UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PRIVATE PLAINTIFFS' SUPPLEMENTAL BRIEF
IN SUPPORT OF THE COURT'S JURISDICTION
OVER COUNT II OF THE SECOND AMENDED COMPLAINT

On July 17, 2013, the Court ordered plaintiff State National Bank of Big Spring ("Bank") to file a brief "addressing what effect, if any, the United States Senate's July 16, 2013 confirmation of Richard Cordray as Director of the Consumer Financial Protection Bureau ['CFPB'] has on Count II of their Complaint." Order at 1 **[Dkt. #37]**.

As explained below, the Senate's confirmation of Director Cordray to serve as CFPB Director does not moot Count II, because the Private Plaintiffs continue to be injured by regulations that he unlawfully promulgated without constitutional appointment to his office. The Court can remedy that injury by providing the relief that the Private Plaintiffs request in the Complaint: *i.e.*, declaring his January 2012 appointment unconstitutional and enjoining him and the CFPB from enforcing regulations promulgated during his unconstitutional appointment.[1]

I. The Bank Is Injured By Regulations That Director Cordray Unconstitutionally Promulgated Before He Received Senate Confirmation

Director Cordray was unconstitutionally appointed as CFPB Director in January 2012, without the Senate's requisite advice and consent. *See* Second Am. Compl. for Declaratory and Injunctive Relief ("Am. Compl.") ¶¶ 124-34, 207-15 **[Dkt. #24]**; *see also* Private Pls.' Opp'n to Defs.' Mot. to Dismiss the Second Am. Compl. ("Opp'n to Mot. to Dismiss") at 7-8 **[Dkt. #27]**.

In the subsequent eighteen months, Director Cordray and the CFPB promulgated several regulations that directly injured the Bank. *See* Am. Compl. ¶¶ 96, 102. And those injuries, in turn, gave the Private Plaintiffs standing to challenge the constitutionality of his appointment and

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[1] The Court's order requested briefing only on the Bank's standing to bring Count II—*i.e.*, the effect of Director Cordray's confirmation on the Private Plaintiffs' challenge to Director Cordray's "recess" appointment. *See* Order at 1 **[Dkt. #37]**. Director Cordray's new appointment is altogether irrelevant to Count I, the Private Plaintiffs' challenge to the unconstitutional formation and operation of the CFPB itself under Title X of the Dodd-Frank Act; his appointment in January 2012 was not a basis for the separate separation-of-powers challenge to the CFPB. Nor does it affect Counts III, IV, V, and VI, regarding the Financial Stability Oversight Council and Orderly Liquidation Authority.

to request a court order declaring his appointment unconstitutional and enjoining the enforcement of regulations promulgated by the CFPB without a constitutionally appointed Director. *See* Am. Compl. ¶¶ 209, 257.

The Private Plaintiffs further developed these allegations in their memoranda opposing the Defendants' motion to dismiss, identifying several CFPB regulations that directly injure them. *See* Opp'n to Mot. to Dismiss; Surreply in Opp'n to Defs.' Mot. to Dismiss **[Dkt. #32]**. These continuing injuries include the following:

1. Director Cordray issued "Regulation X," which governs the Bank's servicing of existing consumer mortgages. *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)*, 78 Fed. Reg. 10696 (Feb. 14, 2013). Regulation X changed the law governing the Bank's rights and responsibilities for foreclosures; it prohibits the Bank from taking any action to foreclose on delinquent loans until 120 days after giving an initial notice, whereas Texas law permits the Bank to initiate foreclosure sale proceedings on a defaulted loan by posting a notice of foreclosure sale at the courthouse if the borrower does not cure within 20 days of a letter notifying him of the delinquency. Tex. Prop. Code Ann. § 51.002(a), (b), (d). This rule increases the Bank's cost of doing business. *See* Decl. of Jim R. Purcell ¶¶ 35-38 **[Dkt. #27-2]**, *incorporated by reference at* Opp'n to Mot. to Dismiss at 14-16, 31; Second Decl. of Jim R. Purcell ¶ 12 **[Dkt. #35]**.

2. Director Cordray issued the Remittance Rule, which governs the Bank's international remittance transfers. *Electronic Fund Transfers (Regulation E)*, 77 Fed. Reg. 6194 (Feb. 7, 2012), *modified by* 77 Fed. Reg. 50244 (Aug. 20, 2012). This rule forced the Bank to cease offering remittance transfers. Decl. of Jim R. Purcell ¶¶ 11-15. The Bank was able to resume remittance transfers only after Director Cordray modified the rule (after this suit was

filed), and the Bank still remains subject to the requirements and burdens imposed by the Remittance Rule. *Id.* ¶¶ 17-20. *See generally* Opp'n to Mot. to Dismiss at 16-17, 31.

3. Finally, Director Cordray issued "Regulation Z," which provides that if a bank offers a first-lien mortgage loan at specified interest rates higher than the Average Prime Offer Rate, as the Bank did when it was in the mortgage market, then it will be deemed to have offered a "higher priced covered transaction," which is then subject to the risk of future litigation.[2] As Mr. Purcell explained, this new regulatory regime injects substantial new uncertainty and compliance cost into the consumer mortgage market, another factor preventing the Bank from re-entering the market. *See* Opp'n to Mot. to Dismiss at 23-24 (citing Decl. of Jim R. Purcell ¶¶ 25, 32); Second Decl. of Jim R. Purcell ¶ 10. That injury was recently compounded by the CFPB's July 2, 2013 decision, under Director Cordray's supervision, to remove the "rural" designation it previously assigned to the county in which the Bank originated a majority of its consumer mortgages (Howard County, Texas).[3] By depriving the Bank of a key exemption from new escrowing rules, this decision further increases the litigation risk and costs the Bank would incur if it were to reenter the mortgage market.[4]

Each of those injurious regulations resulted directly from—and is tainted by—the

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[2] *Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 6408 (Jan. 30, 2013), *amended by* 78 Fed. Reg. 35430, 35503 (June 12, 2013) (to be codified at 12 C.F.R. §1026.43(b)(4)).

[3] *See* Paul Mondor, *Final list of rural and underserved counties for use in 2014* (July 2, 2013), *at* http://www.consumerfinance.gov/blog/final-list-of-rural-and-underserved-counties-for-use-in-2014/; 15 U.S.C. § 1639c (authorizing Bureau to define "qualified mortgages" to include balloon loans made by lenders operating "predominantly in rural or underserved areas").

[4] *See Escrow Requirements Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 4725, 4753 (Jan. 22, 2013) (requiring lenders not predominantly lending in rural counties to establish an escrow account "for payment of property taxes and premiums for mortgage-related insurance" on "higher-priced mortgage loans," one of the types of loan previously made by the Bank); Decl. of Jim R. Purcell ¶ 25; Second Decl. of Jim R. Purcell ¶ 10.

unconstitutional appointment of Director Cordray, who signed and issued them. *See Nguyen v. United States*, 539 U.S. 69, 77-83 (2003) (vacating defendant's criminal conviction because Court of Appeals panel unconstitutionally included an Article IV territorial court judge); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3163 n.12 (2010) ("We cannot assume . . . that the Chairman would have made the same appointments acting alone; and petitioners' standing does not require precise proof of what the Board's policies might have been in that counterfactual world"); *see generally* Opp'n to Mot. to Dismiss at 31-33.

Each of those injuries can be remedied by this Court. If the Bank prevails on the merits of its constitutional challenge to Director Cordray's January 2012 appointment, then this Court can grant the relief that the Private Plaintiffs request in their Second Amended Complaint: it can declare his January 2012 appointment unconstitutional and enjoin him and the CFPB from enforcing Regulation X, the Remittance Rule, and Regulation Z. *See* Am. Compl. ¶ 257.

II. Because The Bank's Injuries Are Not Remedied By Director Cordray's New Appointment, Count II Is Not Moot.

After the Senate finally gave its advice and consent to his nomination, Mr. Cordray was officially appointed to direct the CFPB on July 17, 2013. But this new appointment, in and of itself, does not moot the Private Plaintiffs' challenge to Mr. Cordray's original "recess" appointment, because it does not remedy the aforementioned injuries that the Private Plaintiffs continue to suffer because of that unconstitutional "recess" appointment.

If the Government intends to argue that the Private Plaintiffs' challenge to Director Cordray's January 2012 appointment is now moot, then the Government bears the "heavy burden" of proving that his new appointment "completely and irrevocably eradicated the effects of" his original, unconstitutional appointment. *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998). The Government must demonstrate that Director Cordray's new

appointment makes it "*impossible* for the court to grant *any effectual relief whatever*" to the Bank. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (emphasis added) (internal quotations omitted). So long as the Bank has any "concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citing *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)).

In this case, the Bank still has a substantial "concrete interest" in the outcome of this litigation. The Bank's existing mortgages remain subject to Regulation X's foreclosure requirements; its remittance transfers remain subject to the Remittance Rule; and its ability to re-enter the market for new mortgages remains limited because of Regulation Z's ability-to-pay standards. And each of those injuries can be remedied by the relief requested in the Complaint: namely, declaring the recess appointment unconstitutional and enjoining Director Cordray and the CFPB from enforcing the regulations he issued without constitutional authority.

Nor is the Bank's recess-appointment claim extinguished by the fact that the Court's injunctive relief, with respect to the Plaintiffs' Appointments Clause claim, might now be limited to enjoining only the regulations that Director Cordray *previously* issued, and not regulations or enforcement actions he may undertake in the future.[5] So long as the Court can grant the Plaintiffs even a "partial remedy" for their Appointments Clause claim, then that alone "is sufficient to prevent [the] case from being moot." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).

An instructive example is found in *Decker v. Northwest Environmental Defense Center*,

[5] To be clear, Director Cordray's new appointment does not narrow the injunctive relief that the Court can provide against the CFPB for the Plaintiffs' separation-of-powers challenge to Title X. The Court can still provide full declaratory and injunctive relief prohibiting Director Cordray and the CFPB from exercising any of the powers conferred upon them by Title X of the Dodd-Frank Act.

133 S. Ct. 1326 (2013), in which the Supreme Court considered whether an amendment to an environmental regulation that became final three days prior to oral argument mooted a controversy that arose under the prior version of the regulation. The Court held that it did not, stating that "despite the recent amendment, a live controversy continues to exist regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule." *Id*. at 1335.

The same analysis applies here. Director Cordray's new appointment, in and of itself, does nothing to relieve the injuries that his pre-confirmation regulations have imposed and continue to impose upon the Bank. The Court's injunction against the enforcement of those regulations, by contrast, would remedy the injuries.

Finally, the press has speculated that Director Cordray may choose to "ratify" the regulatory actions that he undertook before he was re-appointed with Senate advice and consent.[6] If Director Cordray chooses to rescind the regulations that he promulgated prior to his unconstitutional "recess" appointment, and to promulgate new regulations in their place, then such an action would raise entirely different questions with respect to mootness, and the Bank's injuries and remedy would have to be evaluated in light of the newly promulgated regulations.[7] But unless such events occur, the regulations that he promulgated before his new appointment remain the regulations that govern the Bank's operations in the remittance and mortgage

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[6] *See, e.g.*, Alan Zibel, *Consumer Bureau's Director Confirmed After Long Delay*, WALL ST. J., July 16, 2013, at A4.

[7] *See, e.g.*, *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996) (explaining how an agency may, or may not, "ratify" its prior decisions). That case followed the D.C. Circuit's decision in *FEC v. NRA Political Victory Fund*, where it held that legislative appointment of non-voting members to the FEC violated the Constitution's separation of powers, and thus invalidated an FEC enforcement action that might have been influenced by the non-voting members' participation in the FEC's deliberations. 6 F.3d 821, 826-28 (D.C. Cir. 1993).

markets. The mere speculative possibility that Director Cordray might rescind those regulations, and promulgate new ones in their place, does not moot the present case. *See CSI Aviation Servs., Inc. v. DOT*, 637 F.3d 408, 414 (D.C. Cir. 2011) (holding that petitioner's challenge to agency's action is not mooted even by the agency's "plans" to commence a new rulemaking that "will most likely change the legal landscape that gave rise to the" agency's action, even when the agency has "superseded" its action with a "temporary exemption"). Thus, the Bank still has standing to challenge the original January 2012 appointment that gave rise to those regulations.

* * *

After the Senate announced that it would vote on the nominations of Director Cordray and two National Labor Relations Board members, the White House stated that the Supreme Court should still hear the case challenging the NLRB's previous "recess" appointments.[8] On that point, we agree. Director Cordray's new appointment, to succeed his previous "recess" appointment, does not affect this case's justiciability. The Private Plaintiffs are still injured by Director Cordray's prior actions. Their injuries are not cured by his new appointment. Their challenge to his January 2012 appointment is not moot.

[8] White House, Press Briefing by Press Secretary Jay Carney (July 17, 2013), *at* http://www.whitehouse.gov/the-press-office/2013/07/17/press-briefing-press-secretary-jay-carney-7172013 ("Well, again, the answer is, yes.").

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Respectfully submitted,

s/Gregory Jacob

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CERTIFICATE OF SERVICE

I, Gregory Jacob, hereby certify that on July 19, 2013, I electronically filed the foregoing Private Plaintiffs' Supplemental Brief in Support of the Court's Jurisdiction Over Count II of the Second Amended Complaint through the CM/ECF system, which will send a notice of electronic filing to counsel for the Defendants in this matter, as well as counsel for the State of Oklahoma and the State of South Carolina.

I further certify that on July 19, 2013, I caused one hard-copy of the foregoing to be mailed by first-class U.S. Mail to each of the below-listed counsel, who are not registered with the Court's electronic filing system.

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