



U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

December 13, 2017

By ECF and Fax

The Honorable Paul G. Gardephe
United States District Judge
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, New York, NY 10007

Re: Plaintiff's Proposed Briefing Schedule, ECF No. 10, *Lower East Side People's Federal Credit Union v. Trump*, No. 1:17cv9536-PGG

Dear Judge Gardephe:

On behalf of Defendants, we respond to Plaintiff's request for a briefing schedule on its motion for preliminary injunction, which would have Defendants oppose Plaintiff's motion—which was filed just yesterday and which we received yesterday afternoon—by 10 a.m. on Monday, December 18, 2017. For the reasons set forth below—including the existence of a preexisting, parallel lawsuit, *English v. Trump, et al.*, Civ. No. 17-2534-TJK (D.D.C.), in which Defendants already must file a preliminary injunction opposition brief on the same day, only three hours later—Plaintiff's proposed schedule is unreasonable. Indeed, that proposed schedule (which Plaintiffs submitted to the Court without first obtaining Defendants' views) scarcely could have been more inconvenient to Defendants had the plaintiffs in both cases designed it with that goal in mind. And in a matter such as this, which raises issues of national significance and which follows the court's denial of a temporary restraining order in *English*, such inconvenience to one party would not serve the interests of justice or judicial economy. Rather, those interests counsel in favor of a briefing schedule that would allow more substantial briefing on all sides, providing the Court the most fulsome record on which to adjudicate the important questions raised here, including those already put before the district court in *English* and additional defenses not previously addressed by the parties in that matter. Among other things, there appear to be significant issues regarding Plaintiff's standing—and thus this Court's jurisdiction—that were not implicated in *English*, and which Defendants have not yet had an opportunity to review and brief.

Thus, Defendants would propose that this Court enter a schedule that would consolidate briefing on Plaintiff's motion for preliminary injunction and Defendants' anticipated motion to dismiss under Federal Rule 12. Defendants anticipate that the District Court for the District of Columbia will have already resolved a request for preliminary injunctive by early January 2018, if not late December, given that oral argument on the plaintiff's motion for a preliminary injunction in that matter is scheduled for December 22. But to expedite consolidated briefing in this case nonetheless, Defendants would agree to file a combined brief in support of a motion to dismiss and in opposition to Plaintiff's motion for preliminary injunction within thirty days of service,

rather than the sixty days provided under Fed. R. Civ. P. 12(a)(3)(A), with subsequent briefs to follow as set forth below.

In the alternative, should the Court prefer not to order consolidated briefing on the expedited timetable proposed by Defendants, Defendants would ask that their opposition to Plaintiff's motion for preliminary injunction be set for 5 p.m. on December 22, 2017, with subsequent briefs to follow as set forth below.

Counsel for Defendants have conferred with Plaintiff's counsel. As to Defendants' proposal for consolidated briefing, we have not yet been able to obtain Plaintiff's views. As for Defendant's alternative proposal, Plaintiff's counsel represented that Plaintiff might be amenable to a schedule requiring Defendants to respond to their motion by December 19, with any reply to be filed on December 20, but otherwise do not consent.

On November 24, 2017, the President designated John M. Mulvaney, Director of the United States Office of Management and Budget, as the Acting Director of the Consumer Financial Protection Bureau. Within forty-eight hours, the President's designation of Acting Director Mulvaney prompted a lawsuit in the United States District Court for the District of Columbia by Leandra English, who purportedly had been appointed Deputy Director of CFPB earlier the same day, challenging the President's designation. *See English v. Trump, et al.*, Civ. No. 17-2534-TJK (D.D.C.). Ms. English quickly filed a motion for temporary restraining order to enjoin the President's designation and require her recognition as Acting Director instead. Following briefing and oral argument, the court denied Ms. English's motion. On December 5, the court set a briefing schedule for Ms. English's motion for preliminary injunction, providing Defendants more time than that presumptively afforded by the local rules in light of the complexity of the issues presented. Pursuant to that schedule, Defendants' opposition is due at 1 p.m. on Monday, December 18, with a hearing set for Friday, December 22.

On December 5, Plaintiff filed suit in this Court, also challenging the President's designation of Acting Director Mulvaney; Plaintiff then moved for a preliminary injunction from this Court on Tuesday, December 12. Around noon on December 12, Plaintiff submitted its request for a briefing schedule to the Court. Although Plaintiff's counsel had reached out to undersigned counsel for Defendants in the *English* case late in the evening on Friday, December 8, counsel's email made no mention of an impending preliminary injunction motion or any proposed schedule for briefing on such a motion. Rather, it was not until after the submission of Plaintiff's proposed schedule that Defendants' counsel learned of that proposed schedule.

Plaintiff's failure to confer in and of itself would warrant denial of its unilateral proposed schedule. But for at least four reasons independent of that failure, the Court should adopt Defendants' proposed schedule in lieu of Plaintiff's. First, the Local Rules of this Court establish a presumptive fourteen-day response period for motions. Absent any showing of good cause to depart from that presumptive schedule, the Court should follow that schedule, and Plaintiff has supplied no such good cause. Indeed, in light of the impending holidays, Defendants' alternative proposed schedule governing briefing on Plaintiff's motion for preliminary injunction alone would

give Defendants less than the full period, making their opposition due on Friday, December 22, only ten days after Plaintiff's motion.

Second, events have already eroded any assertion by Plaintiff that exigent circumstances justify any abbreviation of the fourteen-day response period. Since his November 24 designation, Acting Director Mulvaney has been overseeing CFPB for the better part of three weeks now. And the court in *English* has already denied a motion for a temporary restraining order by Ms. English in her first-filed litigation in that court. Following the submission of briefing and two substantive hearings, the court concluded that Ms. English had shown neither a likelihood of success on the merits of her claim nor—even more importantly here—any likelihood of irreparable harm absent a temporary restraining order. With one court having already determined, on the basis of many of the same arguments advanced here, that no imminent threat of irreparable harm exists, Plaintiff cannot credibly argue that the existence of any such harm warrants expedited briefing on its own, second-filed motion for preliminary relief. Moreover, Defendants anticipate raising arguments and defenses in this case that they did not raise in *English*, which would only weaken Plaintiff's assertion of irreparable harm and likelihood of success.

Third, Plaintiff's own delay in seeking preliminary relief further undermines its argument that some unspecified emergency warrants the scheduling relief it seeks. Had Plaintiff reasonably feared an imminent threat of irreparable harm resulting from the President's November 24 designation of Acting Director Mulvaney, it could have filed suit on a timetable similar to that of Ms. English, who filed suit on Sunday, November 26—less than forty-eight hours following Acting Director Mulvaney's designation—and sought an emergency temporary restraining order later that same night. To be sure, Plaintiff here is entitled to file suit on its own preferred timetable. But any suggestion that an emergency briefing schedule is warranted simply is not consistent with a delay of almost three weeks between the President's November 24 designation and the eventual filing of a motion for preliminary injunction seeking to enjoin that designation (considerably more time than the three business days Plaintiff would allow Defendants to respond).

Finally, even if Plaintiff could point to some true emergency here, the status of the first-filed, parallel litigation in *English* should adequately protect any interest by Plaintiff in guarding against such hypothetical emergency. The court in *English* has already denied a similar request for a temporary restraining order; now, the parties to that matter are in the midst of briefing on Ms. English's subsequent motion for preliminary injunction, with oral argument scheduled for Friday, December 22. Under Plaintiff's own proposed schedule here, its reply would not be due until December 19, just three days before oral argument in *English*, meaning that *English* will be ripe for decision just as briefing would have been completed here. Should the court in *English* enter a preliminary injunction in favor of Ms. English (which, to be clear, Defendants do not believe would be warranted), any interest that Plaintiff might have would be protected.¹

Indeed, the burden that would be imposed on Defendants in this case under Plaintiff's proposed schedule further counsels in favor of setting a briefing schedule more akin to this Court's default briefing schedule. Plaintiff's proposed schedule would force Defendants here to oppose

¹ Further, if Plaintiff here wishes to make its views known to the court in *English*, Defendants would consent to its filing of an amicus brief in that matter, even if such filing would otherwise be out of time under the schedule entered by the court.

Plaintiff's preliminary injunction motion by 10 a.m. Monday, November 18, just three hours before Defendants' preliminary injunction opposition brief is due in *English*. In conferring with Plaintiff's counsel—after the submission of Plaintiff's proposed schedule—Defendants' counsel raised that concern to no avail. Given the burdens that would place on Defendants' counsel and the countervailing arguments in favor of a slightly more extended briefing schedule, there is no reason for the Court to adopt Plaintiff's unilaterally proposed schedule. It should instead adopt one of the more reasonable schedules proposed by Defendants, either in the form of consolidated briefing in Plaintiff's motion and Defendants' anticipated motion to dismiss or briefing solely on Plaintiff's motion that more closely tracks this Court's presumptive briefing timetable.

Accordingly, Defendants respectfully propose the following briefing deadlines. First, should the Court prefer consolidated briefing:

- Defendants' opposition to Plaintiff's motion for preliminary injunction and brief in support of their motion to dismiss to be filed on or before January 12, 2017.
- Plaintiffs' reply in support of its motion for preliminary injunction and opposition to Defendants' motion to dismiss to be filed on or before January 26, 2017.
- Defendants' reply in support of their motion to dismiss to be filed on or before February 9, 2017.

Alternatively, should the Court prefer briefing solely on Plaintiff's motion for preliminary injunction:

- Defendant's Opposition to be filed by 5 p.m. on December 22, 2017.
- Plaintiff's Reply, if any, to be filed by 5 p.m. on December 29, 2017.

We thank the Court for its consideration of this matter.

Respectfully Submitted,

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CC: All Counsel of Record (by ECF)