UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUREAU OF CONSUMER FINANCIAL PROTECTION,

Petitioner,

v.

LAW OFFICES OF CRYSTAL MORONEY, P.C.,

Respondent.

Case No. 7:20-cv-03240-KMK

OPPOSITION TO RESPONDENT'S MOTION TO STAY PENDING APPEAL

The Court should deny Respondent Law Office of Crystal Moroney, P.C.'s (LOCM) motion for a stay pending appeal because LOCM has failed to carry its burden to show that any of the relevant factors favors a stay. Indeed, the Court already resolved many of the questions presented by the instant motion when it denied LOCM's motion for a preliminary injunction in a related case against the Bureau. Since then, LOCM's central claim that the Bureau's method of funding is unconstitutional has only become less tenable because the Supreme Court recently considered the Bureau's funding provisions and announced that the "only constitutional defect" it had found in the Bureau's statute was with its limitation on removing the Director. With respect to irreparable harm, LOCM has failed to offer meaningfully more to corroborate its predictions of imminent insolvency than it did when making the same predictions last January, when the Court correctly found them unpersuasive. Moreover, both the public interest and the Bureau's interests weigh heavily against the months-long delay that LOCM seeks.

LEGAL STANDARD

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citations omitted). Four factors control whether a stay is warranted pending appeal: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *SEC v. Citigroup Glob. Markets Inc*., 673 F.3d 158, 162 (2d Cir. 2012). "[T]he burden of establishing a favorable balance of these factors is a heavy one and more commonly stay requests will be denied." *SEC v. Finazzo*, No. 18-mc-304-KMW, 2008 WL 1721517, at *2 (S.D.N.Y. Apr. 11, 2008) (internal quotation marks and citation omitted) (denying stay of order enforcing agency subpoena).

ARGUMENT

None of the relevant factors favors a stay, and LOCM has failed to show otherwise.

I. LOCM Has Not Shown That Its Claims Are Likely to Prevail

LOCM has not made the required "strong showing" that it is likely to succeed on the merits of its claims, including its central attack on the Bureau's method of funding. At no point has LOCM explained why the funding provisions that Congress included when it enacted the Bureau's statute would violate the Appropriations Clause's mandate that "the payment of money from the Treasury … be authorized by a statute." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). Indeed, even before the Court rejected LOCM's argument on the merits in this case, it held in LOCM's related suit against the Bureau that this claim was not likely to succeed.

See P.I. Hr'g Tr. at 65-66, *LOCM v. CFPB*, No. 7:19-cv-11594-KMK (S.D.N.Y.) (noting "the overwhelming weight of the case law which rejects [LOCM's] claim"), ECF No. 28-10.

LOCM's argument has become, if anything, even less tenable in the wake of *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). The Supreme Court made clear in that case that its decision invalidating the removal provision rendered the Bureau constitutional and left it free to "continue to operate." *Id.* at 2192. "Indeed … the Supreme Court noted that Congress gave the CFPB an independent source of funding, yet the Court determined that the '*only* constitutional defect [it had identified] in the CFPB's structure is the Director's insulation from removal.'" *Rop v. Fed. Hous. Fin. Agency*, No. 1:17-cv-497, 2020 WL 5361991, at *26 (W.D. Mich. Sept. 8, 2020) (quoting and adding emphasis to *Seila Law*, 140 S. Ct. at 2209)); *see also* CID Hr'g Tr. at 55 (noting the same language from *Seila Law* in rejecting LOCM's attack on the Bureau's funding), ECF No. 34-1. Notably, "[t]he Court did not change the CFPB's source of funding. Thus, the Court strongly implied that the CFPB's source of funding was not a problem by itself." *Rop*, 2020 WL 5361991, at *26.[1]

LOCM's attempts to breathe life into its funding claim fall short. Although it asserts that its claim "is a matter of first impression," Mem. at 7-8, in fact, when considering LOCM's attack on the Bureau's funding, this Court cited seven cases addressing and rejecting variants of the argument that the Appropriations Clause prohibits Congress from appropriating money in ways other than via the modern annual budgeting process. CID Hr'g Tr. at 54-56. LOCM appears to suggest that, by holding invalid and severable the statutory removal restriction, *Seila Law*

[1] The claim is no more likely to succeed if framed in terms of the non-delegation doctrine. As this Court observed, "there's really been no explanation of what aspect of the funding structure lacks th[e] intelligible principle" required under Supreme Court precedent. CID Hr'g Tr. at 58. Without such an explanation, there is simply no basis to conclude this claim is likely to prevail.

somehow changed this analysis. Mem. at 8. But the Director's accountability to the President has no bearing on the question whether the Bureau's funding was "authorized by a statute." *Richmond*, 496 U.S. at 424.

LOCM also points out that, if it does file an appeal, the Second Circuit will review its legal claims under a *de novo* standard. Mem. at 8. And it argues that the Bureau is not entitled to any deference on the issues LOCM has raised. *Id.* at 9. But assuming *arguendo* that LOCM is correct on both points, neither shows that it is likely to prevail on the merits.

LOCM's motion includes no mention of the other defenses it has raised against the CID, stating in a footnote only that LOCM "may appeal other issues equally as unprecedented" as its funding challenge. Mem. at 8 n.3. But an argument's novelty is hardly an augur of success, and the other defenses LOCM has raised are unlikely to succeed. Its attack on the ratification, for example, is contradicted by numerous cases that have approved agency ratifications in similar circumstances. *E.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996); *CFPB v. Chou Team Realty LLC*, No. 8:20-cv-00043, 2020 WL 5540179, *3 (C.D. Cal. Aug. 21, 2020) ("Any constitutional deficiency regarding the removability issue at the time the Complaint was filed was cured by the Supreme Court severing the removal provision from the rest of the organic statute, coupled with the Director's July 9 ratification of the action."). LOCM makes no argument to the contrary and thus has not shown it is likely to succeed on any of its other claims.

II. LOCM Has Not Shown It Would Suffer Irreparable Harm Without a Stay

LOCM has failed to establish that it would be irreparably harmed without a stay. It alleges three types of harm, but none satisfies its burden.

First, LOCM asserts that the Court should simply "presume irreparable harm" because LOCM has raised constitutional defenses. Mem. at 3. But this is not the law, and the Court has already ruled against LOCM on this very point. In denying LOCM's motion to preliminarily enjoin the Bureau's investigation, the Court distinguished the cases LOCM cites, noting that they may be limited to their Eighth Amendment context and that "other courts within the Second Circuit, have recognized that the mere assertion of a constitutional injury is not by itself sufficient to trigger a finding of irreparable harm." P.I. Hr'g Tr. at 67-70. In particular, the Court observed that "courts have recognized that the structural provisions of the Constitution, such as those that plaintiff raises here, do not raise irreparable harm claims per se." *Id.* at 68 (citing *Spring Hill Capital Partners, LLC v. SEC*, No. 15-cv-4542-ER, 2015 WL 10714010, at *7 (S.D.N.Y. June 29, 2015)). LOCM offers no reason this Court should revisit its prior conclusion on this point, particularly now that the Court has adjudicated, and rejected, the merits of LOCM's constitutional arguments.

Second, LOCM asserts that without a stay its appeal will become moot because it "would be subjected to the very constitutional harm of which [it] complains." Mem. at 3. That is not what mootness means. "A case is moot when the parties lack a legally cognizable interest in the outcome." *AmeriCredit Fin. Servs., Inc. v. Tompkins*, 604 F.3d 753, 755 (2d Cir. 2010) (internal quotation marks and ellipsis omitted). The Supreme Court has already held that a dispute over an agency investigative subpoena is not rendered moot by the recipient's compliance with the subpoena because the Court could still provide meaningful relief by ordering that the subpoenaed material be returned or destroyed. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 15 (1992); *see also Finazzo*, 2008 WL 1721517, at *4 (applying *Church of Scientology* in rejecting motion to stay order enforcing SEC subpoena); *CFPB v. Harbour Portfolio Advisors,*

LLC, No. 16-cv-14183, 2017 WL 5892227, at *2 (E.D. Mich. Mar. 14, 2017) (same for Bureau CID). Although the Bureau recently cited these decisions in its opposition to LOCM's letter-motion for a stay to explain why any appeal in this matter would not be moot, LOCM makes no attempt to address them. *See* ECF 31 at 3 n.2.

Third, LOCM contends, just as it did in January while seeking a preliminary injunction, that the status quo must be maintained or else it faces imminent insolvency. Mem. at 4-6. Putting aside the fact that LOCM has not sought to negotiate with the Bureau ways in which the requests in the CID could be modified to reduce any burden, "the compelled production of non-privileged documents in response to an administrative subpoena does not constitute irreparable injury warranting a stay pending appeal." *Finazzo*, 2008 WL 1721517, at *4 (internal citation omitted). In any event, LOCM should not be rewarded with a stay on the basis of a purported injury that it never attempted to mitigate.

Nor has LOCM come forward with sufficient evidence to support its prediction that responding to the CID will drive it out of business. As evidence, LOCM offers hardly more than "the self-serving statement of its President that its business will collapse. With nothing more than this statement, [its] claim is speculative" rather than actual and imminent. *Auto Sunroof of Larchmont, Inc. v. Am. Sunroof Corp.*, 639 F. Supp. 1492, 1494 (S.D.N.Y. 1986); *see also Sunni, LLC v. Edible Arrangements, Inc.*, No. 14-cv-461-KPF, 2014 WL 1226210, at *11 (S.D.N.Y. Mar. 25, 2014) (movants failed to show that loss of business was imminent where they "submitted no evidence regarding their current capitalization, their annual or monthly profits, or their ability to withstand a significant loss in business, or even closure, for a short period of time.").

The affidavit LOCM has provided in support of its motion for a stay offers few if any additional details about the financial condition of the business beyond what the Court previously characterized as the "sort of general and speculative claim that just doesn't satisfy the burden that [LOCM] is likely to be insolvent in the absence of injunctive relief." P.I. Hr'g Tr. at 71; *compare* Sept. 2020 Moroney Aff., ECF No. 34-2, *with* Jan. 2020 Moroney Aff., *LOCM v. CFPB*, No. 7:19-cv-11594-KMK (S.D.N.Y.), ECF No. 14-2. A stay, like a preliminary injunction, "should issue not upon a [party's] imaginative, worst case scenario of the consequences flowing from the [other side's] alleged wrong but upon a concrete showing of imminent irreparable injury." *USA Network v. Jones Intercable, Inc*., 704 F. Supp. 488, 491 (S.D.N.Y. 1989).

III. A Stay Would Harm Both the Public Interest and the Bureau's Interests

The final two stay factors—whether a stay is in the public interest or would harm the non-moving party—"merge when the Government is the opposing party." *See Nken*, 556 U.S. at 435. As the Court previously held in denying LOCM's motion for a preliminary injunction, these factors weigh against needlessly delaying the Bureau's legitimate law-enforcement investigation. P.I. Hr'g Tr. at 72-73.

The Bureau is the primary enforcer of federal consumer financial laws. *See, e.g.*, 12 U.S.C. § 5511(a). It issued this CID last November as part of an investigation into suspected violations of those laws. Actions in court to enforce CIDs and other administrative subpoenas are meant to be expeditious summary proceedings, *see, e.g.*, *SEC v. House Ways & Means Comm.*, 161 F. Supp. 3d 199, 224 (S.D.N.Y. 2015), so as to allow enforcement agencies "the rapid exercise of the power to investigate" that provides "the very backbone of [their] effectiveness in carrying out the[ir] congressionally mandated duties," *Fed Maritime Comm'n v. Port of Seattle*,

521 F.2d 431, 433 (9th Cir. 1975); *see also John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 205 (D.D.C. 2017) ("[T]he public has a strong interest in the vigorous enforcement of consumer protection laws"), *aff'd*, 849 F.3d 1129 (D.C. Cir.). Suspending LOCM's obligation to respond to the CID for the many additional months it may take for LOCM to pursue an appeal would harm the Bureau as well as consumers by further delaying the progress of this investigation.

In response, LOCM argues that the Bureau will not be harmed by further delay because it did not come to court quickly enough seeking an order to enforce the CID and because it has not reviewed the few documents that LOCM previously provided but did not claw back. That is not correct. The Bureau commenced this action in April, after the Bureau's Director denied LOCM's petition to modify or set aside the CID in February and after LOCM confirmed its intent not to comply in March. And LOCM's unsupported assertion that the Bureau never reviewed those documents that LOCM produced (and did not claw back) in response to an earlier CID is belied by the Bureau's objections to the format of and deficiencies in that production. *See* CID Hr'g Tr. at 5, 45 (discussing deficiencies in prior production).

LOCM also points out that certain cases, including this one, were delayed pending the Supreme Court's resolution of *Seila Law.* But if anything, that past delay militates *against* further postponing LOCM's obligation to respond to the CID, particularly where LOCM has failed to show it is likely to succeed on the merits or be irreparably harmed absent a stay.

CONCLUSION

For all these reasons, the Court should deny LOCM's motion for a stay.

Date: September 24, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of the Court for the United States Court of the Southern District of New York on September 24, 2020, by using the CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Date: September 24, 2020

/s/ *Kevin E. Friedl*
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