UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:12-cv-01032 (ESH)
JACOB J. LEW, in his official capacity as Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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INTRODUCTION

State National Bank cannot overcome its lack of standing and lack of ripe claims by contending that "[b]ut for the [Consumer Financial Protection] Bureau, its rules, and its enforcement authority, the Bank would reenter the consumer mortgage and remittance markets without limitation." Declaration of Jim R. Purcell ¶ 38, ECF No. 27-2. These purported injuries are *self-inflicted*: the Bank remains out of the consumer mortgage market, and limits its involvement in the remittance market, not because the Bureau prohibits the Bank from operating in these markets, but rather because the Bank fears that participating might subject the Bank to a hypothetical future harm from the Bureau's rules. Yet plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013). The Bank has not plausibly alleged that it would face a certainly impending injury from the Bureau's Remittance Rule, RESPA Servicing Rule, or ATR-QM Rule if it were to reenter the consumer mortgage and remittance markets. Thus, the Bank's self-exile from these markets neither supplies Article III standing to bring Counts I and II, nor renders the Bank's claims ripe.

I. THE BANK'S ALLEGED INJURIES ARE SELF-INFLICTED.

The Bank is voluntarily staying out of the consumer mortgage market. As Mr. Purcell states, "[i]n the last quarter of 2010, the Bank *decided* to exit the consumer mortgage business . . . . The Bank did so due to fear that those [consumer mortgage] loans would be subject to enforcement action under the Dodd-Frank Act because they might be deemed to violate the prohibition against unfair, deceptive, and abusive practices." Purcell Decl. ¶ 30 (emphasis added). This subjective "fear" of a potential enforcement action, and of the potential costs of complying with the Bureau's regulations, *see id.* ¶ 31, is why the Bank chooses not to issue mortgage loans; the Bureau has in no way barred the Bank from reentering the consumer mortgage market.

Likewise, the Bank is voluntarily limiting its participation in the remittance market. The Bank opts to have a policy of offering no more than 99 international consumer remittance transfers in a given year. *Id.* ¶ 18. The Bureau does not require such a policy. Rather, the Bank chooses to cap its remittance transfers because it fears the risk of having to comply with the Remittance Rule if it offers more. *Id.* In short, the Bank's purported injuries are self-inflicted.

II. SELF-INFLICTED INJURIES DO NOT GIVE RISE TO ARTICLE III STANDING IF THEY WERE INCURRED TO AVOID A FUTURE HARM THAT IS NOT CERTAINLY IMPENDING.

The Supreme Court has firmly rejected the view that plaintiffs can create standing by injuring themselves in an effort to avoid a harm that is not certainly impending. "Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 133 S. Ct. at 1151. Such "self-inflicted injuries are not fairly traceable to the Government's purported activities under [the law]." *Id.* at 1152. "If the law were otherwise," the Supreme Court has explained, "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id.* at 1151. But this would "improperly water[] down the fundamental requirements of Article III." *Id.*; *see also Madstad Eng'g, Inc. v. U.S. Patent & Trademark Office*, No. 8:12-cv-1589, 2013 WL 3155280, at *6 (M.D. Fla. May 8, 2013) (applying *Clapper* and concluding that plaintiffs with a self-inflicted injury lack standing to challenge the constitutionality of a patent statute).

In support of its holding, *Clapper* cited the D.C. Circuit's ruling in *National Family Planning & Reproductive Health Ass'n v. Gonzales*, which noted that the D.C. Circuit has "consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing." 468 F.3d 826,

831 (D.C. Cir. 2006)[1]; *see Clapper*, 133 S. Ct. at 1151 (citing *National Family Planning*). As the D.C. Circuit explained in *National Family Planning*, self-inflicted harm "does not amount to an 'injury' cognizable under Article III" and "even if self-inflicted harm qualified as an injury it would not be fairly traceable to the defendant's challenged conduct." 468 F.3d at 831.

To put this point another way, a business that overreacts to a new market regulation by needlessly constraining the services it offers cannot use its self-inflicted overreaction as a basis for standing to challenge the regulation. *See Rodos v. Michaelson*, 527 F.2d 582, 584–85 (1st Cir. 1975) (doctors who stop providing certain abortion services because of fear of penalty under new statute lack standing to challenge that statute because the risk of penalty was speculative); *see also Nova Health Systems v. Gandy*, 416 F.3d 1149, 1156 n.7 (10th Cir. 2005) (similar dicta).

III. THE BANK HAS NOT PLAUSIBLY ALLEGED THAT IT WOULD FACE A CERTAINLY IMPENDING INJURY IF IT WERE TO REENTER THE CONSUMER MORTGAGE AND REMITTANCE MARKETS WITHOUT LIMITATION.

The Bank does not—and could not—plausibly allege that its decisions to exit the mortgage market and limit its participation in the remittance market were necessary to avoid certainly impending injury from the Remittance Rule, RESPA Servicing Rule, or ATR-QM Rule. This Court should therefore reject the Bank's contention that its unwillingness to reenter these markets is an Article III injury fairly traceable to these rules. *See Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (rejecting plaintiffs' speculative assertion that its purported injury was not a "self-inflicted injury" and affirming district court's dismissal for lack of standing). For the same reasons, the Bank's claims are also unripe.

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[1] *See*, *e.g.*, *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 177 (D.C. Cir. 2012); *Equal Rights Ctr. v. Post Properties*, 633 F.3d 1136, 1142 (D.C. Cir. 2011); *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1290 (D.C. Cir. 2007); *Bhd. of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D. C. Cir. 2006); *Taylor v. FDIC*, 132 F.3d 753, 766–67 (D.C. Cir. 1997); *Fair Emp't Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276–77 (D.C. Cir. 1994); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989).

A. THE REMITTANCE RULE

The Bank cannot plausibly allege that it would face a "certainly impending" injury from the Remittance Rule if the Bank were to remove its self-imposed limit on issuing remittance transfers. The Rule will become effective on October 28, 2013. *See* 78 Fed. Reg. 30661, 30662 (May 22, 2013). The government's previous briefs discuss the Rule. *See* Reply in Support of Defendants' Motion To Dismiss ("Reply") at 6–8, ECF No. 30; Memorandum in Support of Defendants' Motion To Dismiss at 23–27, ECF No. 26-1.

Entities that provide 100 or fewer remittance transfers per year are not subject to the Rule's requirements. *See* 12 C.F.R. § 1005.30(f)(2). The Bank admits that, even prior to its self-imposed cap, it typically provided around 25 remittance transfers per year, and it never provided more than 70 in a single year. Purcell Decl. ¶ 11. It is thus pure conjecture that the Bank would ever perform enough remittance transfers to be subject to the Rule's requirements, regardless of whether it formally limits itself to 99 per year. Because the Bank would not face a certainly impending injury from the Rule if it discarded its 99-transfers policy, the Bank's self-imposed limit on its participation in the remittance market is not, under *Clapper* and the other cases cited above, fairly traceable to the Rule. Moreover, the uncertainty of the Rule's effect on the Bank means that the Bank's claims of an injury stemming from this Rule are unripe.

B. THE RESPA SERVICING RULE

Nor can the Bank allege that it would face a "certainly impending" injury from the RESPA Servicing Rule if it were to resume originating consumer mortgage loans. Beginning January 10, 2014, this rule will prohibit "small servicer[s]" from initiating the foreclosure process on a mortgage loan until that loan is more than 120 days delinquent. 78 Fed. Reg. 10696, 10885 (Feb. 14, 2013) (to be codified at 12 C.F.R. § 1024.41(j)).

Whether the RESPA Servicing Rule will ever affect the Bank, even if it reentered the

consumer mortgage market, is a matter of sheer speculation. The RESPA Servicing Rule would apply to the Bank only if a borrower was delinquent on a certain type of mortgage and the Bank then sought to initiate foreclosure proceedings within 120 days of delinquency. *See* Reply at 15–19. But whether any of these events would ever come to pass is conjecture. For example, it is wholly speculative that a borrower would default. Between 2008 and 2012, which covers the years before the Bank voluntarily exited the consumer mortgage market, the Bank did not report having a single loan in default, much less any loan in active foreclosure. *See* ECF No. 30-3. The absence of any loans in default or foreclosure when the Bank was actively originating consumer mortgages wholly undermines any claim that the Bank would face a certainly impending injury from the RESPA Servicing Rule even if it were to resume originating consumer mortgages. Thus the Bank's self-inflicted injury of withdrawing from the consumer mortgage market is not fairly traceable to the RESPA Servicing Rule. *See Clapper*, 133 S. Ct. at 1152; *National Family Planning*, 468 F.3d at 831. This Rule therefore does not supply the Bank with standing to bring Counts I and II or render its claims ripe.

C. THE ATR-QM RULE

Finally, the Bank cannot plausibly allege that, if it were to reenter the consumer mortgage market, it would face a certainly impending injury from the ATR-QM Rule. 78 Fed. Reg. 6408, 6584–89 (Jan. 30, 2013) (to be codified at 12 C.F.R. § 1026.43). This Rule will take effect on January 10, 2014. *Id.* at 6408. It implements provisions in Title XIV of the Dodd-Frank Act that generally require mortgage lenders to determine potential borrowers' ability to repay. *See* Dodd-Frank Act §§ 1411, 1412 (codified at 15 U.S.C. § 1639c(a), (b)); *see also* Reply at 12–15.

The Bank contends that its reluctance to enter the mortgage market is based, in part, on the prospect of private litigation brought to enforce the Rule. Purcell Decl. ¶ 32. But when the Rule takes effect, it will include a safe harbor for certain "qualified mortgages." The Bureau recently

amended the Rule to broaden the applicability of this safe harbor so that the sort of mortgages that would be issued by the Bank are likely to be completely exempt from liability under the Rule. *See* 78 Fed. Reg. 35430, 35503 (June 12, 2013); *see also* 78 Fed. Reg. at 6586-6588 (to be codified at 12 C.F.R. § 1026.43(e)). The Bank has not alleged that it intends to provide loans that would fall outside of this safe harbor, and the Bank can only speculate that private parties would ever try to sue the Bank for failing to comply with this Rule, and therefore the Bank has not shown a certainly impending injury from the ATR-QM Rule that can account for its decision not to reenter the consumer mortgage market. The Bank's self-exile from the consumer mortgage market is thus not fairly traceable to the ATR-QM Rule. *See Clapper*, 133 S. Ct. at 1152; *National Family Planning*, 468 F.3d at 831.

IV. ANY INJURY CAUSED BY THE RULES WOULD NOT BE REDRESSED BY THE BANK'S REQUESTED RELIEF.

Finally, even if the Bank could demonstrate Article III injury based on the existence of the Remittances, RESPA Servicing, or ATR-QM Rules, it still could not base its standing on any of these rules because the relief it has requested—prospective declaratory and injunctive relief—would not redress the injury. For standing, the alleged injury must be "likely to be redressed by the requested relief." *Already, LLC v. Nike, Inc.*, ---U.S.---, 130 S.Ct. 721, 726 (2013) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). For Counts I and II, the Bank has requested a declaration that Title X of the Dodd-Frank Act and Director Cordray's recess appointment are unconstitutional and an injunction preventing any actions by the Bureau. *See* 2d Am. Compl. ¶¶ 256, 257. Plaintiffs have not, however, asked the Court to set aside the rules, *see* 5 U.S.C. 706, and therefore even if the Court were to grant the Bank its requested relief on Counts I and II, the rules would still be enforceable against the Bank by the Office of the Comptroller of the

Currency, *see* 12 U.S.C. § 5516(d)(1), or by private plaintiffs.[2] Accordingly, even if the Bank's allegations were sufficient to demonstrate injury—and they are not—such injury would not be redressed by the relief requested.

The Bank's purported injury based on the ATR-QM Rule is not redressable for an additional reason. Even if the Bank had sought to invalidate the rule (it has not) and the Court granted the requested relief, the Bank would still be subject to the unchallenged provisions of Title XIV that the Rule implements. Thus, the Bank cannot base its standing on the ATR-QM Rule because the Bank does not seek relief that would remedy the purported injury caused by the Rule. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court."); *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 146 (D.C. Cir. 2012).[3]

CONCLUSION

This Court should grant the motion and dismiss this case for lack of jurisdiction.

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[2] *See* 15 U.S.C. § 1693m (providing a private right of action to enforce the Remittances Rule), 78 Fed. Reg. 10696, 10884 (to be codified at 12 C.F.R. 1024.41(a)) (confirming that a borrower may enforce the provisions of the section pursuant to 12 U.S.C. § 2605(f)); 15 U.S.C. § 1640 (providing a private right of action to enforce the ATR-QM Rule).

[3] The Bank also cannot allege an Article III injury predicated on the ATR-QM Rule or the RESPA Servicing Rule because, when it initiated this lawsuit, neither of these rules had been promulgated and thus neither could have injured the Bank when it filed its Complaint. *See Equal Rights Ctr.*, 633 F.3d at 1141–42 (plaintiffs lack standing when their only injuries either are self-inflicted or occurred after they initiated their lawsuit). The Bank commenced this lawsuit in June 2012. *See* Complaint, ECF No 1. The Bureau promulgated the ATR-QM Rule in January 2013, *see* 78 Fed. Reg. 6408 (Jan. 30, 2013), and the RESPA Servicing Rule in February 2013, *see* 78 Fed. Reg. 10696 (Feb. 14, 2013).

Respectfully submitted,

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Dated: July 19, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2013, a copy of the foregoing document was filed electronically via the Court's ECF system, through which a notice of the filing will be sent to all counsel of record.

s/ Ethan P. Davis
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