UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	**RESPONDENTS' REPLY BRIEF IN SUPPORT OF MOTION TO STAY THE DIRECTOR'S FINAL DECISION AND ORDER**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

RESPONDENTS' REPLY BRIEF IN SUPPORT OF MOTION TO STAY THE DIRECTOR'S FINAL DECISION AND ORDER

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I. INTRODUCTION AND SUMMARY

In its Opposition to Respondents' motion for a stay, Enforcement Counsel ("EC") primarily argues that Respondents cannot meet their burden to show that they are likely to succeed on appeal or that they will suffer irreparable harm absent a stay because the Director already has rejected Respondents' defenses and imposed liability; therefore, according to EC, a stay pending judicial review of the Director's decision should be denied. But if the law were that a party could only obtain a stay by convincing the Director that his or her decision was wrong on the merits, then the procedures set forth in 12 C.F.R. § 1081.407 would be essentially meaningless. A stay is appropriate here because Respondents have established "serious legal questions" to be reviewed on appeal or a likelihood of success on the merits, and irreparable injury in the form of constitutional harm and unrecoverable economic losses.

II. ARGUMENT

A. Respondents need not prove that the administrative process "misfired" or that "unusual" circumstances exist to be granted relief.

EC begins its argument by asserting that Respondents must show that "the administrative process has misfired" and that there are "unusual" circumstances to obtain a stay pending judicial review. Opp'n at 3-4. According to EC, the failure to do so "alone is fatal to Respondents' motion." *Id.* at 4. However, those purported requirements are not set forth anywhere in the Consumer Financial Protection Bureau's ("CFPB") own rules, which outline the elements that the Director must consider when ruling on a stay motion. *See* 12 C.F.R. § 1081.407(c). Indeed, requiring a respondent to prove to an agency that its own process "misfired" in order to obtain relief would create a hurdle that is virtually impossible to overcome. The Director should decline to impose additional barriers to relief that are not contained within the CFPB Rules.

B. Respondents have shown "serious legal questions" and a likelihood of success on appeal.

EC next argues that Respondents cannot establish that they are likely to succeed on appeal because the Director already has ruled against them. *See* Opp'n at 1 (describing the issues to be raised on appeal as "recycled defenses that have already been rejected"); *id.* at 4-5 (stating that the Director already rejected Respondents' argument regarding time-barred ratification); *id.* at 5-6 (stating that the Director already found that Respondents' good faith and lack of intent to deceive are irrelevant to restitution). Under this reasoning, a respondent could never successfully move for a stay, making the provision in the CFPB's rules outlining the procedures for obtaining a stay superfluous. *See* 12 C.F.R. § 1081.407. Such a result is contrary to the basic rules of statutory interpretation. *See, e.g.*, *Hibbs v. Winn,* 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp 181-186 (rev. 6th ed. 2000)). For the stay provision to be operative, Respondents must have a meaningful opportunity to obtain relief.

Despite EC's assertion otherwise, the Court of Appeals for the D.C. Circuit has held that it is enough that Respondents 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." *Comm. On The Judiciary U.S. House of Representatives v. Miers*, 575 F. Supp. 2d 201, 203 (D.D.C. 2008); *see also Philipp v. Fed. Republic of Germany*, 436 F. Supp. 3d 61, 66 (D.D.C. 2020) (finding that the "'serious legal question' standard may replace the 'likelihood of success on the merits' standard"). This is particularly true where, as here, the stay would merely "maintain the status quo pending a final determination of the merits of the suit." *Philipp*, 436 F. Supp. at 66 (quoting *Washington Metro. Area Transit Comm'n v. Holiday*

Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977)). It also is particularly appropriate where an agency is considering a stay of its own decision. Otherwise, a respondent must essentially request reconsideration on the merits.

It is clear that Respondents have raised serious legal questions, particularly as to the effectiveness of the Director's time-barred ratification of the unconstitutional bringing of charges against Respondents. The ratification issue is being actively litigated in multiple circuits. *See CFPB v. RD Legal Funding, LLC*, No. 18-2743 (2d Cir.); *CFPB v. All Amer. Check Cashing, Inc.*, No. 18-60302 (5th Cir.); *CFPB v. CashCall, Inc., et al.*, No. 18-55407 (9th Cir.). Earlier this month, the Ninth Circuit ordered the parties to brief the question. Order, *CFPB v. CashCall, Inc., et al.* (No. 18-55407) (9th Cir. Feb. 12, 2021) (Doc No. 12002442).[1] It is a serious question of law that goes to the very heart of the constitutionality of the judgment which Respondents seek to stay.

Even under a strict "likelihood of success" standard, Respondents have met their burden. On the ratification issue, the Director did not attempt to distinguish *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) and its progeny, or otherwise explain why the Supreme Court's holding in that case is not applicable here. Dkt. 308 at 19-20.[2] Regarding

[1] The Ninth Circuit's decision on remand in *Seila Law* did not reach the statute of limitations issue, as that case involved the enforcement of a Civil Investigative Demand. *See CFPB v. Seila Law, LLC*, 984 F.3d 715, 718 (9th Cir. 2020) ("Seila Law's argument fails because this statutory limitations period pertains solely to the bringing of an enforcement action, which the CFPB has not yet commenced against Seila Law.").

[2] Instead, the Director held that the CFPB could not have "discovered" the violation because it was unconstitutionally structured and, therefore, the statute of limitations had not run. Dkt. 308 at 19. But, by that logic, the CFPB is unbounded by a statute of limitations for the entire period prior to the *Seila Law* decision, placing the burden of the CFPB's unconstitutionality on individuals and entities facing regulation for long-past conduct. That is contrary to the purpose of statutes of limitations. The Director also found that the statute of limitations should be tolled because the CFPB's unconstitutionality was not within the agency's "control." *Id.* However, the CFPB actively litigated the issue for years, defending its structure,

restitution, the Director relied on older Federal Trade Commission cases and expressly disregarded recent Ninth Circuit precedent outlining the relevant factors for awarding restitution in CFPB enforcement actions under the Consumer Financial Protection Act ("CFPA"). Dkt. 308 at 36. These are just two of the errors that will be appealed by Respondents, and on which Respondents are likely to be successful. A stay should be granted pending review.

C. Respondents demonstrated irreparable harm.

EC next argues that Respondents have not established "irreparable harm." Opp'n at 7-12. In support of this contention, EC cites multiple times to the former CFPB Director's order denying a stay pending judicial review in *In the Matter of PHH Corporation*. *Id.* at 8, 9, 12. However, that order was overruled by the D.C. Circuit, which *granted* a stay in that very case, based on facts and circumstances analogous to the instant case. Order, *PHH Corp. v. CFPB* (No. 15-1177) (Aug. 3, 2015) (Doc. No. 1565883).[3] Therefore, the *PHH* example supports, rather than undermines, a finding of irreparable harm here and the granting of Respondents' motion.

EC goes on to argue that Respondents have not suffered constitutional harm as a result of the action brought by an unconstitutionally-structured agency because the Director ratified that action. Opp'n at 8-9 ("Any constitutional harm that Respondents could have suffered has been remedied by the Director's ratification. . ."). But, that presumes that ratification was effective, which is the very issue at the heart of Respondents' appeal. This

and prolonging the period of its unconstitutionality – before reversing course and agreeing that it was unconstitutional in Fall 2019. Dkt. 254A. This was certainly within the CFPB's control; equity does not weigh in the agency's favor.

[3] In that case, like this one, the CFPB had ordered that Respondents could place the funds in escrow pending appeal. Nonetheless, the D.C. Circuit granted the stay.

cannot be a basis to deny relief because "irreparable harm" is established where a party *alleges* constitutional harm. *See, e.g., Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (quoting 11A C. Wright, A. Miller & M. Kane, *Fed. Prac. & Proc.* § 2948.1 (2d ed. 1995)) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Respondents have alleged constitutional harm here.[4] *See* Dkt. 310 at 8-9.

Further, the constitutional harm alleged by Respondents is "immediate or ongoing" – not merely speculative. *See Doe Co. v. Cordray*, 849 F.3d 1129, 1135 (D.C. Cir. 2017). In *Doe Co.*, the court denied relief where it found the petitioner's claim of reputational harm, in the context of a pre-enforcement CID, was merely speculative. *Id.* at 1134. The court distinguished its earlier decision granting a stay in *PHH v. CFPB* by noting "the Company is not remotely in the same constitutional position as PHH. PHH, remember, was on the receiving end of a completed law enforcement proceeding by the Bureau, and had been ordered to pay a $109 million fine." *Id.* at 1132. Here, Respondents are on the "receiving end" of a completed, unconstitutional CFPB action and have been ordered to pay a similar multi-million dollar fine. Respondents have sufficiently alleged constitutional harm.

Finally, EC declares that it is "nonsense" that Respondents will suffer economic harm if made to place $50 million in an escrow account, which they cannot access for any purpose, for an undetermined period of time during the pendency of their appeal. Opp'n at 11. That statement belies commonsense. It is readily apparent that the inability to make use of $50 million, particularly for an individual person like Mr. Carnes, for an unknown number of months

[4] Of course, Respondents must also satisfy the first prong, so the allegation of constitutional harm must raise a "serious legal question" or be "likely to succeed." Respondents have satisfied this first prong, as described in Sec. II.B above.

or years will cause economic harm. The question is whether such economic harm constitutes "irreparable harm." In this case, it does. Respondents cannot ever recover the opportunity costs of not having access to such large amounts of money. Nor can they sue the CFPB for the damages associated with their lack of access to their funds, as the CFPB is immune from such suits. *See, e.g.*, *Odebrecht Constr. v. Sec'y, Fla. DOT*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury."). Therefore, there is no remedy at law and the economic loss to Respondents is irreparable.

III. CONCLUSION

For the foregoing reasons, and for the reasons stated in Respondents' opening brief, the Director should stay the Final Order in its entirety pending judicial review. In the alternative, if the Director denies Respondents' motion, the Director should grant a temporary stay of 30 days so Respondents can seek a stay from a United States Court of Appeals.

Dated: February 24, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February 2021, I caused a copy of the foregoing Respondents' Reply Brief in Support of 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 opposing counsel at the following addresses:

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