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August 29, 2018

VIA ECF

The Honorable Loretta A. Preska
United States District Court Judge
Southern District of New York
United States Courthouse
500 Pearl Street, Room 2220
New York, NY 10007

Re: CFPB, et al. v. RD Legal Funding, LLC, et al., Case No. 1:17-cv-890 (LAP)

Dear Judge Preska,

The New York Attorney General (“NYAG”) writes concerning the Court’s June 21, 2018 Order, ECF No. 80, dismissing certain claims in the above case (the “Dismissal Order”) and the August 23, 2018 Order, ECF No. 100, granting plaintiff CFPB’s request pursuant to Rule 56(b) to enter judgment against the CFPB and staying the remainder of the case (the “Stay Order”).

The NYAG respectfully requests that, prior to the entry of judgment against the CFPB, the Court provide clarification to the parties concerning the content of the Dismissal and Stay Orders.

While the Court dismissed the CFPB’s claims in the Dismissal Order, the text of the Order upheld at some length the Court’s jurisdiction to hear *the NYAG’s* claims under the Consumer Financial Protection Act (“CFPA”). “[T]he NYAG [has] independent authority to bring claims in federal district court under the CFPA, without regard to the constitutionality of the CFPB’s structure...therefore federal question subject matter jurisdiction over the CFPA

claims exists regardless of the constitutionality of the CFPB's structure.” (Dismissal Order at 86-87.) The Dismissal Order also potentially struck the entirety of Title X of Dodd-Frank, including, if interpreted literally, the substantive liability provisions the NYAG is seeking to enforce, as well as the provisions explicitly authorizing the NYAG to do so. After the entry of the Dismissal Order, the parties sent letters to the Court discussing this apparent tension in the Dismissal Order and the further questions of whether, even if the Court had dismissed the NYAG's CFPA claims, it nonetheless retains jurisdiction over the NYAG's state-law claims on another basis. It is clear from the letter briefing that the NYAG believes that both its federal and state-law claims survive in this case, and that RD Legal believes the contrary.¹

The Court did not address these issues again, however, before granting the CFPB's request for a Rule 56(b) judgment and RD Legal's request for a stay pending the CFPB's appeal. Thus, the parties remain uncertain as to the precise findings in the Dismissal and Stay Orders, i.e.,

- (1) whether the NYAG's CFPA claims remain before the Court because the Court found it has jurisdiction to hear those claims;
- (2) whether, in the event the Court actually dismissed the NYAG's CFPA claims, the Court retained jurisdiction over the NYAG's state-law claims because the claims contain an embedded question of federal law; and
- (3) whether, even if the Court both dismissed the NYAG's CFPA claims and found that it lacked jurisdiction to hear the NYAG's state-law claims on the grounds there is an embedded question of federal law, the Court has nonetheless exercised its discretion to retain supplemental jurisdiction over these claims.

¹ Compare “The Court's Order...struck each substantive provision of the [CFPA]...as well as the statutory provisions...granting the NYAG enforcement authority over the CFPA...[T]he entire basis for the NYAG invoking federal jurisdiction is Title X of the CFPA, which has been stricken” (August 3, 2018 Letter from RD Legal to the Court, ECF No. 91, at 2-3) with “The Court [in its Order] has explicitly found that it has subject matter jurisdiction over the...[CFPA] causes of action. In addition, the Court has independent original jurisdiction over the NYAG's non-CFPA causes of action” (August 13, 2018 Letter from the NYAG to the Court, ECF No. 93, at 1). See also the August 22, 2018 Letter from RD Legal to the Court, ECF No. 99 (disputing the NYAG's position that the Court would have independent original jurisdiction).

While it appears that the Court has determined that it retains *some* basis for jurisdiction over at least some claims—otherwise it would not have stayed the case with respect to the NYAG, but simply dismissed it, giving the parties the opportunity to appeal the entirety of the Dismissal Order—based on the NYAG’s and RD Legal’s letter briefing, the parties disagree as to the answers to the above questions.

Given that the CFPB is now free to appeal the dismissal of its CFPA claims, the answers to these questions are essential to determining the NYAG’s further conduct in this case. Given the Court’s familiarity with the issues and facts of this case, the NYAG prefers to have all its claims heard in this Court. If, contrary to the text of the Dismissal Order, the Court has indeed dismissed the NYAG’s CFPA claims in their entirety, the NYAG may wish to seek leave to have that dismissal certified for interlocutory appeal in the hopes of having such an appeal consolidated with the CFPB’s so that all CFPA claims in this case might be reviewed at once.² A piecemeal review of the Court’s rulings on the CFPA, if it became necessary, would be an inefficient use of judicial resources. Alternatively, however, given the age and ill health of some of the New York residents who are victims in this case, if the Court has dismissed the NYAG’s CFPA claims entirely and has otherwise retained jurisdiction over the NYAG’s state-law claims,

² The Court has defined the issue on appeal for the CFPB as “the constitutionality of the CFPB’s structure” (Stay Order at 3), which is a question independent of the validity of the substantive liability provisions of the CFPA and, in particular, the provisions authorizing state attorneys general to enforce it. Further, should the Second Circuit agree with this Court that the structure of the CFPB is unconstitutional, the arguments about whether it is appropriate for a court to preserve the CFPB by altering its structure, as opposed to whether a finding of unconstitutionality of the CFPB structure has *any* effect on the CFPA’s substantive liability provisions and its authorization of state attorneys-general to enforce them, involve distinct considerations. Thus, if the NYAG does not participate in the appeal, the questions of liability and state attorneys-general enforcement authority may well not be addressed in an appellate decision on the CFPB’s appeal.

it may become necessary for the NYAG to seek vindication of its state-law claims in state court, rather than wait for the appeal to be heard and decided.

In addition, a clarification from the Court now, by giving the parties certainty about their positions, will facilitate any settlement discussions that may take place during the stay. Clarification will also avert unnecessary motion practice once the CFPB's appeal is complete and the stay lifted. All parties will thus benefit from a clear understanding of what claims remain in this case after the Dismissal and Stay Orders. The NYAG therefore respectfully requests that the Court issue a brief clarification that addresses the three questions outlined above.

Very truly yours,

/s/ Melvin L. Goldberg

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