finally resolved.

This Order is effective immediately and given the absence of harm to CFPB, no bond is required.

It is further ORDERED that Defendant CFPB shall show cause on or before \_\_\_\_\_, 2013 why a preliminary injunction should not issue pursuant to F.R.C.P. 65 and the first to file doctrine.

---

The Honorable Colleen Kollar-Kotelly  
United States District Court Judge

Dated: \_\_\_\_\_, 2013

7035933

# **EXHIBIT B**

TO THE DECLARATION OF RANDALL K. MILLER

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**MORGAN DREXEN, INC. and  
KIMBERLY A. PISINSKI,**

*Plaintiffs,*

v.

Civil Action No. 13-cv-01112 (CKK)

**CONSUMER FINANCIAL  
PROTECTION BUREAU,**

*Defendant.*

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION  
TO PLAINTIFFS’ MOTION FOR A TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION ENJOINING CFPB FROM PROSECUTING ITS  
SECOND-FILED ACTION**

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Dated: August 29, 2013

*Attorneys for Defendant*

**TABLE OF AUTHORITIES**

**Cases**

*AmSouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004) ..... 7

*Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) ..... 5, 8

*Columbia Plaza Corp. v. Sec. Nat’l Bank*, 525 F.2d 620 (D.C. Cir. 1975) ..... 5, 8

\* *EEOC v. Univ. of Penn.*, 850 F.2d 969 (3d Cir. 1988) ..... 7

*Fed’n Internationale De Football Assoc. v. Nike, Inc.*,  
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*Int’l Painters and Allied Trades Indus. Pension Fund v. The Painting Co.*,  
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*Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952) ..... 5

*POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40 (D.D.C. 2012) ..... 7

*Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72 (D.D.C. 2009) ..... 7

*Tempco Elec. Heater Corp. v. Omega Eng’g, Inc.*, 819 F.2d 746 (7th Cir. 1987) ..... 6, 7

*Thayer/Patricof Educ. Funding, LLC v. Pryor Resources, Inc.*,  
196 F. Supp. 2d 21 (D.D.C. 2002) ..... 5, 6

*Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) ..... 5, 6

*Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) ..... 4

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Federal Rule of Civil Procedure 65(b)(2) ..... 4

**Regulations**

16 C.F.R. part 310 ..... 1



## INTRODUCTION

This is Plaintiffs’ second request for an injunction to restrain the Consumer Financial Protection Bureau (Bureau) from pursuing an enforcement action against Plaintiff Morgan Drexen, Inc. (Morgan Drexen). Plaintiffs voluntarily withdrew their first request, filed just over a month ago, even though the Bureau’s counsel made clear to Plaintiffs, including in telephonic hearings before this Court, that the Bureau would not commit to staying its hand while Plaintiffs pursued their constitutional claim in this Court. Now that the Bureau has filed its enforcement action, Plaintiffs seek a second bite at the apple. This time, however, Plaintiffs have jettisoned any attempt to demonstrate that the traditional injunction criteria have been met. Instead, they argue that they are entitled to an injunction simply because they “won” the race to the courthouse steps.

Plaintiffs’ motion should be denied. The law does not give the subjects of government enforcement actions the right to dictate the venue and timing for the resolution of their affirmative defenses by filing “preemptive strike” declaratory judgment actions. The sole issue raised in this action can be resolved (if necessary) together with the rest of the controversy between the parties in the Bureau’s pending enforcement action. And the precedent is clear that where, as here, a declaratory judgment will serve no useful purpose, courts should decline to entertain a request for declaratory relief. As a result, Plaintiffs are not entitled to a ruling on their constitutional challenge to the Bureau’s structure, let alone an injunction of the Bureau’s enforcement action. Plaintiffs’ motion for a preliminary injunction should be denied.

## BACKGROUND

This case arises out of the Bureau’s investigation of Morgan Drexen for potential violations of the Telemarketing Sales Rule, 16 C.F.R. part 310, the Dodd-Frank Wall Street

Reform and Consumer Protection Act, and other laws. On April 22, 2013, the Bureau informed Morgan Drexen that it was “considering enforcement action” against the company and its Chief Executive Officer, Walter Ledda. *See* Declaration of Randal M. Shaheen, Dckt. #3-5 (Shaheen Decl.) Ex. 32. In accordance with its “Notice and Opportunity to Respond and Advise” process, the Bureau invited Morgan Drexen to offer its views on why the Bureau should not file such an action. *See id.* Morgan Drexen took advantage of that opportunity by submitting a written response to the Bureau on May 8, 2013. Shaheen Decl. Ex. 33.

On July 22, 2013, before the Bureau had taken any further public action, Morgan Drexen (joined by Kimberly A. Pisinski) filed the instant action in this Court claiming that the Bureau’s structure violates the constitutional separation of powers and requesting declaratory and injunctive relief. On the same day, Plaintiffs filed their first motion for a preliminary injunction asking the Court to prohibit the Bureau “from taking any further action with respect to Plaintiffs until after the final hearing in this matter and only as permitted by Court order.” *See* Motion for a Preliminary Injunction, Dckt. #3, at 1.

This Court held two telephonic hearings on July 24 and 25, 2013, to discuss the briefing schedule. During those hearings, counsel for the Bureau indicated that the Bureau would not commit to refraining from filing an enforcement action against Morgan Drexen during the pendency of this lawsuit:

THE COURT: . . . Can I make an assumption that from the defendant’s perspective, since you indicate that they [*i.e.*, the civil investigative demands] were not self-enforcing, that during this period of time you would not be filing an enforcement action?

MR. COLEMAN: Your Honor, that determination is not mine to make.

THE COURT: Okay.

MR. COLEMAN: I don’t know the answer to that.

THE COURT: It would be helpful to obviously have some sense of whether you're doing it in terms of the context of how long a period of time. I indicated that this would be an expedited schedule and I would make an expedited decision. It would be helpful, probably, not to have an enforcement action, which they're claiming is unconstitutional, going on at the same time. That was my question.

MR. COLEMAN: Your Honor, I understand your concern. And as the record already demonstrates, we have suggested to the plaintiff in this matter, the defendant [in] an enforcement action, . . . that they were in violation of the law. *We have not yet determined whether or not to file an enforcement action, and I can't commit to what we will do in that regard during the course of our briefing here.*

THE COURT: Okay. All right. Well, whenever you make a decision about it, it would be helpful if you let the Court know.

MR. COLEMAN: Of course, Your Honor, . . .

7/25/13 Tr. at 5:10-6:11 (emphasis added). Notwithstanding the Bureau's reservation of its ability to bring an enforcement action, "Plaintiffs consented to withdraw their [3] motion for preliminary injunction and both parties consented to instead proceed with an expedited briefing on the merits of Plaintiffs' Complaint." Order of July 25, 2013, Dckt. #8. Plaintiffs withdrew their preliminary injunction motion on August 7, 2013. Notice of Withdrawal of Preliminary Injunction Motion, Dckt. #12.

On August 20, 2013, the Bureau filed an enforcement action against Morgan Drexen and Mr. Ledda in the U.S. District Court for the Central District of California. *CFPB v. Morgan Drexen*, No. 8:13-cv-1267. In the action, the Bureau alleges that Morgan Drexen and Mr. Ledda have violated federal laws by charging consumers illegal up-front fees for debt-relief services and deceiving consumers about the likelihood that they would become debt free by working with Morgan Drexen. On the same day, the Bureau filed a notice with this Court advising it of the Bureau's filing of its enforcement action, and attaching the Bureau's complaint. Notice, Dckt. #14. The next day, counsel for the Bureau in the enforcement action sent to counsel for Morgan Drexen a request for waiver of service pursuant to Federal Rule of Civil Procedure 4(d). *See*

Letter from Gabriel O'Malley to Randal Shaheen dated Aug. 21, 2013 (attached as Exhibit 1). If Morgan Drexen agrees to waive service, it will have 60 days from the date of the request—that is, until October 21, 2013—to answer or otherwise respond to the complaint. *See* Fed. R. Civ. P. 4(d)(3).

On August 22, 2013, Plaintiffs filed their second motion for a preliminary injunction, asking the Court to enjoin the Bureau “from prosecuting its second-filed action in the U.S. District Court for the Central District of California.” *See* Motion for a Temporary Restraining Order and Preliminary Injunction, Dckt. #15, at 1.<sup>1</sup>

### ARGUMENT

A preliminary injunction is an “extraordinary remedy” that will be issued only if the plaintiff demonstrates (1) a substantial likelihood of success on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20-22 (2008).

Plaintiffs do not even attempt to satisfy this standard to support their second motion for a preliminary injunction.<sup>2</sup> Instead, Plaintiffs argue that the Bureau’s initiation of its enforcement action somehow entitles Plaintiffs to the same relief they sought in their first motion for a

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<sup>1</sup> Although, Plaintiffs label their motion as one seeking both a temporary restraining order and a preliminary injunction, Plaintiffs are asking the Court to enjoin the Bureau until this case is finally resolved, not for 14 days as permitted for temporary restraining orders under Federal Rule of Civil Procedure 65(b)(2). *See* Points and Authorities in Support of Motion for a Temporary Restraining Order and Preliminary Injunction Enjoining CFPB From Prosecuting Its Second-Filed Action (“Pl. PI Mem.”), Dckt. #15-1, at 8. Accordingly, for simplicity’s sake, the Bureau refers to Plaintiffs’ motion as a motion for a preliminary injunction.

<sup>2</sup> As the Bureau demonstrated in its recently filed memorandum in support of its motion to dismiss, Plaintiffs will not suffer irreparable harm in the absence of injunctive relief nor are they likely to prevail on the merits of their claim. *See* Defendant’s Memorandum in Support of its Motion to Dismiss, or in the Alternative, for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment (Def. Mem.), Dckt. # 17-1.

preliminary injunction, but this time on the sole ground that they managed to file their declaratory judgment action first. This argument is meritless.

Courts have consistently rejected the proposition that “an injunction favoring [a] first-filed action [is] a mandatory step.” *Columbia Plaza Corp. v. Sec. Nat’l Bank*, 525 F.2d 620, 627 (D.C. Cir. 1975); *see also Thayer/Patricof Educ. Funding, LLC v. Pryor Resources, Inc.*, 196 F. Supp. 2d 21, 29 (D.D.C. 2002) (“The first-filed rule is not rigidly or mechanically applied.”). To be sure, “considerations of ‘[w]ise judicial administration, [including] conservation of judicial resources and comprehensive disposition of litigation,’” generally counsel in favor of avoiding “duplicative litigation.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). But, here, such considerations counsel in favor of dismissing Plaintiffs’ declaratory judgment action, not in favor of enjoining the Bureau’s enforcement action.

When federal courts determine whether to defer to or enjoin a parallel federal proceeding, “[n]o one factor is necessarily determinative.” *Colo. River*, 424 U.S. at 818. Rather, a “carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required.” *Id.* at 818-19. And, although courts ordinarily have a “virtually unflagging obligation . . . to exercise the jurisdiction given them,” *id.* at 817, “[t]here is . . . nothing automatic or obligatory about the assumption of jurisdiction by a federal court’ to hear a declaratory judgment action,” *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (quoting E. Borchard, *Declaratory Judgments*, 313 (2d ed. 1941)). Rather, “[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.” *Id.*

As the Bureau demonstrated in its recently filed memorandum, the factors courts consider when deciding whether to exercise their discretion to adjudicate a declaratory judgment action counsel in favor of dismissing this lawsuit. *See* Def. Mem. at 17-21. Entertaining Plaintiffs’ request for declaratory relief will “serve no useful purpose.” *Wilton*, 515 U.S. at 288. Morgan Drexen is not seeking to determine whether its conduct is lawful so that it may structure its affairs accordingly<sup>3</sup>; it “is instead in the position of one who desires an anticipatory adjudication, at the time and place of its choice, of the validity of the defenses it expects to raise against . . . claims it expects to be pressed against it.”<sup>4</sup> *Hanes Corp. v. Millard*, 531 F.2d 585, 592 (D.C. Cir. 1976).

But, “[t]he anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse.”<sup>5</sup> *Id.* at 592-93. As the Seventh Circuit put it: “The wholesome purpose of the declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum . . . . The federal declaratory judgment is not a prize to the winner of the race to the courthouse.” *Tempco Elec. Heater Corp. v. Omega Eng’g, Inc.*, 819 F.2d 746, 750 (7th Cir. 1987) (internal citations and quotations omitted). Accordingly, “[c]ases construing the interplay between declaratory judgment actions

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<sup>3</sup> *See* Pl. PI Mem. ¶ 22 (observing that this is not “a garden-variety declaratory judgment claim (where a plaintiff requests a declaration that its conduct is not unlawful)”).

<sup>4</sup> *See also* Pl. PI Mem. ¶ 9 (“Morgan Drexen disputes [the allegations contained in the Bureau’s complaint] based upon the *identical* constitutional argument that is set forth in Plaintiffs’ pending motion for summary judgment already filed in this Court.”) (emphasis in original).

<sup>5</sup> *See also Int’l Painters and Allied Trades Indus. Pension Fund v. The Painting Co.*, 569 F. Supp. 2d 113, 116 (D.D.C. 2008) (observing that the first-to-file rule should not be applied when “the first-filing plaintiff has launched a preemptive strike declaratory judgment action in the face of an impending . . . suit.”) (quoting *Fed’n Internationale De Football Assoc. v. Nike, Inc.*, 285 F. Supp. 2d 64, 67 (D.D.C. 2003)); *Thayer/Patricof*, 196 F. Supp. 2d at 30-31 (same).

and suits based on the merits of underlying substantive claims create, in practical effect, a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit.” *AmSouth Bank v. Dale*, 386 F.3d 763, 791 n.8 (6th Cir. 2004) (quoting *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am.-UAW v. Dana Corp.*, 1999 WL 33237054, at \*6 (N.D. Ohio Dec. 6, 1999)).

Indeed, the equitable considerations that generally lead courts to reject preemptive declaratory judgment actions are heightened in the context of a government enforcement action. Plaintiffs’ request for a mechanical application of the so-called “first-to-file” rule, if granted, would seriously impede the efficient operation of both the government’s enforcement agencies and the courts. By Plaintiffs’ reasoning, any subject of a government investigation could delay the government’s prosecution of a pending enforcement action simply by filing a preemptive declaratory judgment action seeking a ruling on some potential defense (however meritless). Not only would this unnecessarily impede the government’s enforcement efforts, it would encourage “an unseemly race to the courthouse, and quite likely, numerous unnecessary suits.” *EEOC v. Univ. of Penn.*, 850 F.2d 969, 978 (3d Cir. 1988) (quoting *Tempco*, 819 F.2d at 750).

Fortunately, courts have recognized as much and held that the first-to-file rule “should not apply when at least one of the party’s motives is to . . . preempt an imminent . . . enforcement action.” *Id.*; see also *POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 44-45 (D.D.C. 2012) (dismissing a declaratory judgment action filed two weeks prior to an administrative enforcement action, in part, on the ground that “granting declaratory relief would require the resolution of an anticipatory defense.”); *Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72, 76 & n.3, 78-80 (D.D.C. 2009) (dismissing a declaratory judgment action filed three months prior to the filing of an

enforcement action on the grounds that the plaintiff was engaged in “procedural fencing” and was asking the Court to “adjudicate an anticipatory affirmative defense”).

Other equitable considerations, including “the desirability of avoiding piecemeal litigation,” *Colo. River*, 424 U.S. at 818, Morgan Drexen’s location in the Central District of California, and the early stage of the respective proceedings, likewise support dismissal of Plaintiffs’ lawsuit. See *Furniture Brands Int’l, Inc. v. U.S. Int’l Trade Comm’n*, 804 F. Supp. 2d 1, 6-7 (D.D.C. 2011). By contrast, Plaintiffs have provided no ground for enjoining the Bureau’s enforcement action other than a “mechanical application” of the first-to-file rule.<sup>6</sup> *Columbia Plaza*, 525 F.2d at 627. Plaintiffs’ second motion for a preliminary injunction should be denied.

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<sup>6</sup> Concerns regarding “duplicative motions practice” or “multiple and inconsistent decisions on the issue of the CFPB’s constitutionality,” Pl. TRO. Mem. at 6, are solely attributable to Plaintiffs’ decision to file this preemptive declaratory judgment action, and can and should be addressed by dismissing Plaintiffs’ lawsuit without reaching the merits of their constitutional claim.



## CONCLUSION

For these reasons, the Bureau respectfully requests that the Court deny Plaintiffs' motion for a temporary restraining order and preliminary injunction.

Respectfully submitted,

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Deputy General Counsel  
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/s/ John R. Coleman  
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Dated: August 29, 2013

*Attorneys for Defendant*

# EXHIBIT 1



Consumer Financial  
Protection Bureau

1700 G Street, N.W., Washington, DC 20552

August 21, 2013

**UPS Overnight Delivery**

Walter Ledda, on behalf of Morgan Drexen, Inc.  
C/O Randal Shaheen, Esq.  
Venable LLP  
575 7<sup>th</sup> Street, NW  
Washington, DC 20004

**Re: Request For Waiver of Service by Morgan Drexen, Inc. – Consumer Financial Protection Bureau v. Morgan Drexen, Inc. and Walter Ledda, Case No. SACV 13-01267 – JST (JEMX)**

Dear Randy,

Based on my understanding that your office is representing Morgan Drexen, Inc. (“Morgan Drexen”) in the above-captioned action, and per our discussion yesterday, please find attached:

- A copy of the Civil Cover Sheet, Summons, and Complaint filed in the above-captioned action;
- A Notice of Lawsuit and Request for Waiver of Service of Summons concerning the above-captioned action;
- Two copies of the Waiver of Service of Summons form;
- A copy of two *Pro Hac Vice* motions and proposed orders filed in the above-captioned action;
- A copy of the Notice of Pendency of Other Actions or Proceedings filed in the above-captioned action; and
- A self-addressed, stamped envelope for you to return a signed Waiver of Service of Summons form to our office at no cost to your client.

Please do not hesitate to contact me if you have any questions. If Morgan Drexen is going to waive service, I would appreciate it if you could let me know informally, via a call or an e-mail, as well as through the formal return of the waiver. I can be reached at 202-435-9747.

Sincerely

Gabriel O'Malley  
Enforcement Attorney

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

Consumer Financial Protection Bureau,

Plaintiff(s),

v.

Morgan Drexen, Inc., and Walter Ledda, individually and as  
owner, officer, and manager of Mogran Drexen, Inc.,

Defendant(s).

CASE NUMBER:

CV-SA - 13-01267 JST (JEMx)

**NOTICE OF LAWSUIT AND REQUEST  
FOR WAIVER OF SERVICE OF SUMMONS**

This is to notify you that a lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the United States District Court, Central District of California,  Western Division  Southern Division  Eastern Division, and has been assigned case number: SACV 13-01267 JST (JEMx)

This is not a formal summons or notification from the Court, but rather my request, pursuant to Federal Rules of Civil Procedure 4(d), that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within 30 days after the date designated below as the date on which this Notice and Request is sent. Enclosed is a self-addressed, stamped envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the Court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the Court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, **please read the statement concerning the duty of parties to waive the service of the summons, which is set forth at the foot of the waiver form.**

I (We) affirm that this request is being sent to you on behalf of the plaintiff, this twenty first day of August, 2013

  
Signature of Plaintiff  
(or counsel representing Plaintiff)

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

Consumer Financial Protection Bureau,  <p align="center">PLAINTIFF(S)</p> <p align="center">v.</p> Morgan Drexen, Inc. and Walter Ledda, individually, and as owner, officer, or manager of Morgan Drexen, Inc.,  <p align="center">DEFENDANT(S).</p>	CASE NUMBER  <p align="center">SACV 13-01267 JST (JEMx)</p> <hr/> <p align="center"><b>WAIVER OF SERVICE OF SUMMONS</b></p>
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To: Morgan Drexen, Inc., C/O Randal Shaheen, Esq., Venable LLP, 575 7th Street, NW, Washington, DC 20004  
*(Name of Plaintiff's Attorney or Unrepresented Plaintiff)*

I hereby acknowledge receipt of your request that I waive service of a summons in the above-entitled action. I have also received a copy of the complaint in the action, two copies of this waiver form, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4 of the Federal Rules of Civil Procedure.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served within 60 days after\* August 21, 2013, or within 90 days after that date if the request was sent outside the United States.

*\*Date Notice of Lawsuit and Request for Waiver of Service Summons is sent.*

\_\_\_\_\_  
*Date Signed by Receiving Party*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name*

\_\_\_\_\_  
*Telephone Number and Fax Number*

\_\_\_\_\_  
*Street Address*

\_\_\_\_\_  
*Relationship to Entity on Whose Behalf I am Acting*

\_\_\_\_\_  
*City, State, Zip Code*

\_\_\_\_\_  
*Name of Party Waiving Service*

**Duty to Avoid Unnecessary Costs of Service of Summons**

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of summons was received.

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

Consumer Financial Protection Bureau,

PLAINTIFF(S)

v.

Morgan Drexen, Inc. and Walter Ledda, individually, and as  
owner, officer, or manager of Morgan Drexen, Inc.,

DEFENDANT(S).

CASE NUMBER

SACV 13-01267 JST (JEMx)

**WAIVER OF SERVICE OF  
SUMMONS**

To: Morgan Drexen, Inc., C/O Randal Shaheen, Esq., Venable LLP, 575 7th Street, NW, Washington, DC 20004  
*(Name of Plaintiff's Attorney or Unrepresented Plaintiff)*

I hereby acknowledge receipt of your request that I waive service of a summons in the above-entitled action. I have also received a copy of the complaint in the action, two copies of this waiver form, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4 of the Federal Rules of Civil Procedure.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served within 60 days after\* August 21, 2013, or within 90 days after that date if the request was sent outside the United States.

*\*Date Notice of Lawsuit and Request for Waiver of Service Summons is sent.*

\_\_\_\_\_  
*Date Signed by Receiving Party*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name*

\_\_\_\_\_  
*Telephone Number and Fax Number*

\_\_\_\_\_  
*Street Address*

\_\_\_\_\_  
*Relationship to Entity on Whose Behalf I am Acting*

\_\_\_\_\_  
*City, State, Zip Code*

\_\_\_\_\_  
*Name of Party Waiving Service*

**Duty to Avoid Unnecessary Costs of Service of Summons**

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of summons was received.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**MORGAN DREXEN, INC. and  
KIMBERLY A. PISINSKI,**

*Plaintiffs,*

v.

Civil Action No. 13-cv-01112 (CKK)

**CONSUMER FINANCIAL  
PROTECTION BUREAU,**

*Defendant.*

**[PROPOSED] ORDER**

Having considered Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction Enjoining CFPB from Prosecuting Its Second-Filed Action; and all memoranda in support thereof and in opposition thereto, it is hereby ORDERED that Plaintiffs’ motion is DENIED.

SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
**Colleen Kollar-Kotelly**  
United States District Judge

# **EXHIBIT C**

TO THE DECLARATION OF RANDALL K. MILLER



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**MORGAN DREXEN, INC. and  
KIMBERLY A. PISINSKI,**

*Plaintiffs,*

v.

**CONSUMER FINANCIAL  
PROTECTION BUREAU,**

*Defendant.*

Civil Action No. 13-01112 (CKK)

**PLAINTIFFS' REPLY IN SUPPORT  
OF MOTION FOR A TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION  
ENJOINING CFPB FROM  
PROSECUTING ITS  
SECOND-FILED ACTION**

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## INTRODUCTION

The Opposition of Defendant Consumer Financial Protection Bureau (“CFPB”) does not rebut this Court’s legal presumption that this first-filed – and almost completed – case should continue and the second-filed California Lawsuit should be enjoined.

The arguments in CFPB’s Opposition are notable for what they ignore:

- CFPB relies on cases involving “as applied” challenges (challenging an agency’s actions in a particular case), ignoring that this case is a “facial” challenge to CFPB’s structure, where the D.C. Circuit permits “*pre-enforcement [judicial] review.*” See *Gen. Elec. Co. v. EPA*, 360 F.3d 188, 194 (D.C. Cir. 2004) (emphasis added).
- CFPB asserts that this case and the California Lawsuit (which involves discovery and disputed facts) are both at “the early stage of the respective proceedings” (Opp’n at 8), ignoring this case is on an *expedited* track (with merits briefing closing in 4 weeks).
- CFPB asserts that Plaintiffs won the “race to the courthouse” (Opp’n at 1), ignoring that CFPB told the Court after this case was filed that it had not yet even decided whether to bring an enforcement action.
- CFPB plucks favorable language from certain cases but ignores their holdings, which stop a second-filed action in favor of a first-filed case. See *Furniture Brands Int’l, Inc. v. United States Int’l Trade Commission*, 804 F. Supp. 2d 1, 2 (D.D.C. 2011) (dismissing second-filed action in favor of first-filed case “for reasons of comity and judicial economy”); *Int’l Painters and Allied Trades Indus.*

*Pension Fund v. The Painting Co.*, 569 F. Supp. 2d 113, 121 (D.D.C. 2008)

(staying second-filed action in favor of first-filed declaratory judgment action).

- CFPB nonsensically argues that Plaintiffs’ motion is somehow a “second bite at the apple” (Opp’n at 1), ignoring that the motion seeks to enjoin a second-filed action that did not even exist when this case started, and that Plaintiffs withdrew their first motion for preliminary injunction only after and because CFPB consented to, and the Court ordered, an expedited schedule that rolled the preliminary injunction and an expedited decision on the merits into one.
- CFPB mixes its opposition to Plaintiffs’ motion with its other argument that this case actually should be dismissed, and that “entertaining” this case will “serve no useful purpose” (Opp’n at 6), ignoring that this case raises a collateral and foundational constitutional challenge to a new and unprecedented super agency.

The circumstances that CFPB’s Opposition ignores support enjoining the California Lawsuit. Accordingly, for the reasons stated in Plaintiffs’ opening motion and below, this Court should exercise its authority under *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620 (D.C. Cir. 1975) and enjoin the California Lawsuit.

**ARGUMENT**

**I. CFPB FAILS TO DISTINGUISH BETWEEN FACIAL CHALLENGES (SUCH AS THIS CASE) AND AS-APPLIED CHALLENGES**

The gravamen of CFPB’s position is that Plaintiffs’ entire lawsuit serves no useful purpose, and is also beyond this Court’s discretionary jurisdiction because CFPB was contemplating an enforcement action when this case was filed. Opp’n at 6-7. However, the Supreme Court and D.C. Circuit have recognized that this Court may and should conduct “pre-

enforcement review” when a plaintiff raises a facial challenge that is collateral (and in the case, foundational) to the merits of an enforcement proceeding. These authorities support enjoining the California Lawsuit, and underscore that the “as applied” cases are inapplicable.

For example, in *General Electric Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004), the D. C. Circuit reversed a decision granting the government’s motion to dismiss and held the district court had jurisdiction over a “facial” constitutional challenge to the CERCLA regime, as opposed to an “as-applied” challenge. 360 F.3d at 192. In so holding, the D.C. Circuit emphasized the “distinction” between “a challenge to the way in which [an agency] is administering the statute in any particular removal or remedial action or order,” which could be precluded, and “a challenge to the [enabling] statute itself,” which is not precluded. *Id.* at 191. The D.C. Circuit held that “usual practical considerations counseling against pre-enforcement review are not present in the adjudication of a facial [constitutional] claim.” *Id.* at 194 (citations omitted). Instead, the case presents “a purely legal issue whose resolution does not depend on” discovery and resolution of factual disputes present in an enforcement proceeding. *Id.* The D.C. Circuit remanded so that the court could conduct “pre-enforcement review” of GE’s “facial constitutional challenge.” *Id.* at 191.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S.Ct. 3138 (2010), the Supreme Court rejected a government argument almost identical to that raised by CFPB here. That case involved a facial constitutional challenge to a new agency, and the government argued that the plaintiff had no “private right of action directly under the Constitution” to challenge the agency’s structure, asserting that such challenges could only be raised “through established statutory mechanisms or as *defenses to enforcement actions.*” Brief for the United States, 2009 WL 3290435, at \*22-23 (emphasis added). The Court rejected the

government's argument, noting that it has long been recognized that federal courts have original jurisdiction and equitable power to hear and remedy such constitutional claims. 130 S.Ct. at 3151 n.2. The Court found that the petitioner's constitutional claim was "collateral" to particular agency orders and rules because petitioners more fundamentally "object to the Board's *existence*." *Id.* at 3150 (emphasis added). The Court held that the petitioners were "entitled to declaratory relief sufficient to ensure that the [rules] to which they are subject will be enforced only by a constitutional agency . . ." *Id.* at 3164.

Other D.C. cases confirm that this Court has jurisdiction over facial constitutional challenges, which need not be heard as a defense in the ordinary course of an agency's enforcement processes. *See Hettinga v. United States*, 560 F.3d 498 (D.C. Cir. 2009) (asserting jurisdiction over a constitutional claim and rejecting the government's argument that the claim first required exhaustion of administrative remedies); *Time Warner Entertainment Co., L. P. v. FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996) (asserting jurisdiction and noting that there is a "necessary distinction between a constitutional challenge that is exclusively directed to the source of putative agency authority and a challenge to the manner in which the agency has exercised or . . . failed to exercise that authority."); *Elk Run Coal Co., Inc. v. U.S. Dep't of Labor*, 804 F. Supp. 2d 8, 21 (D.D.C. 2011) (asserting jurisdiction over the plaintiff's "broad facial and systemic challenges," which did not require prior exhaustion of administrative remedies).

In this case, Plaintiffs assert a facial challenge to the constitutionality of CFPB's structure. Plaintiffs argue that CFPB's insulation from ordinary checks, balances, and oversight is novel and violates the Constitution. As the U.S. Chamber of Commerce has stated, Congress broke new ground when it created CFPB. In referring to CFPB's Director, the Chamber stated:



[T]here is no other agency head who exercises sole decisionmaking authority with regard to rulemaking, enforcement and supervision actions, and every other matter—**and** need not obtain the concurrence of colleagues on a multi-member commission; **and** who also has policy independence from the President such that he or she may be removed from office only ‘for inefficiency, neglect of duty, or malfeasance in office’; **and** who also has plenary power to appoint every one of the agency’s employees; **and** who also has the ability to spend more than half a billion dollars without congressional approval.

Statement of the U.S. Chamber of Commerce on “Enhanced Consumer Financial Protection After the Financial Crises,” *U.S. Senate Committee on Banking, Housing, and Urban Affairs*, at 29 (July 19, 2011) (emphasis in original).<sup>1</sup> Plaintiffs agree and argue that the combination of CFPB’s structural features violates the Constitution. “[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute,” and CFPB’s “novelty may . . . signal unconstitutionality.” *Ass’n of American Railroads v. U.S. Dept. of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013).

This kind of facial challenge does not involve discovery or disputed facts such as those at issue in *Swish Marketing, Inc. v. Federal Trade Commission*, 669 F. Supp. 2d 72 (D.D.C. 2009), or the vast majority of cases cited by CFPB, and cannot be lumped together with them in analyzing jurisdiction or the efficiency<sup>2</sup> of proceeding with this case first. Instead, the law underscores the propriety of completing the task initiated with the Scheduling Order in this case, and without the distraction of the California Lawsuit.

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<sup>1</sup> Available at [http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=19e3efe3-0c50-47df-bb3c-b75ff93e7a5f](http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=19e3efe3-0c50-47df-bb3c-b75ff93e7a5f) (lasted visited Aug. 5, 2013).

<sup>2</sup> The Court is required to consider equity and efficiency considerations relevant to “the convenience of the parties and the courts” and the “overall interests of justice.” *Columbia Plaza*, 525 F.2d at 622, 626-27.

## II. THE CASES UPON WHICH CFPB RELIES DO NOT INVOLVE FACIAL CONSTITUTIONAL CHALLENGES TO AGENCY STRUCTURE

The cases that CFPB cites are distinguishable because they involve plain-vanilla declaratory judgment actions where plaintiffs races to court to obtain an order that their conduct in the underlying matter is lawful. These cases provide little guidance because the nature of Plaintiffs' claim here is to challenge the constitutionality of CFPB's structure, which is a foundational issue raised by many yet evading review.

For example, CFPB cites *Amsouth Bank v. Dale*, 486 F.3d 763 (6th Cir. 2004) to argue that there is a "presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit." Opp'n at 7. However, that case did not involve a facial challenge to the constitutionality of a statute; instead the plaintiffs "ask[ed] for declaratory relief that they [were] not liable" for negligence. *Id.* at 772.<sup>3</sup>

In any event, much of CFPB's authority supports Plaintiffs' position. For example, in *International Painters*, 569 F. Supp. 2d 113 (D.D.C. 2008), the first-filed declaratory judgment action was not a facial challenge to a statute. However, the Court nonetheless stayed the second-filed action. *Id.* at 121. Similarly, CFPB cites *Furniture Brands*, 804 F. Supp. 2d 1, 2 (D.D.C.

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<sup>3</sup> The vast majority of CFPB's cases involve similar fact patterns that do not raise constitutional issues. See *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (first-filed case brought by an insurer seeking a declaration as to the scope of an insurance policy) *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 181 (1952) (first-filed case brought by an alleged infringer seeking a declaration that patents were invalid and that it did "not infringe the C-O-Two patents"); *Swish Marketing, Inc. v. Federal Trade Commission*, 669 F. Supp. 2d 72, 74 (D.D.C. 2009) (first-filed case brought by FTC target seeking a declaration as to "whether and to what extent the FTC may seek monetary relief for the alleged violation of the FTCA"); *Federation Internationale de Football Ass'n v. Nike, Inc.*, 285 F. Supp. 2d 64, 67 (D.D.C. 2003) (first-filed suitcase brought by an alleged infringer seeking a declaration that the use of a phrase "did not amount to trademark infringement"); *Thayer/Patricof Education Funding v. Pryor Resources, Inc.*, 196 F. Supp. 2d 21, 27 (D.D.C. 2002) (first-filed case brought a party alleged in breach of a contract seeking a declaration that would limit the other party's damages); *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819, F.2d 746 (7th Cir. 1987) (first-filed suit brought by an alleged infringer seeking a declaration that it did not commit "trademark infringement").

2011) to argue that “equitable considerations” support dismissing Plaintiffs’ case. Opp’n at 8. However, *Furniture Brands* dismisses the second-filed action “for reasons of comity and judicial economy.” 804 F. Supp. 2d at 7 (“Because equitable considerations favor the [Court of International Trade (“CIT”)] . . . and because the CIT is the first-filed court, this Court will defer to the litigation at the CIT and dismiss the case”). CFPB’s authority is therefore consistent with the authority cited in Plaintiffs’ opening brief, such *Lab Corp. v. Am. Holdings v. Chiron Corp.*, 384 F.3d 1326, 1333 (Fed. Cir. 2004) (enjoining a second-filed suit in favor of a first-filed declaratory judgment action).<sup>4</sup> The same result should obtain here, particularly where Plaintiffs have raised a facial constitutional challenge that should be resolved before CFPB can prosecute any enforcement action.<sup>5</sup>

**III. CFPB FAILS TO ANALYZE THE FACTORS THAT PERMIT THE COURT TO EXERCISE JURISDICTION OVER THIS ACTION AND TO ENJOIN THE SECOND-FILED ACTION**

The parties appear to agree that *Columbia Plaza Corp. v. Sec. Nat’l Bank*, 525 F.2d 620, 627 (D.C. Cir. 1975) provides the standard for enjoining the second-filed action. *See* Docket No.

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<sup>4</sup> In *Lab Corp.*, the plaintiff was accused of patent infringement and filed a declaratory judgment action declaring that it was not liable. *Id.* at 127. The patent-owner brought a second-filed action for patent infringement. *Id.* Like Plaintiffs here, the first-filed plaintiff moved to enjoin the second-filed action. The first-filed defendant opposed, arguing that it was an “effort to forum shop in abuse of the Declaratory Judgment Act.” *Id.* at 132. Nonetheless, the district court granted the motion and the Federal Circuit affirmed, holding that “the district court made an informed determination as to how it would manage the litigation pending before it based on sound reasoning and identified facts.” *Id.* at 1333.

<sup>5</sup> The cases cited by CFPB which involve concurrent actions with constitutional issues are not facial constitutional challenges to an agency’s enabling statute. *See POM Wonderful LLC v. Federal Trade Commission*, 894 F. Supp. 2d 40, 41 (D.D.C. 2012) (the plaintiff sought declaratory judgment against the FTC based on statements in two consent orders); *Equal Employment Opportunity Commission v. Univ. of Penn.*, 850 F.2d 969, 973, 975-76 (3d Cir. 1988) (the plaintiff sought declaratory judgment against the EEOC in the District of Columbia to “evade unfavorable controlling Third Circuit precedent,” based on an EEOC policy that required “disclosure of peer review materials”).

15-1 at 4 and Opp'n at 5.<sup>6</sup> CFPB's criticism that Plaintiffs' "sole ground" for moving for a preliminary injunction is that Plaintiffs filed first (Opp'n at 5) grossly mischaracterizes Plaintiffs' opening brief which identified many factors, only one of which is the first-filed rule. Docket No. 15-1 at 5. CFPB's authority supports Plaintiffs' position. *See Int'l Painters*, 569 F. Supp. 2d at 116 (D.D.C. 2008) (recognizing the first-filed rule generally allows the action commenced first to conclude first, and discussing other cases where courts analyze other factors to consider an "exception" to the first-filed rule).

Contrary to CFPB's argument that courts generally "reject preemptive declaratory judgment actions" in the context of a second-filed "government enforcement action" (Opp'n at 7), there is no such rule. CFPB relies on *POM Wonderful* 894 F. Supp. 2d 40 and *Swish Mktg, Inc.*, 669 F. Supp. 2d 72 to suggest such a rule, but these cases simply apply a multifactor test, including "equity," "convenience," and the "public importance of the question to be decided."

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<sup>6</sup> Despite the fact that CFPB cites *Columbia Plaza*, it still criticizes Plaintiffs for not analyzing the preliminary injunction factors identified in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20-22 (2008) (Opp'n at 4). However, Plaintiffs' opening brief explained that "[i]n determining whether the prosecution of a suit in another forum should be preliminarily enjoined pending disposition of the action in which the motion is filed, [the preliminary injunction factors] are of secondary significance." *Columbia Plaza Corp.*, 525 F.2d at 622 n.3. "The primary factor to be weighed is the convenience of the parties and the courts." *Id.* This pragmatic approach is routinely applied in the authority cited by both parties. It is not clear that *Winter* would otherwise govern this motion in any event. *See Bayer Healthcare, LLC v. U.S. Food & Drug Admin.*, --- F. Supp. 2d ---, 2013 WL 1777481, at \*4-5 (D.D.C. Apr. 17, 2013) (applying a "sliding scale" whereby "a lesser showing on one factor could be surmounted by a greater showing on another factor" in partially granting motion for temporary restraining order); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 113 n.6 (D.D.C. 2012) (employing pre-*Winter* sliding scale analysis). However, even under *Winter*, Plaintiffs' motion should be granted because: (1) Plaintiffs have demonstrated a "substantial likelihood of success on the merits" for the reasons identified in their summary judgment briefing (Docket No. 13-2); (2) Plaintiffs are likely to "suffer irreparable harm" for the reasons identified in their moving papers (Docket No. 15-1 at 7 ¶ 19); (3) "the balance of equities tips" in Plaintiffs' favor because an injunction will not harm CFPB – it merely has to wait until Plaintiffs' constitutional challenge is resolved; and (4) upholding the Constitution and ensuring the orderly administration of justice is in the "public interest."

*POM Wonderful*, 894 F. Supp. 2d at 44 (citation omitted). CFPB does not address these factors; as explained below, they favor exercising jurisdiction over this case and granting Plaintiffs' motion.

For example, CFPB cites the "the early stage of the respective proceedings" (Opp'n at 8), but that is factually incorrect because this case will be fully submitted on September 25 and there is not yet a scheduling order in the California Lawsuit, which will involve discovery, motions practice, disputed facts, and proceedings that could last for years. Given the expedition ordered and consented to in this case, this factor favors enjoining the California Lawsuit. This Court commented that it would make an "expedited decision," and therefore it "would be helpful, probably, not to have an enforcement action . . . going on at the same time." 7/25/2013 Tr. 5:20-24. This Court's commitment of resources to decide this matter quickly, with all parties' consent, is another reason to permit this case to reach its conclusion and to enjoin the California Lawsuit.

CFPB also argues that Plaintiffs won the "race to the courthouse" (Opp'n at 1), but there is no evidence of any "race" because CFPB had not decided whether or not to sue. CFPB confirmed this to the Court after this suit was filed. *See* 7/25/13 Tr. at 5:10 to 6:11 ("We have not yet determined whether or not to file an enforcement action, and I can't commit to what we will do in that regard . . .").

CFPB relegates its response to Plaintiffs' argument about the inefficient duplication and risk of inconsistent decisions that would result from litigating the California Lawsuit (where Plaintiffs would be forced to move to dismiss on the constitutional issue) to a footnote (Opp'n at 8 n.6) and CFPB's only response is to blame Plaintiffs for filing this lawsuit. This gives impermissibly short shrift to an important factor weighing in favor of granting the injunction: the

protection of both the parties' and the Court's resources, and the generally tendency of courts (as embodied in doctrines like *res judicata*) to avoid multiple and inconsistent judgments on the same issue. *See Columbia Plaza*, 525 F.2d at 626 ("Sound judicial administration counsels against separate proceedings, and the wasteful expenditure of energy and money incidental to separate litigation of identical issues should be avoided"). Plaintiffs have the right to challenge CFPB's structure under D.C. Circuit and Supreme Court authority, as explained in Section I above. There was nothing improper about Plaintiffs' filing this suit.

CFPB argues that "the anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure" (Opp'n at 6). However, Plaintiffs are not anticipating defenses but instead bringing a facial constitutional challenge to the structure of an agency that has purported to exercise authority over them and that has caused and threatened them with significant financial injury. Plaintiffs have the right and authority to bring this as a stand-alone case under *General Electric* and *Free Enterprise Fund*.

There are still other factors favoring completing this case first that CFPB fails to address, including:

- a. CFPB is located here. (CFPB argues that Morgan Drexen is located in California (Opp'n at 8), but that poses no inconvenience to CFPB in any way.)
- b. All lawyers on both sides of the case work here. (This is readily apparent from the signature blocks in both cases. *See* Docket No. 14-1.)
- c. The majority of CFPB's investigation occurred here, and Morgan Drexen has already produced over seventeen thousand pages of documents to CFPB in the District of Columbia. *See* Declaration of Randal K. Shaheen, Docket No. 3-5 (Ex. 26).
- d. The D.C. Circuit has the most experience with constitutional issues affecting federal administrative agencies.
- e. Another case challenging CFPB's structure is on appeal in this Circuit (having been dismissed by the district court for lack of standing). *See State Nat'l Bank of*

*Big Spring*, Case No. 1:12-cv-01032-ESH (Docket Nos. 45-46) (Notices of Appeal).

- f. The constitutional issue is already joined here, with Plaintiffs' motion for summary judgment and CFPB's response thereto pending before this Court.
- g. No fact issues or expensive and time consuming discovery required here (unlike an as-applied claim, "the litigation of which—unlike a facial challenge—would require the time and expense of discovery." *See Daskalea v. Washington Humane Society*, 710 F. Supp. 2d 32, 45 (D.D.C. 2010) (Kollar-Kotelly, J.)).

#### **IV. CFPB DISREGARDS THE NOVELTY AND UNTESTED CONSTITUTIONAL STATUS OF THE AGENCY**

CFPB argues that the implication of the pending motion is that "any subject of a government enforcement action" could file a preemptive case and delay an enforcement proceeding. Opp'n at 7. CFPB cites cases involving the FTC, a multimember commission whose constitutionality has long been settled. This case is *sui generis* given the novelty of CFPB structure and foundational nature of the constitutional claims. Deciding this case first benefits CFPB, who will otherwise have to contend with the ongoing controversy surrounding its structure, which continues to be debated both in and out of Congress. With every passing day, CFPB takes more actions, the validity of which remain questionable unless and until there is a final ruling on the agency's structure.

#### **V. PLAINTIFFS ARE NOT "SEEKING A SECOND BITE AT THE APPLE"**

CFPB's claim that Plaintiffs "seek a second bite at the apple" (Opp'n at 1) is unfounded. Plaintiffs withdrew their first preliminary injunction motion after the telephonic hearings with the Court where all parties consented to move on an expedited basis.<sup>7</sup> Plaintiffs did not

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<sup>7</sup> At the initial hearing, the Court commented: "The one question that I had is, I was going to propose as to whether it would be amenable to the parties to roll the preliminary injunction into a decision on the merits. In other words, to do the briefing on the merits with an expedited schedule, obviously, an expedited decision. The underlying complaint is challenging the constitutionality of the statute establishing the agency, and that is the subject of at least the merits in terms of the PI. And instead of doing it in two different bites, it might be better to

withdraw their motion because they feared it would be denied. This hardly constitutes an unsuccessful “bite.” It is CFPB’s filing of the California Lawsuit that has complicated what the Court and Plaintiffs sought to simplify at the initial conference– with CFPB’s consent. CFPB’s apparent change of heart and belated tactical decision need not be accepted as controlling by the Court in its *Columbia Plaza* analysis.

---

frankly just roll it in and make one decision that will take care of the whole case, if the parties are willing, and if actually this case would work out that way.” 7/24/2013 Tr. 3:10-22. The parties consented to follow the Court’s suggestion.



**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a temporary restraining order and preliminary injunction enjoining CFPB from proceeding with its later-filed action in the U.S. District Court for the Central District of California, until such time as this case is fully and finally resolved.

Dated: September 3, 2013

Respectfully submitted,

VENABLE LLP

/s/

---

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*Attorneys for Plaintiffs Morgan Drexen, Inc. and  
Kimberly A. Pisinski*

7054141

# **EXHIBIT D**

TO THE DECLARATION OF RANDALL K. MILLER

**DePalma, Nicholas M.**

---

**From:** Miller, Randall K.  
**Sent:** Tuesday, October 15, 2013 12:04 PM  
**To:** Gabriel.O'Malley@cfpb.gov  
**Cc:** Shirley.Chiu@cfpb.gov; DePalma, Nicholas M.; Shaheen, Randal M.  
**Subject:** meet/confer-notice re motion

Dear Gabriel –

Thank you again for taking my call yesterday.

To confirm our discussion: although you would be willing to consider providing us with a short (day or two) extension of time to respond to the Complaint in the California case, you were not willing to consider a broader request for a stay of the California action pending a resolution of the motion to enjoin the California case awaiting decision in D.C.

I have now conferred with my client and we intend to file a request today with Judge Staton that the California case be stayed pending a decision in D.C.

We are preparing the filing now and expect to have it on file today. We are bringing it under the Ex Parte Application procedure that will require CFPB to respond within 24 hours. I expect that the motion will be short (about 2 pages) and will essentially (a) notify the Court about the D.C. action and pending motion; and (b) request that Judge Staton stay the California case for reasons of judicial efficiency.

I will email you a copy of the motion as soon as we get it on file. In the meantime, please let me know any questions.

Thank you and best regards,

--Randy

***Randy Miller, Esq., Partner***

**Venable LLP / 703.905.1449**

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Tysons Corner, VA 22182

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4 Suite 2100  
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7 (Fax) 310-229-9901  
8 Email: cmbrecht@venable.com

9 Attorneys for MORGAN DREXEN  
10 and WALTER LEDDA

11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 CONSUMER FINANCIAL  
14 PROTECTION BUREAU

15 Plaintiff,

16 v.

17 MORGAN DREXEN, INC.  
18 and  
19 WALTER LEDDA, individually, and as  
20 owner, officer, or manager of Morgan  
21 Drexen, Inc.

22 Defendants.

23 CASE NO. SACV13-01267 JST  
24 (JEMx)

25 Hon. Josephine L. Staton  
26 Courtroom: 10A (Santa Ana)

27 **DECLARATION OF CELESTE**  
28 **M. BRECHT**

Action Filed: August 20, 2013  
Trial Date: Not set

VENABLE LLP  
2049 CENTURY PARK EAST, SUITE 2100  
LOS ANGELES, CA 90067  
310-229-9900

**DECLARATION OF CELESTE M. BRECHT**

1  
2 1. I am a member of this Court, an Associate at Venable LLP, and  
3 counsel to Defendants in this case.

4 2. I submit this Declaration in support of Defendants’ Ex Parte  
5 Expedited Motion to Stay This Action.

6 3. Attached as Exhibit A is a true and correct copy of the July 25, 2013  
7 Scheduling Order in Morgan Drexen v. CFPB (D.C. Civil Action 1:13-cv-01112-  
8 CKK) (the “First Filed Case” case) providing an expedited schedule for summary  
9 judgment, requiring all briefs to be submitted by September 25, 2013. *Id.* at 4.

10 4. The Order states that “both parties consented to ... proceed with an  
11 expedited briefing on the merits of Plaintiffs’ Complaint.” *Id.* at 1.

12 5. Attached as Exhibit B is a true and correct copy of the July 25, 2013  
13 transcript from the First Filed case.

14 6. As the transcript reflects, the Court stated that it would proceed on an  
15 “expedited schedule” and issue “an expedited decision.” *Id.* at 5.

16 7. The Court also commented that “It would be helpful, probably, not to  
17 have an enforcement action, which they're claiming is unconstitutional, going on at  
18 the same time.” *Id.*

19 I declare under penalty of perjury under the laws of the United States of  
20 America that the foregoing is true and correct.

21 Executed this 15th day of October, 2013, at Los Angeles, C

22 /s/ Celeste M. Brecht  
23 Celeste M. Brecht  
24  
25  
26  
27  
28

# **EXHIBIT A**

TO THE DECLARATION OF CELESTE M. BRECHT

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**MORGAN DREXEN, INC. and  
KIMBERLY A. PISINSKI,**

*Plaintiffs,*

v.

**CONSUMER FINANCIAL  
PROTECTION BUREAU,**

*Defendant.*

Civil Action No. 13-01112 (CKK)

**SCHEDULING AND PROCEDURES ORDER**  
(July 25, 2013)

The Court held two on the record telephone conference calls with the parties on July 24, 2013 and July 25, 2013, during which Plaintiffs consented to withdraw their [3] motion for preliminary injunction and both parties consented to instead proceed with an expedited briefing on the merits of Plaintiffs' Complaint. The parties jointly proposed a schedule, which this Court granted. Accordingly, and in order to administer this civil action in a manner fair to the litigants and consistent with the parties' interest in completing this litigation in the shortest possible time and at the least possible cost, it is, this 25th day of June, 2013, hereby

**ORDERED** that the parties are directed to comply with each of the directives set forth in this Order. The Court will hold the parties responsible for following these directives; failure to conform to this Order's directives **may, when appropriate, result in the imposition of sanctions.**

1. **COMMUNICATIONS WITH THE COURT.** The parties should endeavor to keep communications with Chambers to a minimum. *Ex parte* communications on matters other than scheduling are **strictly prohibited**; if the parties need to contact Chambers, it must be done **jointly** pursuant to a conference call arranged by the parties.

2. **MOTIONS FOR EXTENSIONS OF TIME.** The Court will not entertain or honor stipulations for extensions of time; parties must file a motion in accordance with the following instructions:

- (a) Motions for extensions of time **must be filed at least four (4) business days prior to the first affected deadline.**
- (b) Motions for extensions of time are strongly discouraged; they will be granted only in truly exceptional or compelling circumstances and parties should not

expect the Court to grant extensions.

- (c) All motions for extensions of time **must include the following or they will not be considered:**
  - (i) The specific grounds for the extension;
  - (ii) The number of previous extensions, if any, granted to each party;
  - (iii) A statement of the impact that the requested extension would have on all other previously set deadlines;
  - (iv) A proposed schedule for any other affected deadlines, to be proposed only after consulting with opposing counsel; and
  - (v) A statement of opposing counsel's position vis-à-vis the motion in accordance with Local Rule LCvR 7(m).

3. **MOTIONS GENERALLY.** Parties must comply with the following instructions when briefing any motion:

- (a) Memoranda of points and authorities filed in support of or in opposition to any motion may not, without leave of the Court, exceed forty-five (45) pages, and reply memoranda may not exceed twenty-five (25) pages, with margins set at one inch and with all text double-spaced (excepting footnotes) and in twelve-point Times New Roman (including footnotes).
- (b) A party may not file a sur-reply without first requesting leave of the Court.
- (c) Where a party fails to file a memorandum of points and authorities in opposition to a given motion, the Court **may treat the motion as conceded.** See Local Rule LCvR 7(b). Similarly, where a party fails to respond to arguments in opposition papers, the Court may treat those specific arguments as conceded. See *Phrasavang v. Deutsche Bank*, 656 F. Supp. 2d 196, 201 (D.D.C. 2009).
- (d) **Exhibits shall be properly edited** to exclude irrelevant material and to direct the Court's attention to the pertinent portions thereof.
- (e) Each submission shall be accompanied by a table of cases and other authorities cited therein.
- (f) Every pleading or paper, regardless of whether it is signed by an attorney or a *pro se* party, shall contain the name, address, telephone number, and, for an



attorney, bar identification number. *See* Local Rule LCvR 5.1(e).

4. **MOTIONS FOR SUMMARY JUDGMENT.** Parties must comply with the following instructions when briefing motions for summary judgment and the Court may strike papers not in conformity therewith:

- (a) The Court **strictly adheres to the dictates of Local Rule LCvR 7(h)**, which requires that each party submitting a motion for summary judgment attach a statement of material facts for which that party contends there is no genuine dispute, with specific citations to those portions of the record upon which the party relies in fashioning the statement. The party opposing the motion must, in turn, submit a statement enumerating all material facts which the party contends are genuinely disputed and thus require trial. *See* Local Rule LCvR 7(h)(1). The parties are strongly encouraged to carefully review *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145 (D.C. Cir. 1996), on the subject of Local Rule LCvR 7(h).
- (b) The moving party's statement of material facts shall be a short and concise statement, **in numbered paragraphs**, of all material facts as to which the moving party claims there is no genuine dispute. The statement must contain **only one factual assertion in each numbered paragraph**.
- (c) The party responding to a statement of material facts must respond to each paragraph with a **correspondingly numbered paragraph**, indicating whether that paragraph is admitted or denied. If a paragraph is admitted only in part, the party must specifically identify which parts are admitted and which parts are denied.
- (d) The Court may assume that facts identified by the moving party in its statement of material facts are **admitted**, unless such facts are controverted in the statement filed in opposition to the motion. *See* Local Rule LCvR 7(h)(1).
- (e) The responding party must include any information relevant to its response in its correspondingly numbered paragraph, with specific citations to the record. However, if the responding party has additional facts that are not directly relevant to its response, it must identify such facts in consecutively numbered paragraphs **at the end** of its responsive statement of facts. **If additional factual allegations are made, the opponent must file a responsive statement of its own.**
- (f) The parties must furnish **precise citations** to the portions of the record on which they rely; the Court need not consider materials not specifically identified. *See* Fed. R. Civ. P. 56(c)(3).

5. **MOTIONS FOR RECONSIDERATION.** Motions for reconsideration of prior rulings are strongly discouraged. Such motions shall be filed only when the requirements of Fed. R. Civ. P. 54(b), Fed. R. Civ. P. 59(e), and/or Fed. R. Civ. P. 60(b) are met. If such a motion is filed, it **shall not exceed ten (10) pages in length**. Moreover, the Court will not entertain: (a) motions which simply reassert arguments previously raised and rejected by the Court; or (b) arguments which should have been previously raised, but are being raised for the first time. *See Nat'l Trust v. Dep't of State*, 834 F. Supp. 453, 455 (D.D.C. 1993). Motions not in compliance with these instructions may be stricken.

6. **COURTESY COPIES.** The parties shall deliver one (1) courtesy copy of any submission that is over twenty-five (25) pages in length or that includes more than one (1) exhibit to the Court Security Officer at the loading dock located at Third and C Streets (not the Clerk's Office or Chambers). Courtesy copies shall be appropriately bound and tabbed for ease of reference.

7. **SETTLEMENT.** The parties are expected to evaluate their respective cases for purposes of settlement. The Court encourages the use of alternative dispute resolution *e.g.*, mediation or neutral case evaluation. The use of these methods is available at any time, as is a settlement conference before a magistrate judge. If counsel are interested in pursuing these options, they may contact Chambers at any time. If the case settles in whole or in part, counsel shall **promptly** advise the Court.

8. **APPEARANCES AT HEARINGS.** Principal trial counsel must appear at all hearings unless excused by the Court in advance.

It is **FURTHER ORDERED** that the parties shall adhere to the following schedule:

- (a) On or before **August 7, 2013**, Plaintiffs shall file their motion for summary judgment;
- (b) On or before **August 27, 2013**, Defendant shall file its opposition to Plaintiffs' motion for summary judgment and cross-motion to dismiss and/or for summary judgment;
- (c) On or before **September 13, 2013**, Plaintiffs shall file their reply in further support of their motion for summary judgment and opposition to Defendant's cross-motion; and
- (d) On or before **September 25, 2013**, Defendants shall file its reply in further support of its cross-motion to dismiss and/or for summary judgment.

Additional dates will be set as necessary. The dates identified above are firm; the Court has endeavored to give the parties the schedule that they have requested and expects that they will adhere

to that schedule. The Court shall also endeavor to issue a ruling on the parties' motions on an expedited basis and will advise the parties in the event a hearing is necessary.

**SO ORDERED.**

Date: July 25, 2013

\_\_\_\_\_  
/s/

**COLLEEN KOLLAR-KOTELLY**  
United States District Judge

# **EXHIBIT B**

TO THE DECLARATION OF CELESTE M. BRECHT

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC., and  
KIMBERLY A. PISINSKI,  
Plaintiffs,

vs.

CA No. 13-1112  
Washington, DC  
July 25, 2013  
1:45 p.m.

CONSUMER FINANCIAL PROTECTION BUREAU,  
Defendant.

---

TRANSCRIPT OF TELEPHONE CONFERENCE  
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

RANDALL K. MILLER, ESQUIRE  
NICHOLAS M. DePALMA, ESQUIRE  
Venable, LLP  
8010 Towers Crescent Drive  
Suite 300  
Tysons Corner, VA 22182  
(703) 821-8949

For the Defendant:

JOHN R. COLEMAN, ESQUIRE  
NANDAN M. JOSHI, ESQUIRE  
Consumer Financial Protection  
Bureau  
1700 G Street, NW  
Washington, DC 20552  
(202) 435-7254

Court Reporter:

Lisa M. Foradori, RPR  
Official Court Reporter  
U.S. Courthouse, Room 6706  
333 Constitution Avenue, NW  
Washington, DC 20001  
(202) 354-3269

Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription

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P R O C E E D I N G S

THE COURT: Good afternoon, it's Judge Kotelly.

MR. MILLER: Good afternoon.

MR. COLEMAN: Good afternoon, Your Honor.

THE COURT: Let me call the case, Kimberly Pisinski and Morgan Drexen, Incorporated, are the plaintiffs. And the Consumer Financial Protection Bureau is the defendant. It's 13-cv-1112. If counsel that are on the phone would identify themselves, please. Plaintiffs' counsel first.

MR. MILLER: Good afternoon, Your Honor, Randy Miller from Venable on behalf of the plaintiffs, and I'm here with my colleague Nicholas DePalma.

THE COURT: Okay. And for the defendant?

MR. COLEMAN: Good afternoon, Your Honor. This is John Coleman on behalf of the Consumer Financial Protection Bureau, I'm here with my colleague, Nandan Joshi.

THE COURT: Okay. We're picking up from our conference call on the record from yesterday, and we'll do the same thing of just making sure you give us your last name in terms of when you make any comments to the Court's questions in order to make sure that we ascribe the comments to the correct people.

We had left it that you would confer with your clients, as well as with each other, to come back and indicate -- the options that we were considering was a

1 schedule that you had proposed relating to proceeding with the  
2 preliminary injunction. I had proposed, and it at least  
3 looked like perhaps it would be possible, to roll the PI into  
4 a merits decision where the focus would be strictly on the  
5 merits, since the question that has been raised in the  
6 complaint and the likelihood of success on the merits in the  
7 PI is an issue in terms of whether the -- you're basically  
8 challenging the constitutionality of the statute that  
9 established this Bureau.

10 And we had talked about having the plaintiff have  
11 an opportunity to supplement their arguments in that context,  
12 and then the defendants had talked about cross-moving.

13 So, let me start with the plaintiffs, where are we  
14 on this?

15 MR. MILLER: Thank you, Your Honor. Randy Miller  
16 for plaintiffs. So, counsel met and conferred and we talked  
17 about the four rounds of briefing that we were discussing on  
18 yesterday's call, and we were able to reach agreement on that.  
19 And, also, we have proposed dates. If it's acceptable to the  
20 Court, I can run through those dates.

21 THE COURT: Okay. Why don't you -- so, plaintiffs  
22 would supplement their merits discussion, is that what you're  
23 doing first?

24 MR. MILLER: Correct, Your Honor.

25 THE COURT: And what date are you proposing?

1 MR. MILLER: August 7th.

2 THE COURT: And then the defendant, as I understand  
3 it, would file an opposition to that and cross-move. Is that  
4 correct, defense counsel?

5 MR. COLEMAN: That's correct, Your Honor. This is  
6 John Coleman for the defendants.

7 THE COURT: And what date did you propose?

8 MR. COLEMAN: Your Honor, we agreed upon -- I think  
9 it's August 27th. Is that where we ended up?

10 MR. MILLER: Randy Miller. Yes, that's correct.

11 THE COURT: Okay. And then the plaintiff will file  
12 a reply to their original, you know, basically, motion, and an  
13 opposition to the defendant's motion. And what date would you  
14 come back with that?

15 MR. MILLER: Randy Miller for plaintiffs, Your  
16 Honor. That's September 13th.

17 THE COURT: All right. And then the defendant will  
18 file a reply to their -- to the defendant's motion. What date  
19 would that be?

20 MR. COLEMAN: John Coleman for the defendant, Your  
21 Honor. September 25th.

22 THE COURT: So, we would have -- in essence, the  
23 supplementation would be, I take it, a new motion. You would  
24 be making a motion for summary judgment using some of the same  
25 arguments, is that correct? Plaintiffs' counsel?



1 MR. MILLER: Randy Miller for plaintiffs, Your  
2 Honor. That is correct.

3 THE COURT: All right. And then the defendants  
4 would oppose the plaintiffs' motion and cross-move on the 27th  
5 of August. Plaintiffs would file a reply to the their own  
6 motion and an opposition to the defendant's by September 13th,  
7 and then the defendant would file a reply to their motion by  
8 September 25th.

9 All right. This is workable from our perspective.  
10 Can I make an assumption that from the defendant's  
11 perspective, since you indicate that they were not  
12 self-enforcing, that during this period of time you would not  
13 be filing an enforcement action?

14 MR. COLEMAN: Your Honor, that determination is not  
15 mine to make.

16 THE COURT: Okay.

17 MR. COLEMAN: I don't know the answer to that.

18 THE COURT: It would be helpful to obviously have  
19 some sense of whether you're doing it in terms of the context  
20 of how long a period of time. I indicated that this would be  
21 an expedited schedule and I would make an expedited decision.  
22 It would be helpful, probably, not to have an enforcement  
23 action, which they're claiming is unconstitutional, going on  
24 at the same time. That was my question.

25 MR. COLEMAN: Your Honor, I understand your

1 concern. And as the record already demonstrates, we have  
2 suggested to the plaintiff in this matter, the defendant, an  
3 enforcement action, and we didn't think that they were in  
4 violation of the law. We have not yet determined whether or  
5 not to file an enforcement action, and I can't commit to what  
6 we will do in that regard during the course of our briefing  
7 here.

8 THE COURT: Okay. All right. Well, whenever you  
9 make a decision about it, it would be helpful if you let the  
10 Court know.

11 MR. COLEMAN: Of course, Your Honor, we'll let the  
12 Court --

13 THE COURT: Excuse me. And I take it that the only  
14 thing that is outstanding at this point are the subpoenas that  
15 are requests for information? Is there anything else that is  
16 outstanding that has come from the Bureau?

17 MR. COLEMAN: Your Honor, my understanding is that  
18 we issued to the -- not to Ms. Pisinski, but to Plaintiff  
19 Morgan Drexen, a number of Civil Investigative Demands.

20 THE COURT: Okay.

21 MR. COLEMAN: And there may be some lingering  
22 disputes over whether or not the plaintiff in this matter has  
23 fully complied. As I mentioned yesterday, they're not  
24 self-enforcing, so if we -- they don't actually have an  
25 obligation to do anything until we receive them -- an order

1 from a District Court to enforce those investigative demands.

2 THE COURT: Okay. Has anything been filed or any  
3 requests made of the individual?

4 MR. COLEMAN: No, Your Honor.

5 THE COURT: Ms. Pisinski. So, this has been  
6 strictly towards Morgan Drexen, is that correct? Just to get  
7 a sense of what is involved with it.

8 MR. COLEMAN: Morgan Drexen has been the subject of  
9 the investigation, Your Honor.

10 THE COURT: Okay.

11 MR. COLEMAN: Not any individual -- or not any  
12 individual that doesn't work at Morgan Drexen.

13 THE COURT: All right. Just to make sure I  
14 understood. One question that I had, and this is not a  
15 hearing, but after listening to it last night or yesterday, in  
16 terms of their not be self-enforcing, and they have to file an  
17 action and they haven't done so. Has plaintiff, in your  
18 materials -- I don't remember having it addressed, and I have  
19 to say that I've only had an opportunity to look through very  
20 quickly because I've had pretrials in some civil cases that I  
21 needed to take care of, as to whether or not you have  
22 addressed the issue that if it's not self-enforcing at this  
23 point, and therefore, they have taken no action to do this, as  
24 to how this fits into your irreparable damage.

25 Do you want to address that?

1 MR. MILLER: Your Honor, Randy Miller for  
2 plaintiffs. We think that we have multiple forms of  
3 irreparable harm that is set forth in the Walter Ledda  
4 declaration, which we submitted. He goes through it. But  
5 what you'll see from that document is that CFPB has sent CIDs  
6 to many of our most important business partners, including  
7 some of the lawyers.

8 What Morgan Drexen does is it supports lawyers.  
9 So, we're a back office for the lawyers. And a lot of the  
10 documents that -- all of the documents that we get from these  
11 clients are given to us under the attorney/client privilege,  
12 and a lot of it is personal financial data. So, you know, I  
13 understand the comment that there's nothing we're obligated to  
14 do, but that's not what the courts are saying to us on the  
15 enforcement side.

16 I'm not counsel on the enforcement side, but I have  
17 seen some of the transcripts and I've seen statements  
18 indicating that they, on the enforcement side, take the  
19 position that we're obligated -- that we're compelled to do  
20 this. And that they're letting all of your business partners  
21 know, and we suffered various problems from that black cloud  
22 that the investigation has had, including because of some of  
23 the conduct of the CFPB in sending out these CIDs to our  
24 business partners, and to take the position that we're  
25 obligated to produce personal financial data and

1 attorney/client protected material, and that they're building  
2 these databases and aggregating personal data and those kinds  
3 of things. So, we think that we are -- and Mr. Ledda goes  
4 through some of the details, like the consequences of that and  
5 sort of the reputational injury to the business. And the fact  
6 that the agency said that our entire business has violated  
7 some standard that we don't think even -- that we should even  
8 be within the jurisdiction because we're lawyers and that's a  
9 state regulatory function, not a federal regulatory function.

10 THE COURT: Okay. Mr. Miller, that's enough. I  
11 was just trying to get a sense. Irreparable damage is not  
12 going to be part of this lawsuit. I was rasing it in that  
13 context to get to the issue in sort of a roundabout way. Is  
14 your challenge facial? That's what it looked like to me.  
15 Is it facial or is it not -- is it more than that?

16 MR. MILLER: Well --

17 THE COURT: Or is it implementation?

18 MR. MILLER: Well, we have problems on both. We  
19 have --

20 THE COURT: Let me put it this way. Let me  
21 interrupt for a second, Mr. Miller.

22 MR. MILLER: Yeah.

23 THE COURT: What I want to do is -- when you file  
24 the papers, you need to be very specific about the challenge  
25 because it does make a difference in terms of how it's

1 analyzed. So, I'm raising this because I want to -- sometimes  
2 we get this -- it's unconstitutional -- and it's not clear  
3 precisely on what grounds you're saying -- is it a facial  
4 challenge to the statute? Is it the implementation of the  
5 statute? Is it both? What is it?

6 You don't have to tell me now, but I want to make  
7 sure that the papers address it since there's a different  
8 approach to it.

9 MR. MILLER: I think I can answer it. Randy Miller  
10 for the plaintiffs. It might be helpful for me to tell you  
11 what I'm thinking, which is that the likelihood of success  
12 portion of our preliminary injunction motion, which we're now  
13 going to stand -- in terms of this I guess motion for --

14 THE COURT: -- merits.

15 MR. MILLER: -- motion for summary judgment that  
16 we're filing on August 7th. We'll focus on -- I think what  
17 you're describing is a facial challenge, which is that the  
18 structure of the CFPB violates the constitutional requirement  
19 that's articulated in those cases, like *Humphrey's Executor*,  
20 those line of cases that talk about the internal checks and  
21 balances and political oversight for agencies of federal  
22 government.

23 So, that's what it will -- and that was our  
24 likelihood of that portion -- that's what we're going to focus  
25 on. Now, what we did in the complaint, just so the record is

1 clear, is that it might be that you determine -- perhaps it  
2 will ultimately be determined that the CFPB is constitutional  
3 and that we're wrong about that. Or perhaps you'll say that  
4 it's unconstitutional and Congress will fix it. Either way.  
5 Either CFPB is going to come out of this alive, if you will,  
6 and they may still want to proceed with the enforcement action  
7 against Morgan Drexen, and Kim Pisinski is affected by this  
8 because it's her records and clients that are affected.

9           So, we would want to preserve and not waive or  
10 relinquish the sort of -- you know, I think what you described  
11 as the implementation or sort of the application of CFPB  
12 authority as to us. We think --

13           THE COURT: Now, let me interrupt you. If we're  
14 doing it on the merits, my assumption was that this would take  
15 care of the case.

16           MR. MILLER: Yeah.

17           THE COURT: In other words, the point of doing it  
18 on the merits is it resolves the case.

19           MR. MILLER: Sure.

20           THE COURT: So, I just wanted to make sure -- I did  
21 not see -- at least as to this lawsuit -- now, if you --  
22 depending on the decision and various other factors, you might  
23 want to file a different lawsuit at some point.

24           MR. MILLER: Sure.

25           THE COURT: My question is, is that the idea of it

1 being on the merits is that you resolve the present case.

2 MR. MILLER: Right. Because the constitutional  
3 challenge to the CFPB will be resolved by our motion.

4 THE COURT: Right. Okay. And so it takes care of  
5 the case that you actually have filed?

6 MR. MILLER: Right. Right. And it doesn't -- if  
7 later CFPB sues us or something, we still would have our  
8 merits defenses and that --

9 THE COURT: Yeah, it won't affect any of that.  
10 I just wanted to make sure we were on the same playing field  
11 here. My understanding then is that it's a facial challenge  
12 to the way it's been established. And this argument will  
13 basically resolve this particular lawsuit. It doesn't mean  
14 it's necessarily the end, but at least as to this lawsuit it  
15 would be -- or we would hope that it would be in some way.

16 Is that correct?

17 MR. MILLER: Randy Miller for plaintiffs. That's  
18 correct, Your Honor.

19 THE COURT: Let me ask the defendants. Can you  
20 give me some idea of the basis of your motion. Is it strictly  
21 in terms of the motion that you are going to be the proponent  
22 of, not just the opposition? Are they the same argument or  
23 are they slightly different arguments?

24 MR. COLEMAN: Your Honor, we are still developing  
25 the arguments that we might set forth in our motion under the



1 schedule that we have over a month to do so. So, I'm not  
2 prepared to go into too much detail right now because we just  
3 haven't discussed certain theories internally. But I will  
4 say, and I told Mr. Miller, that we do think that the merits  
5 for their constitutional claim is wrong -- incorrect -- and so  
6 we will move at least on that ground.

7 THE COURT: All right. I don't have a problem with  
8 your schedule, and I will operate to resolve it as quickly as  
9 I can afterwards. I won't leave it lingering. If anything  
10 happens in the meantime that would seem to impact on the case,  
11 if you would make sure that you file a notice and let me know.

12 To the extent that there -- if it's going to be a  
13 facial challenge, it seems to me the facts are basically  
14 what's in the statute and there's probably not any real  
15 outside facts from it. So, it should be fairly  
16 straightforward in terms of being a straight analysis of the  
17 structure of the statute in establishing the agencies and  
18 oversight, et cetera, on constitutional grounds.

19 Is that accurate, Mr. Miller?

20 MR. MILLER: Randy Miller. Yes, that's accurate,  
21 Your Honor.

22 THE COURT: All right. Then what I would ask is to  
23 make sure that -- to the extent that you do do a statement of  
24 material facts that are not in dispute, they should be set out  
25 in paragraph form, and the other side should respond

1 specifically to them so I know whether there's a dispute here  
2 for some reason or not. And if you want to add some  
3 additional facts, then you do those separately.

4 I don't see that being the case here because it  
5 seems to me it's just an analysis of the statute. But to the  
6 extent that even that sets out particular facts, I would ask  
7 that you at least respond to it. When I put out the order,  
8 I'll put this information in it so it's quite clear.

9 In the meantime, Mr. Miller, are you -- as part  
10 of -- I would ask that as part of your first briefing, when  
11 you file it, if you would then withdraw your PI at that time  
12 so it's not left on the record as if that's still outstanding.  
13 You're basically substituting briefing on the merits, and I  
14 don't have a problem if you want to wait until you actually  
15 file your brief.

16 MR. MILLER: Understood, Your Honor, will do.

17 THE COURT: Anything else, Mr. Miller?

18 MR. MILLER: Randy Miller for plaintiffs. The only  
19 reason why I gave the sort of long-winded answer to the  
20 irreparable harm point was that this thing -- this proposal  
21 that we have now, which I'm sure you're going to enter an  
22 order, it was material from my client that, you know -- you  
23 had made the comment yesterday that the whole proceeding would  
24 be expedited and that was material to their agreement to  
25 withdraw the PI and proceed on this basis. That is the only

1 point I wanted to mention.

2 THE COURT: No, I understand that, in terms of  
3 substituting one for the other, you know, that it will be done  
4 on an expedited basis. Once I have all the material, if  
5 there's a need for a hearing, I will contact you and set one  
6 up.

7 Mr. Coleman, anything else from you?

8 MR. COLEMAN: No, Your Honor.

9 THE COURT: All right. Parties are excused then.  
10 Thank you.

11 MR. MILLER: Thank you, Your Honor.

12 END OF PROCEEDINGS AT 2:05 P.M.

13

14 C E R T I F I C A T E

15 I, Lisa M. Foradori, RPR, FCRR, certify that  
16 the foregoing is a correct transcript from the record of  
17 proceedings in the above-titled matter.

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21 Date: \_\_\_\_\_

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Lisa M. Foradori, RPR, FCRR

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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

CONSUMER FINANCIAL  
PROTECTION BUREAU

Plaintiff,

v.

MORGAN DREXEN, INC. and  
WALTER LEDDA, individually, and as  
owner, officer, or manager of Morgan  
Drexen, Inc.

Defendant.

CASE NO. SACV13-01267 JST (JEMx)

Hon. Josephine L. Staton  
Courtroom

**PROPOSED ORDER**

Action Filed: August 20, 2013  
Trial Date: Not Set

**VENABLE LLP**  
2049 CENTURY PARK EAST, SUITE 2100  
LOS ANGELES, CA 90067  
310-229-9900

1 This matter having come before the Court on Defendants’ Motion to Stay this  
2 Action pending a decision in a related first-filed case, *Morgan Drexen et al. v. CFPB*,  
3 D.C. Civil Action No. 1:13-cv-01112-CKK (the “D.C. Action”);

4 Having found that a fully-briefed emergency motion for TRO and preliminary  
5 injunction is pending in the D.C. Action which, if granted, will enjoin the Plaintiff from  
6 prosecuting this case;

7 Having found that it is in the interest of judicial efficiency to stay the action and to  
8 avoid duplicative proceedings and the risk of inconsistent decisions;

9 IT IS SO ORDERED that:

- 10 1. This Action is STAYED.
- 11 2. Defendants shall apprise the Court of any material developments in the  
12 D.C. Action;
- 13 3. After the decision in the D.C. Action, the parties shall jointly request a  
14 scheduling conference to discuss next steps, if any, in this proceeding.  
15 Until the Court holds such scheduling conference, the Action shall  
16 remain stayed and neither party shall be obligated to make any filing  
17 other than those required by this Order.

18 Dated: \_\_\_\_\_, 2013

19 \_\_\_\_\_  
20 Josephine L. Staton  
21 United States District Judge  
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VENABLE LLP  
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LOS ANGELES, CA 90067  
310-229-9900