UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of	)	
INTEGRITY ADVANCE, LLC and JAMES R. CARNES.	)	ORDER DENYING MOTION FOR A STAY

The Bureau served its Decision and Order in this matter on Respondents on January 11, 2021. The Order requires Respondents to pay restitution and a civil money penalty. It also contains one injunctive provision: It requires Respondents to cooperate in assisting the Bureau in determining the identity, location, and amount of restitution due to each consumer entitled to redress. Pursuant to both the terms of the Order and the relevant rule from the Bureau's rules of practice for adjudicative proceedings, 12 C.F.R. § 1081.407(a), the Order became effective 30 days after the date of service. Thus, the Order has already taken effect. On February 9, 2021, Respondents filed their Motion to Stay the Director's Final Decision and Order. Case Document (Doc.) 310. They seek a stay pending appellate review, or in the alternative, a 30-day stay so that Respondents may seek a longer stay from a court of appeals. (Respondents have filed a petition for review in the U.S. Court of Appeals for the 10th Circuit.) The Bureau's rules set out the standard for a stay motion. The motion must address four factors: "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). Respondents' Motion addresses these factors, but fails to make the sort of showing that would warrant a stay pending appellate review. Accordingly, I deny that portion of their Motion that seeks a stay pending appellate review. However, I grant their request for a 30-day stay to allow them an opportunity to seek a stay from the 10th Circuit.

1. Likelihood of success – With respect to the first factor, likelihood of success, Respondents contend that they need merely show a serious legal question, not a mathematical probability of success, citing several cases from the D.C. Circuit. Doc. 310 at 2. However, the D.C. Circuit has held that "it remains an open question whether the 'likelihood of success' factor is 'an independent, free-standing requirement,' or whether … a plaintiff need only raise a 'serious legal question' on the merits." *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). In any event, Respondents fail to satisfy even the reduced standard that they favor. *See Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (even with this reduced standard, a movant must at least show "a substantial case for relief on the merits").

Respondents first focus on Director Kraninger's ratification of the Bureau's decision to file the Notice of Charges that initiated this proceeding. Doc. 310 at 4-5; Doc. 312 at 3-4. Respondents' argument has two parts: First, Respondents suggest that ratification is not an adequate remedy for the constitutional injury that they claim resulted from the fact that, when the Notice of Charges was

filed in 2015, the Bureau's Director was not fully accountable to the President. And second, they contend that even if ratification were an appropriate remedy, Director Kraninger's ratification in this proceeding was not valid because by the time ratification occurred, the statute of limitations had expired with respect to their violations.

Respondents do not show that they have a substantial case on the merits with respect to either part of their ratification argument. Instead, they merely observe that the same argument has been raised in other cases. Doc. 310 at 4. But what they fail to disclose is that five courts have already held that ratification is an appropriate remedy for the constitutional violation Respondents claim they suffered when the Bureau filed its Notice of Charges, and no court has held otherwise.[1] Respondents provide no reason as to why they are likely to succeed where everyone else has failed.

With respect to the second part of Respondents' argument – that a statute of limitations could preclude ratification – one court has addressed that argument in a detailed and thorough opinion and rejected it.[2] Again, no court has held otherwise.[3] The mere fact that the issue has been raised in other cases provides no justification for staying the Order in this case. "[I]t is well established that simply calling an issue important – primarily because it involves the relationship of the political branches – does not transform … weak arguments into a likelihood of success or a substantial appellate issue." *Comm. on the Judiciary v. McGahn*, 407 F. Supp. 3d 35, 41 (D.D.C. 2019). That is all that Respondents have done. Because they have no support for either part of their ratification argument, Respondents have neither shown that they are likely to succeed on the merits nor raised a serious legal argument.[4]

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[1] Those five cases are *CFPB v. Seila Law LLC*, 984 F. 3d 715 (9th Cir. 2020); *BCFP v. Citizens Bank, N.A.*, No. 1:20-cv-0044, 2020 WL 7042251 (D.R.I. Dec. 1, 2020); *BCFP v. Fair Collections & Outsourcing, Inc.*, No. 8:19-cv-02817, 2020 WL 7043847 (D. Md. Nov. 30, 2020)); *BCFP v. Chou Team Realty LLC*, No. 8:20-cv-00043, 2020 WL 5540179 (C.D. Cal. Order Regarding Motion to Dismiss, Aug. 21, 2020); *BCFP v. Law Offices of Crystal Moroney, P.C.*, No. 7:20-cv-03240) (S.D.N.Y. Transcript of Hearing Aug. 19, 2020)). Further, in *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996), the court held that ratification was an appropriate remedy where an agency's members were not adequately accountable to the President.

[2] *CFPB v. Navient Corp.*, 3:17-cv-101, 2021 WL 134618 (M.D. Pa. Jan. 13, 2021).

[3] Respondents claim support from *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994), *see* Doc. 310 at 4; Doc. 312 at 3, but there are significant procedural and factual differences between that case and the issue that Respondents raise. In *NRA Political Victory Fund*, the action at issue, the filing of a petition for a writ of certiorari, was originally taken by the FEC, which had no authority to do so. 513 U.S. at 98. In addition, the limitations period at issue in that case was jurisdictional. Here, the CFPA provided the Bureau with the authority to take the action at issue, the filing of the Notice of Charges, and the Bureau did so in 2015. Moreover, the CFPA's statute of limitations is not jurisdictional.

[4] Respondents claim support from a January 20, 2021, motion for a stay of the mandate that was filed by RD Legal in *CFPB v. RD Legal Funding*, No. 18-2743 (2d Cir.). *See* Doc. 310 at 4. However, the Second Circuit denied RD Legal's motion and issued its mandate. *CFPB v. RD Legal Funding*, No. 18-2743 (2d Cir. Feb. 10, 2021) (Order denying stay of the mandate). (As a result of

Next, Respondents contend that there is a "serious legal question" as to whether their reliance on the advice of counsel precludes any award of restitution. Doc. 310 at 5-6; Doc. 312 at 3-4. Respondents rely primarily on the district court's decision in *CFPB v. CashCall, Inc.*, No. 15-cv-7522, 2018 WL 485963, at *12 (C.D. Cal. Jan. 19, 2018). But as explained in the Decision of the Director, *CashCall* is inconsistent with the weight of authority, including appellate authority in the circuit where that case is now on appeal. Doc. 308 at 36. One (incorrectly decided) district court decision does not raise a serious legal question with respect to this issue.

Third, Respondents contend that "there is a 'serious legal question'" regarding "Enforcement Counsel's interpretation of the CFPA's statute of limitations." Doc. 310 at 6. But Enforcement counsel's interpretation of the CFPA's statute of limitations is not an issue that the 10th Circuit will have to resolve. Indeed, in her Decision, the Director explained that she did not have to determine whether the CFPA's statute of limitations begins to run when a reasonably diligent agency plaintiff should have discovered a violation or when the Bureau actually discovered a violation because Respondents had not shown that that the statute of limitations had expired under either interpretation. Doc. 308 at 17-19. Thus, the interpretation of the CFPA's statute of limitations is not an issue before the Tenth Circuit.

Finally, Respondents list seven issues that they apparently intend to raise before the Tenth Circuit. Doc. 310 at 7. A list of issues without any argument does not raise a serious legal question and does not demonstrate likelihood of success. Accordingly, Respondents have failed to satisfy the first criterion for a stay pending appeal.

2. Irreparable harm – The second factor – irreparable harm – is so crucial to a stay that a failure to make an adequate showing is grounds for denial, even if the other three factors favor such relief. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). To show irreparable harm, Respondents bear the burden of providing evidence of injury that is "both certain and great; it must be actual and not theoretical." *Id.* Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. In addition, the injury must be "of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Id.* The injury must also really be "irreparable." *Id.* Although economic injury may be sufficient to satisfy this factor, the movant must show that such injury is "beyond remediation." *Id.*

Respondents contend that they have suffered irreparable harm because they were subjected to an enforcement action brought by an unconstitutional agency, and because during that proceeding they were denied due process. Doc. 310 at 8-9; Doc. 312 at 4-5. It is true that where an order threatens to deprive a party of its constitutional rights, such as free speech or freedom of religion, most courts will conclude that there is a likelihood of irreparable harm. *See* Doc. 310 at 8, citing, *inter alia*, *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020) (staying an order that limited attendance at church services); Doc. 312 at 5, citing *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (holding that denial of pastoral counseling infringed an prisoner's constitutional rights). But that is not the situation here. Although Respondents claim that the Bureau's enforcement action infringed their constitutional rights, they do not contend that the Bureau's Order will result in any additional

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the issuance of the mandate, the district court will now address the effect of the ratification of the Bureau's prosecution of RD Legal.)

infringement. In fact, the Order merely requires them to pay money into an escrow account. The irreparable-harm prong of the test for a stay looks to the future – will the Order, if it takes immediate effect, infringe Respondents' constitutional rights? The Bureau's Order will not. *See Rhinehart v. Scutt*, 509 F. App'x 510, 514 (6th Cir. 2013) ("irreparable injury must be more than [an] allegation of a constitutional violation").

Respondents also claim that paying money into escrow will cause them irreparable harm because they "could not recover from the CFPB damages based on its losses, including the inability to otherwise access or otherwise use such substantial amounts of money, as the CFPB is protected from a suit for monetary damages by sovereign immunity." Doc. 310 at 9-10; *see also* Doc. 312 at 5-6. This is a factual argument for which Respondents provide no support. Indeed, the Bureau's rules provide that a motion for a stay "shall include supporting affidavits or other sworn statements." Here, Respondents provided nothing to back up their claim that they will be harmed by paying money into an escrow account, particularly since the escrow account could be interest-bearing. Accordingly, Respondents have failed to show any irreparable injury whatsoever.

3. Harm to the other parties and the public interest – Because a federal agency is one of the parties, the final two factors, harm to the other party, and the public interest, merge into one and become a balancing of the equities. *Open Tech. Fund v. Pack*, 470 F. Supp. 3d 8, 31 (D.D.C. 2020).

Respondents make two arguments regarding the balance of equities. First, they contend that a stay will not result in any harm to the Bureau or to the public because they stopped offering loans nine years ago. Doc. 310 at 10. But this ignores that the Order in this matter seeks to provide restitution to consumers injured by Respondents' practices, and to require Respondents to pay a civil penalty. Respondents provide no assurance that, if the Bureau prevails before the 10th Circuit, Respondents will have sufficient resources to satisfy the judgment. To extent they dissipate assets during the pendency of further proceedings, consumers are less likely to be redressed. Thus, the stay that Respondents seek may well harm the public.

Second, Respondents contend that "it is not in the public interest to subject Respondents to an unconstitutional judgment, for which Respondents cannot recover damages." *Id.* But as explained above, Respondents have not shown that if they comply with the Bureau's Order that they will suffer any damages. Pending review, they can pay the restitution and civil penalty into an escrow account of their choosing, and this account could be interesting-bearing. As a result, the balance of equities tips strongly in favor of denying Respondents' Motion.

Accordingly, I conclude that Respondents have not satisfied the requirements for a stay as set forth in Bureau rule 407. However, I will stay the effective date of the order for 30 days from the date of this Order to permit Respondents an opportunity to seek a stay from the court of appeals.

For the reasons set forth above, I DENY Respondents' Motion to Stay the Director's Final Decision and Order to the extent it seeks a stay pending judicial review. However, I GRANT a 30-day stay of the Order. Accordingly, that the Order will now take effect 30 days from today.

SO ORDERED the 8th day of March, 2021.

David K. Uejio

David Uejio
Acting Director
Consumer Financial Protection Bureau

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying Motion for a Stay* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 9th day of March 2021
at Washington, D.C.