UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STAY THE DIRECTOR'S FINAL DECISION AND ORDER**
INTEGRITY ADVANCE, LLC, and JAMES R. CARNES,	
Respondents.	

I. Summary

After over five years of litigation, encompassing two separate administrative proceedings, Respondents Integrity Advance, LLC, and James R. Carnes were found liable for running an illegal payday loan operation that harmed tens of thousands of consumers by improperly debiting tens of millions of dollars. Respondents now move for the extraordinary remedy of a stay of Director Kathleen L. Kraninger's final administrative order holding them accountable for these actions.

But Respondents' motion is hopelessly flawed. Director Kraninger's order already grants Respondents the relief to which a litigant is normally due. It gives Respondents the option of placing funds into escrow, in effect giving them the protection they would get from filing a supersedeas bond but without the additional cost, until their petition for judicial review is resolved. Respondents suggest that they should be exempt from such an obligation because they are likely to succeed on appeal and because they would be irrevocably harmed by depositing the judgment amount into escrow. But Respondents have shown neither of these predicates to be true.

The arguments Respondents intend to present on appeal are the same, recycled defenses that have already been rejected by two Administrative Law Judges and the Director in this case. Their argument that Director Kraninger's ratification in this matter was ineffective has been rejected by every federal court to consider the question. And the one outlier case Respondents cite to support their claim that the Bureau had to show fraudulent intent in order to be awarded restitution is inapplicable by its own terms. Finally, Respondents articulate no present, acute constitutional harm, and their claim of irrevocable financial harm is defective both because depositing funds into an escrow account would ensure that they would be returned to them if Respondents' appeal is successful, and because Respondents have failed to introduce evidence of

any financial harm. Since Respondents have failed to demonstrate that the factors for a stay weigh in their favor, no stay is warranted here.

II. Background

The Bureau's final decision and order in this matter found Respondents liable for running a payday loan operation that consistently violated federal law by failing to accurately disclose the cost of their loans, forcing consumers into electronic payments, and using an obscure financial product to continue withdrawing funds from consumers even after those consumers had realized they were being overcharged and had withdrawn authorization for electronic payments. Decision of the Director (Jan. 11, 2021) [Dkt. 308] ("Decision of Director"); Final Order (Jan. 11, 2021) [Dkt. 309] ("Final Ord."). The Director found that Integrity Advance violated the Truth in Lending Act and the Electronic Fund Transfer Act, that both Integrity Advance and Carnes violated the Consumer Financial Protection Act ("CFPA"), and that they were jointly liable for restitution amounting to $38,453,341.62. *See* Decision of Director at 2. The Director also found Integrity Advance and Carnes liable for civil penalties of $7.5 million and $5 million, respectively. *See id.*

The Director ordered Respondents to pay those amounts by wire transfer to the Bureau within 30 days after service of the Final Order. *See* Final Ord. at 1-2. However, recognizing that Respondents could seek judicial review of the Bureau's final decision and order pursuant to 12 U.S.C. § 5563(b)(4), the Director gave Respondents the option of paying those amounts into an escrow account in lieu of making the payment to the Bureau. *See id.* The Director ordered that the escrow account be designed so that the amount held in escrow would eventually be paid to either the Bureau or Respondents, depending on how the appellate court decides. *See id.*

On February 9, 2021, Respondents filed the present motion to stay the final order pending resolution of a petition for judicial review. Respondents' Motion to Stay the Director's Final

Decision and Order [Dkt. 310] ("Resps. Stay Mot."). The following day, Respondents filed a petition for review of the Bureau's final decision and order in the United States Court of Appeals for the Tenth Circuit. Pet. for Review, *Integrity Advance v. CFPB*, No. 21-9521 (10th Cir. Feb. 10, 2021).

III. Argument

Under the Bureau's Rules of Practice for Adjudication Proceedings, a motion for a stay "shall address the likelihood of the movant's success on appeal, whether the movant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest." 12 C.F.R. § 1081.407(c). These factors mirror those applied by courts in considering requests for a stay pending appeal. *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 426 (2009).

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right . . . ." *Nken*, 556 U.S. at 427 (citations omitted) (internal quotation marks omitted). A stay is an "'extraordinary remedy that should not be granted' unless the applicant clearly is entitled to such relief." *Pueblo of Pojoaque v. New Mexico*, 233 F. Supp. 3d 1021, 1141 (D.N.M. 2017) (quoting *Nken*, 556 U.S. at 437 (Kennedy, J., concurring)). Appellants seeking to enjoin "governmental action taken in the public interest" must meet a high burden to demonstrate entitlement to a stay. *See id.* at 1116; *cf. Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). Indeed, "[a] strong presumption of regularity supports any order of an administrative agency; a stay pending judicial review is a rare event and depends on a demonstration that the administrative process has misfired." *Busboom Grain Co. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987) (citing *Coleman v. PACCAR, Inc.*, 424 U.S. 1301 (1976)).

Even where a stay is warranted, the posting of "a full supersedeas bond should be the requirement in normal circumstances." *Athridge v. Iglesias*, 464 F. Supp. 2d 19, 23 (D.D.C.

2006) (quoting *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 760 (D.C. Cir. 1980)). This is because "[a] supersedeas bond secures the appellee from loss resulting from the stay of execution." *Brinkman v. Dep't of Corr.*, 815 F. Supp. 407, 408 (D. Kan. 1993). By permitting the restitution and civil penalty amounts to be paid into escrow, the Final Order here has in effect already made this "normal" mechanism available to Respondents. Respondents have made no objective demonstration of good cause for deviating from that general rule. *See Brinkman*, 815 F. Supp. at 410.

There has been no "misfire" here, and Respondents have made no showing of "unusual" circumstances to warrant a stay. Although this alone is fatal to Respondents' motion, below Enforcement Counsel addresses the four factors from Section 1081.407(c) in turn.

A. Respondents have failed to establish a likelihood of success on appeal

To obtain a stay pending appeal, Respondents must make "a strong showing that [they are] likely to succeed on the merits." *Nken*, 556 U.S. at 434. This requires Respondents to do more than show a possibility of success on the merits. *Id.* Rather, Respondents have a "heavy burden of showing . . . that the judgment . . . was erroneous on the merits." *Pueblo of Pojoaque*, 233 F. Supp. 3d at 1114 (quoting *Nken*, 556 U.S. at 439 (Kennedy, J., concurring)). And, like here, where "'governmental action taken in the public interest' is involved," the "likelihood-of-success showing is heightened above the 'strong showing' minimum." *Id.* at 1116 (quoting *Heideman*, 348 F.3d at 1189). Although Respondents baldly assert that the Director reached erroneous legal conclusions, they otherwise fail to show any way in which the Director erred on the merits. Thus, there is no justification for staying the Director's Final Order.

Respondents first suggest, without explanation, that the Director erred in holding that her ratification of the Bureau's decision to file the Notice of Charges and prosecute this action provided Respondents with an appropriate remedy for the CFPA's unconstitutional removal

restriction. *See* Resps. Stay Mot. at 4. Respondents have argued that the Director could not ratify this action because the CFPA's statute of limitations would have barred this action if the Bureau had brought it at the time of the ratification. *See* Decision of Director at 19. But the Director provided three independent reasons why this argument fails: (1) the Bureau satisfied the statute of limitations by filing the Notice of Charges in 2015; (2) if the Bureau did not satisfy the statute of limitations when it filed the Notice of Charges, then the statute of limitations has not expired; and (3) even if the statute of limitations had run, the limitations period was equitably tolled. *Id.* at 19-20. To succeed on the merits, Respondents would need to show error in each, yet Respondents' motion fails to engage with any of them. *See* Resps. Stay Mot. at 4-5.

There is no error here. Each court to have considered the merits of ratifications of enforcement actions by the Bureau's Director since the Supreme Court's decision in *Seila Law v. CFPB*, 140 S. Ct. 2183 (2020), has rejected challenges and permitted the actions to continue. *See, e.g.*, *CFPB v. Navient Corp.*, 17-cv-101, 2021 WL 134618, at *9-14 (M.D. Pa. Jan. 13, 2021); *BCFP v. Citizens Bank, N.A.*, No. 20-cv-044, 2020 WL 7042251, at *8-9 (D.R.I. Dec. 1, 2020); *BCFP v. Chou Team Realty LLC*, No. 20-cv-043, 2020 WL 5540179, at *4 (C.D. Cal. Aug. 21, 2020); *see also CFPB v. Seila Law, LLC*, 984 F.3d 715, 718 (9th Cir. 2020) (holding that ratification of civil investigative demand "remedies any constitutional injury that [a company] may have suffered due to the manner in which the CFPB was originally structured"). Respondents point to no contrary authority or otherwise identify flaws in the Director's reasoning, and thus fail to meet their burden.

Respondents next assert that they are likely to prevail on their argument that in awarding restitution the Director erroneously failed to consider evidence that they lacked fraudulent intent. This, too, fails. As an initial matter, the Director held that consistent with the weight of authority,

Respondents' intent to deceive consumers, or purported good faith, is irrelevant to the appropriateness of restitution. *See* Decision of Director at 36. Respondents do not even attempt to identify any error in that reasoning or explain why the outlier case they have identified is more persuasive than the weight of authority. More importantly, even if Respondents were right on the law here, it would have no impact on the merits. The outlier case on which Respondents rely explains that restitution is appropriate if the Bureau shows either intention to defraud *or* that consumers did not receive the benefit of their bargain. *See CFPB v. CashCall, Inc.*, No. CV 15-07522, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018). Since the Director held that consumers did not receive the benefit of their bargain, *see* Decision of Director at 36, even *CashCall* recognizes that there is an appropriate basis to provide restitution.

Finally, Respondents suggest that the judgment should be stayed because of a legal issue that they candidly admit had no bearing on the Director's decision: the meaning of "discovery" in the CFPA's statute of limitations. Resps. Stay Mot. at 6. Indeed, the Director held that the Bureau satisfied the statute of limitations as to Carnes regardless of whether the statute of limitations began when the Bureau actually discovered his violations or when a reasonably diligent agency plaintiff could have discovered the violations. *See* Decision of Director at 17-19. And the Director's decision upholding the denial of Respondents' subpoena does not turn on this distinction. *Id.* at 20-23. Thus, this legal issue has no bearing on either the Director's decision or the legal merits and cannot provide a justification for a stay.[1]

[1] Respondents identify an additional seven issues on which they intend to appeal, but go no further than simply listing them. *See* Resps. Stay Mot. at 7. Respondents cannot meet their burden by simply stating an issue without providing any additional explanation in support of a stay.

Rather than attempting to establish that they are likely to succeed on the merits, Respondents assert that they are entitled to a stay because they have raised "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Resps. Stay Mot. at 7 (quoting *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 575 F. Supp. 2d 201, 203 (D.D.C. 2008)). But the Tenth Circuit Court of Appeals, where Respondents have filed their petition for review, has rejected that standard as inconsistent with Supreme Court caselaw. *See Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (refusing to apply modified test in the preliminary injunction context); *Pueblo of Pojoaque*, 233 F. Supp. 3d at 1114-16 (explaining that the "relaxed fair-ground-for-litigation test" is "no longer viable" in the context of stays of judgment pending appeal). In any event, courts generally reserve the modified standard for where appellants have made extremely strong showings on the other factors (i.e., irreparable harm, injury to the nonmovant, and public interest), *see, e.g.*, *Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 560 (D.D.C. 2018), and Respondents have failed to make such a showing here, *see* Sec. III.B-C, *infra*. Even if such a standard did apply, Respondents have not shown that any issue they raise is difficult and doubtful. At most they have shown that they will raise issues that have been previously litigated. Such a showing should not be enough to intrude "into the ordinary processes of administration and judicial review." *See Nken*, 556 U.S. at 427.

B. Respondents will not be irreparably harmed if a stay is not granted

Respondents claim that they will suffer irreparable constitutional harm by being forced to continue litigating this matter against an "unconstitutionally structured agency," and suffer irreparable financial harm if they are required to deposit funds into an escrow account pending the outcome of their appeal. To demonstrate irreparable harm, Respondents "bear[] the burden of providing evidence of some injury that is 'both certain and great; it must be actual and not

theoretical.'" Order Denying Motion for a Stay (June 24, 2015), *In the Matter of PHH Corporation*, Dkt. 231 ("PHH Order") at 1 (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). "Simple assertions of alleged harm or conclusory statements based on unsupported assumptions will not suffice," and "the injury must be 'of such *imminence* that there is a "clear and present" need for equitable relief to prevent irreparable harm.'" *Id.* (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297). Irreparability of injury "is a very high standard" to which "demanding scrutiny must be applied." *Bristol-Myers Squibb Co. v. Shalala*, 923 F. Supp. 212, 220 (D.D.C. 1996). Because Respondents have failed to meet that very high standard, the irreparable harm factor weighs overwhelmingly against a stay and the Director can decide Respondents' motion on this factor alone. *See* PHH Order at 1 (irreparable harm factor "is so crucial to a stay that a failure to show irreparable harm is grounds for denial, even if the other three factors favor such relief") (citing *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297).

1. Respondents suffer no irreparable constitutional harm

Respondents first assert that they will be irreparably harmed absent a stay because they have allegedly suffered constitutional harm as a result of defending against the Bureau's enforcement action. *See* Resps. Stay Mot. at 8-9. But an alleged constitutional injury is not *per se* irreparable, particularly Respondents' claimed injury of being subjected to an unconstitutional adjudicative proceeding. *See John Doe Co. v. CFPB*, 849 F.3d 1129, 1135 (D.C. Cir. 2017) ("In the absence of immediate or ongoing harm stemming from the [Bureau's] alleged constitutional defects, the violation of separation of powers by itself is not invariably an irreparable injury.") (alteration in original) (internal quotation marks omitted); *Tilton v. SEC*, 824 F.3d 276, 286-87 (2d Cir. 2016). Any constitutional harm that Respondents could have suffered has been remedied by the Director's ratification, *see* Decision of Director at 19, and has not resulted in "immediate

or ongoing" harm resulting in irreparable injury that would be remedied by a stay of the Final Order. Respondents fail to allege actual, immediate, ongoing harm, let alone prove such harm through affidavits or other evidence, as required under 12 C.F.R. § 1081.407(c). Respondents cite only to the Final Order itself, and Enforcement Counsel's communication of wiring instructions to Respondents to facilitate compliance with the order, as evidence of "immediate or ongoing" harm. *See* Resps. Stay Mot. at 8-9 & n.4. Such generalized, unsupported allegations fall far short of meeting the "very high standard" and "demanding scrutiny" required to justify a stay here. *Bristol-Myers Squibb*, 923 F. Supp. at 220.[2]

Indeed, Respondents are not suggesting that a constitutional defect is putting them in the kind of genuine, present harm described in the cases they rely upon. Respondents do not contend, for example, that denying a stay would prevent them from exercising religious liberties protected by the First Amendment, as in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), and *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001). And they are not arguing that denial of their stay motion would force them into a Hobson's choice that would result in significant, immediate, economic or other harm, as was the case in *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) (petitioners faced with

[2] Respondents suggest that Enforcement Counsel's communication of wiring instructions constitutes evidence of an "immediate threat of harm," Resps. Stay Mot. at 9 n.4, but Respondents need not wire funds to the Bureau and can instead satisfy the judgment by depositing funds into an escrow account of their choosing. Moreover, fear of this supposed threat has not dissuaded Respondents from flouting the Final Order and the Bureau's Rules of Practice for Adjudication Proceedings. Neither the Final Order nor the Bureau's Rules provide that merely filing a stay motion operates as a stay of the Director's order. *See* Final Ord.; 12 C.F.R. § 1081.407 (regarding stays pending judicial review); *see also* PHH Order (ruling on similar stay motion, but where Respondents requested that motion be resolved before 30-day window closed); *cf.* 12 U.S.C. § 5563(b)(5) (commencement of proceedings for judicial review does not operate as a stay of a Bureau order). Yet Respondents have chosen not to wire the funds to the Bureau or an escrow account, as required by the Final Order.

either shuttering their business or complying with unconstitutional contractual provisions that would cause significant economic harm), and in *City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. 2018) (petitioner faced with either complying with unconstitutional federal dictate that would endanger public safety or forgoing needed federal funds).

Instead, Respondents allege constitutional deficiencies relating to an administrative adjudication, and are now pursuing their right to seek review by a federal court of the final agency order resolving that adjudication. Any injury this may cause is not irreparable. For one, Respondents have not demonstrated they are likely to succeed on this constitutional defense, *see* Section III.A, *supra*, and therefore cannot presume injury. *See Schrier v. Univ. of Co.*, 427 F.3d 1253, 1266 (10th Cir. 2005) (denying "presumption of irreparable injury" to plaintiff who "failed to demonstrate the requisite likelihood of success" on First Amendment claims). But more importantly, the only conceivable injury they could suffer here is needing to go through the process that could ultimately serve to vindicate them if they are indeed correct. As the Supreme Court has explained, "'the expense and disruption of defending [oneself] in protracted adjudicatory proceedings' is not an irreparable harm." *Doe*, 849 F.3d at 1135 (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)). "That is because, if found to be constitutionally warranted, '[v]acatur, even at the appeal-from-final-judgment stage, would fully vindicate' the separation-of-powers rights of the Company." *Id.* (quoting *In re al-Nashiri*, 791 F.3d 71, 80-81 (D.C. Cir. 2015)).

2. Respondents suffer no irreparable economic harm

Respondents also assert that they will be irreparably harmed absent a stay because they will be required to deposit funds into an escrow account pending the outcome of their appeal. *See* Resps. Stay Mot. at 9-10. They claim, without elaboration, that doing so would result in theoretical "non-recoverable economic costs" and result in "loss of access to their own funds."

Id. at 9. Tellingly, though, Respondents don't argue that they lack the financial resources to deposit the funds into escrow, or articulate the actual harm that loss of access to the funds would cause to Integrity Advance or Carnes. And even if they had made such arguments, they have failed to even attempt to prove such harm through affidavits or other evidence, as required under 12 C.F.R. § 1081.407(c). Instead, Respondents contend that their unidentified economic harm would be particularly acute because Respondents would be unable to sue the Bureau to recover funds if they prevail on appeal. *See* Resps. Stay Mot. at 9-10.

These claims are nonsense. If Respondents succeed in the Tenth Circuit, they won't need to sue the Bureau to regain control of their funds. They will be returned to Respondents automatically within 30 days of the appellate court's mandate. The availability of such recourse is the opposite of "irreparable." *See Mann v. WMATA*, 185 F. Supp. 3d 189, 195 (D.D.C. 2016) (explaining that economic loss constitutes irreparable harm when after-the-fact legal remedies are inadequate to return a party to the status quo, and holding that an appellate ruling reversing a district court's order of costs can return a party to status quo).

Respondents have made no effort to show that they will suffer any intermediate harm as a consequence of those funds' potentially temporary unavailability, let alone substantial harm. And even if they had demonstrated that they would suffer economic loss absent a stay, "it is well settled that economic loss does not, in and of itself, constitute irreparable harm." *Doe*, 849 F.3d at 1134 (internal quotation marks omitted). "'Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough' to demonstrate 'irreparable injury.'" *Carabillo v. ULLICO Inc. Pension Plan & Tr.*, 355 F. Supp. 2d 49, 54-55 (D.D.C. 2004), *aff'd* 198 F. App'x 1 (D.C. Cir. 2006) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Rather, to weigh in favor of a stay,

"the injury must be both certain and great." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see* PHH Order at 1 (holding that Respondent must show that costs would be "sufficiently severe to impose serious and irreparable effects upon its business operations" (citing *Toxco, Inc. v. Chu*, 724 F. Supp. 2d 16, 31 (D.D.C. 2010)). Since Respondents have made no showing of economic harm, let alone substantial, unrecoverable economic harm, this factor alone strongly weighs against granting a stay.

C. Absent a stay, the public interest will be harmed

The final two factors – harm to third parties, and the public interest – are properly considered together here because Enforcement Counsel "is responsible for representing the public interest by enforcing the law." Order, *Daniel Chapter One*, 149 F.T.C. 1589, 2010 WL 9434821, at *7 (F.T.C. Mar. 22, 2010); *see also, e.g.*, Decision and Order, *Frontier State Bank*, 2011 WL 2574394, at *3 (F.D.I.C. May 11, 2011). Respondents argue that the Bureau would not be harmed by a stay, and that a stay would not be against the public interest. *See* Resps. Stay Mot. at 10-11. But this argument ignores the real, economic harm that Respondents inflicted on tens of thousands of consumers, and it discounts the Bureau's interest in ensuring that violations of law that it prosecutes and proves result in redress to the individuals harmed by that illegal activity. Respondents extracted tens of millions of dollars from the customers they deceived, and every day they are allowed to continue enjoying the proceeds from their illegal practices increases the likelihood that the funds required to make harmed consumers whole will be diminished and ultimately denied to those consumers. *Cf. Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1559 (10th Cir. 1996) ("The purpose of requiring a supersedeas bond pending appeal is to secure the judgment throughout the appeal process against the possibility of the judgment debtor's insolvency." (internal quotation marks omitted)).

This is particularly concerning here, where Respondents have provided no assurances that they are or will be able to satisfy the requirements of the Final Order. Moreover, the public interest is served by ensuring that a government enforcement agency's administrative rules, decisions, and orders are followed by those who it successfully prosecutes, and that the agency's attempts to provide redress to harmed consumers are not thwarted by the very same wrongdoers who caused that harm. Requiring that Respondents temporarily deposit funds into an escrow account until their appeal is resolved in the Tenth Circuit would protect the consumers Respondents harmed, and would be in the public interest.

IV. Conclusion

For these reasons, Respondents' Motion for Stay should be denied.

Dated: February 18, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February 2021, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' Motion to Stay the Director's Final Decision and Order to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on Respondents' counsel at the following addresses:

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