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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Bureau of Consumer Financial Protection, Plaintiff, vs. Certified Forensic Loan Auditors, LLC; Andrew Lehman; and Michael Carrigan, Defendants.	Case No.: 2:19−cv−07722 ODW (JEMx) OPPOSITION TO MOTION TO STAY PROCEEDINGS

Plaintiff Consumer Financial Protection Bureau filed this action to address serious ongoing violations of the Consumer Financial Protection Act (CFPA), 12 U.S.C. §§ 5531, 5536(a), as well as Regulation O, 12 C.F.R. pt. 1015, which governs mortgage-relief services that purport to help homeowners facing foreclosure. Defendants Certified Forensic Loan Auditors, LLC, and Andrew Lehman (collectively, "Defendants") have now moved to stay all proceedings in this case for the seven months or more it may take the Supreme Court to decide a different case involving the constitutionality of a provision in the CFPA that limits the grounds on

which the Bureau's Director can be removed to "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3). *See Seila Law LLC v. CFPB*, No. 19-7 (U.S.).

This Court should deny that motion. No good purpose would be served by the lengthy delay that Defendants seek because the Supreme Court's decision in *Seila Law* is unlikely to dispose of the Bureau's claims here. A stay would also injure the Bureau and the public interest by preventing the parties from beginning discovery and, ultimately, delaying the just resolution of this matter and the adjudication of the Bureau's claims for relief on behalf of consumers, including injunctive relief that it intends to seek. A stay would also risk exposing consumers to additional injury from Defendants' ongoing illegal practices. For their part, Defendants will suffer no harm if their motion is denied beyond the ordinary cost of litigation, which the Ninth Circuit has held is not enough to justify a stay. Finally, denying a stay in this case while deferring final resolution of Defendants' constitutional argument would be entirely consistent with the decisions of other courts that have also deferred final resolution of the constitutional issue.

If the Court is inclined to grant a stay, however, it should at least give the Bureau the opportunity to seek a preliminary injunction in order to prevent further consumer harm while this matter is stayed.

LEGAL STANDARD

"A district court has discretionary power to stay proceedings in its own court." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). Among the factors that courts weigh in deciding whether to issue a stay are: "[1] the possible damage which may result from the granting of a stay, [2] the hardship or inequity which a party may suffer in being required to go forward, and [3] the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law." *Id.* at 1110.

The moving party "must make out a clear case of hardship or inequity" from being denied a stay "if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis v. North American Co.*, 299 U.S. 248, 255 (1936). "[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Lockyer*, 398 F.3d at 1112.

ARGUMENT

I. The Supreme Court's Decision in *Seila Law* Is Not Likely to Dispose of the Bureau's Claims in This Case

Whatever the Supreme Court decides about the constitutionality of the CFPA's removal provision is unlikely to preclude this case from moving forward. There is thus no need for this Court to stay proceedings in their entirety until the Supreme Court issues its decision—particularly given that, as described below, the balance of equities in this case decisively favors this action moving forward in the meantime.

The challenger in *Seila Law* argues that the Bureau's structure violates the Constitution because the Bureau exercises significant executive authority and is headed by a single Director, yet the President's authority to remove that Director is limited by statute. The Bureau agrees that this restriction on the President's removal power violates the Constitution. But whether or not the Supreme Court adopts that view in *Seila Law*, its decision is unlikely to require dismissal of this action (assuming that Defendants renew their constitutional argument in response to the Bureau's First Amended Complaint, ECF No. 29). *Cf. Prime Healthcare Servs.-San Dimas, LLC v. Price*, No. 2:16-cv-08101-ODW, 2017 WL 10581094, at *3 (C.D. Cal. June 29, 2017) (denying motion for stay that was premised on other ongoing cases that the Court concluded would not "necessarily dispose of the claims here").

If the Supreme Court concludes that the removal provision is constitutional, that is of course no obstacle to the Bureau seeking relief in this case. And if the Court holds the provision invalid, that is unlikely to pose an obstacle to the Bureau's maintenance of this suit, either, because the Supreme Court's precedent in recent comparable cases, as well as the express language of the statute here, call for simply severing the provision from the CFPA while leaving the rest of the statute in place. That is what the Supreme Court did in 2010 when it last confronted an unconstitutional removal restriction (with no justice disagreeing that severance would be the appropriate remedy). *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508-10 (2010). And that is what Congress provided for here by including an express severability clause in the statute stating that "[i]f any provision of this Act … is held to be unconstitutional, the remainder of this Act … shall not be affected thereby." 12 U.S.C. § 5302. Indeed, one justice already reached this conclusion with respect to the Bureau: While on the D.C. Circuit, then-Judge Kavanaugh concluded that the CFPA's removal restriction is unconstitutional (disagreeing with a majority of the en banc D.C. Circuit on that point) but indicated that the appropriate remedy would be to sever it and allow the Bureau to "continue to operate … as an executive agency." *PHH Corp. v. CFPB*, 881 F.3d 75, 200 (2018) (en banc) (Kavanaugh, J., dissenting).

With the removal provision severed, the Bureau should then be given the opportunity to choose to ratify this action as necessary. Assuming that the Bureau determined that it was appropriate to do so, the case could then carry on with the Bureau headed by a Director who is removable at will by the President. *See FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (dismissal of agency enforcement action was "neither necessary nor appropriate" after court severed unconstitutional statutory provision and agency ratified its decision to file suit); *cf. Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc) (any "ongoing injury" to plaintiffs

challenging the constitutionality of another independent agency headed by a single person "is remedied by a declaration that the 'for cause' restriction is declared removed").

Because there is little chance that *Seila Law* will dispose of the Bureau's claims in this case, this Court should simply defer decision on Defendants' constitutional argument (again, assuming that they renew it) while allowing the parties to proceed toward discovery in the meantime.[1] *See, e.g.*, Fed. R. Civ. P. 12(a)(4)(A), (i) (district court may postpone resolution of defenses raised on Rule 12 motion up until trial). This approach would be especially prudent here in light of the balance of equities, which tilts definitively against a stay of all proceedings.

II. Halting All Proceedings in This Case for Months Would Harm the Bureau and the Public Interest

The Bureau is the primary enforcer of federal consumer financial laws. *See, e.g.*, 12 U.S.C. § 5511(a). It filed this action to address serious violations of the CFPA's prohibition on deceptive and abusive practices, *id.* §§ 5531, 5536, as well as Regulation O's provisions meant to protect often-desperate homeowners who are seeking help to avoid foreclosure, 12 C.F.R. pt. 1015. The Bureau has reason to believe that the violations at issue here are ongoing and is seeking injunctive relief.

Halting all proceedings in this case for the seven months or more it may take for a decision in *Seila Law* would harm both the Bureau's interests and the public interest. It can hardly be doubted that "the public has a strong interest in vigorous

[1] Defendants' constitutional argument is contrary to a decision of this Circuit. *See CFPB v. Seila Law LLC*, 923 F.3d 680, 683 (9th Cir. 2019) (holding that "the CFPB's structure is constitutionally permissible"), *cert. granted*, No. 19-7 (2019). The Bureau now disagrees with the reasoning of the Court of Appeals in that decision, and the Supreme Court has granted certiorari to review it, but the existence of current circuit precedent foreclosing Defendants' argument hardly counsels in favor of granting a stay that is, in any event, contrary to the public interest. *Cf. In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (decision of the court of appeals remains "binding authority 'which must be followed unless and until overruled by a body competent to do so.'") (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc)).

enforcement of consumer protection laws." *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 205 (D.D.C. 2017), *aff'd*, 849 F.3d 1129 (D.C. Cir.). More particularly, both the Bureau and consumers have a strong interest in moving this case forward to discovery so that the relevant facts can be assembled while evidence remains fresh and, ultimately, so that the matter may reach final resolution expeditiously.[2]

The stay sought by Defendants would harm these important interests. It would mean more time in which Defendants are not subject to the injunctive relief that the Bureau seeks for the public's protection. (This case is a world away from one in which the plaintiff is seeking only money damages for itself, *cf. Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (refusing to overturn stay where plaintiff was seeking "only damages" and had "alleged no continuing harm and sought no injunctive or declaratory relief")). It would mean more time in which Defendants' assets may be depleted. And it would mean consumers would have to wait longer for any redress they may be entitled to receive if and when the Court enters judgment in the Bureau's favor. Moreover, because delay "inherently increases the risk that witnesses' memories will fade and evidence will become stale," *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr.*, 490 F.3d 718, 724 (9th Cir. 2007) (internal quotations omitted), a stay could make it harder down the road for the Bureau to secure any relief for consumers. All this for a decision in *Seila Law* that, again, is unlikely to dispose of the Bureau's claims here.

III. Defendants Will Not Be Harmed by This Case Proceeding to Discovery

Because there is, at minimum, a "fair possibility" that the stay Defendants seek "will work damage to some one else," Defendants "must make out a clear case

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[2] Defendants grossly misstate the facts when they claim that the Bureau received evidence from CFLA nearly four years ago and "sat idle" for years. Mot. at 7, 10. In reality, the Bureau sent its first investigative subpoena to CFLA in August 2017 and has worked diligently to advance its investigation every step of the way.

of hardship or inequity" from this litigation moving forward in order to secure a stay. *Landis*, 299 U.S. at 255. Defendants cannot make that showing.

Defendants' primary claim of hardship is that the denial of a stay would work "a huge constitutional deprivation of liberties" because the CFPA's removal provision is unconstitutional. Mot. at 7. But even if the Supreme Court were to agree that the provision is invalid, the most appropriate remedy for that unconstitutional limitation—severing the removal provision—is, for the reasons already discussed, unlikely to result in dismissal of the Bureau's claims.

Defendants also complain that they will "incur further legal expenses and costs" from litigation if their request is denied. Mot. at 8. But that will always be the case when a party is denied a stay. Accordingly, the Ninth Circuit has already held that "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*" that would justify a stay. *Lockyer*, 398 F.3d at 1112. What's more, because it is unlikely that the Supreme Court's decision in *Seila Law* will warrant dismissal of the Bureau's claims here, Defendants will likely incur the costs of continued litigation whether or not their request is denied.

IV. Allowing This Case to Proceed While Deferring Final Resolution of the Constitutional Issue Is Entirely Consistent With Other Courts' Decisions to Defer Final Resolution of the Constitutional Issue

Finally, Defendants err in suggesting that there would be any inconsistency between the Court denying a stay in this case and the decisions by two courts of appeals to defer their consideration of the constitutional claim at issue in *Seila Law*. *See* Mot. at 10-11. In both of those cases, the courts of appeals were being asked to resolve the constitutional challenge to the CFPA's removal provision, and they appropriately decided to defer doing so until the Supreme Court issues its decision in *Seila Law*. *See* Order, *CFPB v. Cashcall Inc.*, No. 18-55407 (9th Cir., Oct. 21,

2019); Order, *CFPB v. RD Legal Funding, LLC*, No. 18-2743 (2d Cir., Nov. 5, 2019). It would be equally appropriate, as well as consistent with those other decisions, for this Court to defer final resolution of Defendants' constitutional argument. Doing so would not, however, support putting any other aspect of this litigation on hold in the interim.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Stay and instead simply apply the decision in *Seila Law* when it is handed down while, in the meantime, allowing this case to proceed in the ordinary course. In the event the Court were to conclude instead that a stay is warranted, it should first give the Bureau a chance to seek a preliminary injunction.

Dated: November 18, 2019

/s/ Benjamin Vaughn
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CERTIFICATE OF SERVICE

I, Benjamin Vaughn, hereby certify that the foregoing Opposition to Defendants' Motion to Stay was served electronically on the parties via the Court's electronic filing system.

/s/ Benjamin Vaughn
Benjamin Vaughn (pro hac vice)