

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES
ASSOCIATION OF AMERICA, LTD. *et al.*,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION
BUREAU *et al.*,

Defendants.

Civil Action No. 1:18-cv-295

PLAINTIFFS' OPPOSED MOTION FOR STAY PENDING APPEAL

Pursuant to Rule 8(a)(1) of the Federal Rules of Appellate Procedure, Plaintiffs respectfully request that the Court extend its stay of the implementation period and compliance date of the payments provisions of the 2017 Payday Rule until 286 days after their appeal of this Court's judgment and orders is fully and finally resolved. In simplest terms, Plaintiffs respectfully ask this Court to pause the running of the 286-day compliance period in order to maintain the status quo pending appeal. In order to preserve the status quo secured by this Court's previous stay, and to facilitate orderly proceedings in the Fifth Circuit, Plaintiffs respectfully request a decision on this motion at the Court's earliest convenience, and no later than Monday, September 27, 2021.

Pursuant to Local Civil Rule 7(G), counsel for the parties have conferred in a good-faith attempt to resolve this matter by agreement. Counsel for Defendants indicated that Defendants oppose the relief requested.

BACKGROUND

On August 31, 2021, this Court granted judgment for Defendants and restored the parties to the original compliance period remaining when the Court granted its stay (286 days), acknowledging that Plaintiffs "should receive the full benefit of the temporary stay," which would

also allow “time for appeal.” ECF No. 103 (“SJ Order”), at 24. On September 9, 2021, Plaintiffs filed their notice of appeal. Plaintiffs intend to seek a stay pending appeal in the Fifth Circuit should the Court deny the instant motion.

ARGUMENT

A stay pending appeal “maintain[s] the status quo pending a final determination on the merits.” *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A June 1981) (per curiam). A party seeking a stay “need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.” *Campaign for S. Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014). The Fifth Circuit has consistently counseled against “apply[ing] these factors in a rigid, mechanical fashion.” *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). A stay is proper “where relative harm and the uncertainty of final disposition justify it.” *Ruiz*, 650 F.2d at 565.

This case presents “a serious legal question” that affects not only the public’s access to credit in a global pandemic, but also has overarching implications for litigants’ remedial relief from rulemakings commenced by unlawfully structured agencies. *See Wildmon v. Berwick Universal Pictures*, 983 F. 2d 21, 24 (5th Cir. 1992) (per curiam) (serious legal question if case involves “far-reaching effects or public concerns”). Plaintiffs have presented a substantial case on the merits, and the balance of equities favors a stay given this Court’s own (correct) determination that Plaintiffs are entitled to maintenance of the status quo, including the time to come into compliance, while these issues are being litigated.

I. PLAINTIFFS HAVE PRESENTED A SUBSTANTIAL CASE ON THE MERITS ON THE SERIOUS LEGAL QUESTIONS PRESENTED.

Respectful of this Court’s resources and its careful consideration of the merits, Plaintiffs do not seek reconsideration before this Court. Indeed, it is unnecessary for this Court to revisit its

merits decision or “express any opinion on the resolution” of the legal issues in order to conclude that a substantial case on the merits exists. *Baylor Univ. Med. Ctr.*, 711 F.2d at 40. Rather, “[t]he Fifth Circuit recognizes that a party presents a substantial case on the merits when there is a lack of precedent to clarify the issues at bar.” *Cruson v. Jackson Nat’l Life Ins. Co.*, No. 16-cv-00912, 2018 WL 2937471, at *4 (E.D. Tex. June 12, 2018).

The Supreme Court has not resolved the vexing remedial issues presented here, opting instead to remand questions of remedy and ratification to the lower courts after invalidating agency structures on constitutional grounds. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2208 (2020); *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021). This Court based its remedial holding in large part on a reading of *Collins* advocated by the Bureau that the Fifth Circuit is poised to address in two pending en banc cases, *CFPB v. All American Check Cashing*, No. 18-60302, and *Collins v. Yellen*, No. 17-20364. Indeed, the parties in those cases filed their supplemental reply briefs on September 8, rendering both ripe for decision. This Court’s carefully deliberate consideration of the merits, coupled with the Fifth Circuit’s en banc review in the two related cases, illustrates that Plaintiffs have a “substantial case on the merits,” at least on the remedial questions related to the Bureau’s unlawful structure. *See Fed. R. App. P. 35(a)* (explaining that “en banc hearing or rehearing is not favored and ordinarily will not be ordered unless” “necessary to secure or maintain uniformity of the court’s decisions; or” “the proceeding involves a question of exceptional importance”); 5th Cir. R. 35.1 (cautioning counsel that en banc review “is a serious call on limited judicial resources”). And as the prior briefing and this Court’s summary judgment order demonstrate, Plaintiffs’ APA claims likewise present substantial questions on the merits.

II. PLAINTIFFS' MEMBERS WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

“Irreparable harm is perhaps the single most important prerequisite for the issuance” of temporary relief. *Amegy Bank Nat'l Ass'n v. Monarch Flight II, LLC*, No. 11-cv-3218, 2011 WL 6091807, at *6 (S.D. Tex. Dec. 7, 2011) (cleaned up). This Court has already recognized the irreparable harm caused by potentially unnecessary costs expended to come into compliance, both when this Court entered the initial stay order and in its decision to grant Plaintiffs the full benefit of the pre-stay, 286-day compliance period. Allowing the compliance clock to run pending appeal, however, will likewise cause irreparable harm if the Fifth Circuit ultimately sets aside the challenged regulations because absent a stay Plaintiffs' members will need to incur these costs while the appeal is pending.

Specifically, preparation for compliance is a costly, months-long process that involves a complete overhaul of Plaintiffs' members' internal compliance systems and external client communications. *See, e.g.*, Decl. James A. Ovenden Supp. Pls. Opp'n to Defs. Mot. Summ. J. (“Ovenden Decl.”), ECF No. 84-1, ¶¶ 6–7. The changes will necessitate extensive testing, new recordkeeping, re-training of employees, restructuring of outside vendor relationships, and similar burdens. *Id.* ¶¶ 5–8. All this will take substantial cost and time to implement: six to twelve months, “[a]ssuming the business impacts from COVID-19 normalize in 2021.” *Id.* ¶ 9. Moreover, the cost and time required to implement necessary changes has exponentially grown due to the COVID-19 pandemic. *Id.* ¶¶ 8–11. This pandemic was completely unanticipated when the Bureau promulgated the original rule and when the original stay went into effect, and it seems to be far from over.

As this Court recognized in maintaining the stay for 286 days after judgment, allowing for “time for appeal” is also an important consideration. SJ Order at 24. But because preparing for

compliance will take at least six to twelve months, Ovenden Decl. ¶ 9, Plaintiffs’ members will (absent the requested relief) have to undertake these compliance costs before resolution of Plaintiffs’ appeal. Indeed, because the median decision time in the Fifth Circuit is approximately 280 days,¹ it is likely that Plaintiffs’ members will need to begin *complying* with the payments provisions (not just preparing to comply with them) before the appeal is resolved. Extending the stay until 286 days after the appeal is fully and finally resolved is therefore a more effective way to maintain the status quo and effectuate this Court’s judgment that there should be “time for appeal” before compliance.

Finally, these injuries—including the costs expended on preparing for compliance—are irreparable because, given the government’s sovereign immunity from suit, none of them will be compensable by money damages should the payments provisions be invalidated on appeal. *See Texas v. EPA*, 829 F.3d 405, 433–34 (5th Cir. 2016) (“complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs”); *Enter. Int’l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 473 (5th Cir. 1985) (“The absence of an available remedy by which the movant can later recover monetary damages ... may also be sufficient to show irreparable injury.”); *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529, 543 (W.D. Tex. 2015).

III. THE REMAINING FACTORS AND THE BALANCE OF EQUITIES HEAVILY FAVOR A STAY.

Balancing the irreparable harm facing Plaintiffs’ members against the public interest and any harm to the government weighs heavily in favor of a stay. *See Nken v. Holder*, 556 U.S. 418,

¹ Practitioner’s Guide to the United States Court of Appeals for the Fifth Circuit 4 (Dec. 2020), <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/documents/practitionersguide.pdf>.

435 (2009) (noting that harm to the opposing party and the public interest “merge when the Government is the opposing party”). Courts routinely recognize that the equities favor temporary relief where judicial review can resolve serious questions before altering the status quo in a way that cannot be undone “if [the government program] were to be implemented.” *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015); *see also Ruiz*, 650 F.2d at 569.

Preserving the status quo costs the Bureau nothing. The Rule imposes unprecedented changes to the lending industry, whereas extending the stay pending appeal merely maintains, for a short while longer, the status quo that has been in place for decades. The Rule has never gone into effect, and the Bureau previously joined in delaying compliance.

A stay also serves the public interest. The payments provisions will significantly alter the public’s access to affordable credit during a global pandemic. Plaintiffs’ members have to budget for increased compliance costs, which means their services will be more costly, they can offer fewer services to fewer people, and/or they have less ability to negotiate new payment terms for borrowers behind on payments. Focusing resources on compliance costs also means that companies will have to take limited resources away from more “immediate and urgent priorities associated with COVID-19, such as addressing consumer needs for convenient remote servicing options and increasing payment accommodation capabilities during these unprecedented times.” Oviden Decl. ¶ 8. At the very least, the public would not be served by borrowers being subjected to contradictory ping-ponging loan terms if, for example, the payments provisions go into effect before the appeal concludes, but the Fifth Circuit ultimately invalidates those provisions. Plaintiffs’ members’ “normal procedures ... should not be interrupted so significantly until an appeal has been decided.” *Baylor Univ. Med. Ctr.*, 711 F.2d at 40.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to extend the stay of the compliance date of the payments provisions until 286 days after their appeal of this Court's orders are fully and finally resolved. Plaintiffs further respectfully request a decision on this Motion at the Court's earliest convenience, and no later than Monday, September 27, 2021.

Dated: September 9, 2021

Respectfully submitted,

/s/Laura Jane Durfee
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: September 9, 2021

/s/Laura Jane Durfee _____
Laura Jane Durfee
Counsel for Plaintiffs

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Plaintiffs conferred with counsel for Defendants on September 8–9, 2021. Defendants oppose this motion.

Dated: September 9, 2021

/s/Laura Jane Durfee
Laura Jane Durfee
Counsel for Plaintiffs

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[PROPOSED] ORDER

Before the court in the above styled and numbered case is Plaintiffs' Opposed Motion for Stay Pending Appeal, filed September 9, 2021. Having considered the motion, the case file, and the applicable law,

IT IS ORDERED that Plaintiffs' motion is **GRANTED**.

IT IS FURTHER ORDERED that the compliance date of the 2017 Rule is **STAYED** until 286 days after the date of the final disposition of Plaintiffs' appeal by the United States Court of Appeals for the Fifth Circuit.

SIGNED this ____ day of _____, 2021.

THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE