20-3471

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Consumer Financial Protection Bureau,

Petitioner-Appellee,

v.

Law Offices of Crystal Moroney, P.C.,

Respondent-Appellant.

On Appeal From the United States District Court
For the Southern District of New York

APPELLEE'S OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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The Consumer Financial Protection Bureau brought this case to enforce an administrative subpoena known as a civil investigative demand (CID). *See* 12 U.S.C. § 5562(c), (e). The Bureau issued the CID to Respondent Law Offices of Crystal Moroney, P.C., a debt-collection firm, as part of an investigation into possible violations of several consumer-protection laws, violations the Bureau is concerned may be ongoing. Respondent has refused to comply with the CID since it was issued in November 2019 and now seeks to avoid complying with the district court's order of August 19, 2020, enforcing the CID. Respondent argues that it should not have to provide information in response to the CID because, it says, the Bureau's statutory method of funding violates the Constitution. That argument is without merit and has been rejected by every court to consider it.

The Court should deny Respondent's motion for a stay because Respondent has not met its burden on any of the relevant factors. Respondent is not likely to succeed on the merits because its claim is contradicted by Supreme Court precedent and unsupported by any authority. A stay would harm the public interest by stymieing an ongoing investigation into suspected violations by Respondent and others, including whether they may be disregarding warnings that the debts they are trying to collect are the result of identity theft. Finally, Respondent cannot avoid its obligation to respond to the CID simply by claiming it would be too expensive to do so—particularly when Respondent has offered only self-serving

and insufficient evidence of its financial condition and, moreover, has rejected multiple opportunities to seek ways to alleviate any burden imposed by the CID.

BACKGROUND

Petitioner the Consumer Financial Protection Bureau is the primary enforcer of federal consumer financial laws. *See, e.g.*, 12 U.S.C. § 5511(a). It may issue administrative subpoenas—known as civil investigative demands or CIDs—in aid of its investigations. *Id.* § 5562(c). To enforce compliance with a CID, the Bureau must file a petition in district court. *Id.* § 5562(e). Such CID-enforcement actions are meant to be summary proceedings, *see, e.g.*, *SEC v. House Ways & Means Comm.*, 161 F. Supp. 3d 199, 224 (S.D.N.Y. 2015), 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).

Respondent is a debt-collection firm. The Bureau sent Respondent a CID in November 2019 as part of an investigation into suspected violations of federal law. *See* Resp't's Ex. J at 22 (describing investigation), ECF No. 23-11.

After Respondent refused to comply with the CID, the Bureau filed a petition to enforce it in district court. *See id.* at 2-5. The district court granted the petition. The court observed that there is "really no authority to support [Respondent's] … theory" that it should not have to comply with the CID because,

it claims, Congress violated the Appropriations Clause when it chose to appropriate funds for the Bureau primarily from the earnings of the Federal Reserve System rather than via the annual appropriations process.[1] Resp't's Ex. A at 56 (Enf. Hr'g Tr.), ECF No. 23-2. The district court rejected Respondent's argument and noted that every other court to have considered that argument, including the en banc D.C. Circuit, had likewise rejected it. *Id.* at 54-58.

Respondent moved to stay the district court's order pending appeal. The court denied the motion, ruling that all of the relevant factors weighed against a stay. It held that Respondent could not clear the threshold showing of success on the merits, stating that it would be "pretty hard to argue that there are these serious constitutional concerns regarding [the Bureau's] funding" and further stated that "there's really not been a solid explanation [from Respondent] as to why the funding that Congress included when it enacted CFPB violates the Appropriations Clause." Resp't's Ex. F, at 24-30 (Stay Hr'g Tr.), ECF No. 23-7.

[1] Like many financial regulators, the Bureau is funded through its statute rather than through annual appropriations bills. *Cf., e.g.*, 12 U.S.C. § 16 (Office of the Comptroller of the Currency); *id.* § 243 (Federal Reserve Board); *id.* §§ 1815(d), 1820(e) (FDIC). Congress authorized the Bureau to draw funding from the earnings of the Federal Reserve System—of which the Bureau is formally a part, *id.* § 5491(a)—up to a specified cap, *id.* § 5497(a). The Bureau must obtain any additional funding through the annual appropriations process. *See id.* § 5497(e). The Director must report to the House and Senate Appropriations Committees on the Bureau's financial operating plans and use of funds. *Id.* § 5497(e)(4).

The court also concluded that the public interest and Bureau's interests "cut[] pretty strongly in CFPB's favor," given the importance of the underlying investigation, the significant delay to that investigation already, and the resulting risk of prejudice "from things like lost memories, and documents being lost, witnesses just becoming unavailable." *Id.* at 37-38. Finally, the court found that Respondent had not shown it was likely to suffer irreparable harm without a stay, given (1) "the absence of more specific evidence that substantiate[s]" Respondent's claim that responding to the CID would render it insolvent, and (2) Respondent's failure to respond to "the CFPB's willingness to try to accommodate some of [its] concerns" regarding burden. *Id.* at 37-38.

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) (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." *Id.* at 426. The movant bears the burden to show that the intrusion of a stay pending appeal is warranted. *Id.* at 433-34.

ARGUMENT

I. Respondent's claim is without merit, has been roundly rejected in numerous courts, and is contradicted by Supreme Court precedent.

Respondent claims that the Bureau's statutory method of funding violates the Appropriations Clause, but that claim makes little sense on its face and has been unanimously rejected by courts across the country. Respondent has not shown this claim is sufficiently likely to succeed that a stay is warranted here.[2]

The Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. "[T]he straightforward and explicit command of the Appropriations Clause … 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). "[I]n other words, the payment of money from the Treasury must be

[2] Respondent raised additional objections to the CID in the district court but does little more than allude to them in its motion for a stay. *See* Mot. at 2 (alleging unspecified "fatal flaws" in the Bureau's ratification of this action and stating that Respondent "will assert on appeal" other claims involving the reasonableness of the CID). Because Respondent's motion does not actually articulate any claim beyond the funding argument, Respondent certainly has not met its burden to show that any such additional claims are likely to succeed.

authorized by a statute." *Id.* The Bureau's funding is so authorized: The Bureau's statute authorizes it to receive funds from the Federal Reserve up to a specified annual cap, 12 U.S.C. § 5497(a), and Congress remains free to change that funding at any time through the ordinary legislative process.

Indeed, *every* court to have considered the Bureau's statutory funding mechanism, including the en banc D.C. Circuit, has held that the way Congress chose to fund the Bureau does not violate the Appropriations Clause. *See PHH Corp. v. CFPB*, 881 F.3d 75, 95-96 (D.C. Cir. 2018) (en banc) ("The way the CFPB is funded fits within the tradition of independent financial regulators."), *abrogated on other grounds*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020); *CFPB v. Citizens Bank, N.A.*, --- F. Supp. 3d ---, 2020 WL 7042251, at *13 (D.R.I. Dec. 1, 2020) ("The CFPB's funding does not violate the Appropriations Clause."); *CFPB v. Fair Collections & Outsourcing, Inc.*, No. 8:19-cv-02817, 2020 WL 7043847, at *5-7 (D. Md. Nov. 30, 2020) ("[T]he CFPB's funding structure complies with the Appropriation Clause's mandate … ."); *CFPB v. Think Finance LLC*, No. 17-cv-127, 2018 WL 3707911, at *1-2 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530, at *16 (M.D. Pa. Aug. 4, 2017); *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 896-97 (S.D. Ind. 2015); *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014); *see also Rop v. Fed. Housing Fin. Agency*, No. 1:17-CV-497, 2020 WL

5361991, at *26 (W.D. Mich. Sept. 8, 2020) (concluding that the Supreme Court's decision in *Seila Law* "strongly implied that the [Bureau's] source of funding was not a problem by itself").

Respondent says it is nonetheless likely to succeed because its claim (1) is one of first impression, (2) will be reviewed de novo, and (3) does not warrant any special deference to the Bureau. Mot. at 14-17. But, as already shown, Respondent's first point is incorrect as a matter of fact. Nor do Respondent's second and third points show that it is likely to succeed here because that is the same standard applied in every one of the cases cited above, all of which rejected this argument on the merits. That is hardly an augur of success.

II. A stay would harm the public interest by further delaying the Bureau's investigation into potentially ongoing violations of federal consumer-protection law.

The balance of equities also leans heavily against the unnecessary delay Respondent seeks.

The Bureau issued this CID in November 2019 as part of an investigation into possible violations of the Consumer Financial Protection Act, Fair Debt Collection Practices Act, and the Fair Credit Reporting Act. Among other things, the Bureau is seeking to determine whether Respondent or others may be ignoring cease-and-desist requests from consumers or disregarding warnings that the debts they are trying to collect are the result of identity theft. The Bureau is also seeking

to determine whether any such violations are ongoing and, therefore, causing additional harm to the public.[3]

Court actions to enforce CIDs and other administrative subpoenas are meant to be summary proceedings, *see, e.g.*, *House Ways & Means Comm.*, 161 F. Supp. 3d at 224, so that agencies can carry out their statutory responsibilities to promptly investigate and, where appropriate, take enforcement action to address violations of federal law. In general, delay makes it more difficult for agencies to pursue such investigations because it "inherently increases the risk that witnesses' memories will fade and evidence will become stale." *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc*., 490 F.3d 718, 724 (9th Cir. 2007). Those risks are compounded in this case by the significant amount of time that has already passed since the Bureau issued the CID.

Moreover, "the public has a strong interest in the vigorous enforcement of consumer protection laws." *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 205 (D.D.C. 2017). Suspending Respondent's obligation to respond to the CID until the

[3] Respondent is incorrect when it says the Bureau issued the CID "without ***any*** suspicion of wrongdoing and without ***any*** consumer complaints." Mot. at 3. The Bureau sent the CID to investigate the suspected wrongdoing described in the CID. Moreover, while a CID's validity does not turn in any way on the number of complaints the Bureau may have received about particular conduct under investigation, the Bureau notes that it has received complaints about Respondent's debt-collection activities and has previously so informed Respondent.

conclusion of this appeal would harm the Bureau and the public by impeding the progress of an important government investigation to enforce those laws.

III. Respondent has not shown it will suffer irreparable injury absent a stay and has ignored multiple opportunities to lessen any burden imposed by responding to the CID.

Because Respondent has not made any showing that it is likely to succeed on the merits, its burden with respect to irreparable harm is correspondingly higher. *Cf. Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) ("Simply stated, more of one excuses less of the other."). Respondent cannot meet that burden on any of the three forms of injury it alleges.

1. Respondent claims it will suffer some type of *per se* constitutional injury from having to provide documents and information to the Bureau despite its belief that the Bureau's method of funding violates the Appropriations Clause. Mot. at 8-9. This argument is flawed because it assumes a constitutional problem that is not there. Moreover, adopting Respondent's argument would mean that a party need only allege a constitutional violation—no matter how implausible—in order to demonstrate irreparable harm.

Both cases Respondent cites are readily distinguishable because they involved prisoners alleging plausible violations of their personal constitutional right not to be subject to cruel and unusual punishment. *See id.* (citing *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996), and *Mitchell v. Cuomo*, 748 F.2d 804 (2d

Cir. 1984)). Those cases are a world away from this one, where Respondent, a law firm, is claiming constitutional injury from having to comply with a subpoena issued by a regulatory agency that Respondent claims draws its funding in an unconstitutional manner. Respondent cites no case, and gives no reason, to support its claim that the Court should assume constitutional harm in such circumstances.

2. Respondent also asserts that without a stay its appeal will become moot because it "would be subjected to the constitutional harm of which it complains." Mot. at 9. 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) (quotation marks and ellipsis omitted). And on *that* question, the Supreme Court has squarely held that a dispute over an agency subpoena is not rendered moot by the recipient's compliance with the subpoena because a 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).

3. Finally, Respondent, a law firm, claims that to comply with the Bureau's CID would be so costly as to drive it out of business. Mot. at 9-13. The district court correctly held that Respondent had not shown that compliance would render it insolvent. *See generally Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989) ("A monetary loss will not suffice [to show irreparable

injury] unless the movant provides evidence of damage that cannot be rectified by financial compensation. Bankruptcy is such a case."). The court also correctly observed that the Bureau had invited Respondent to negotiate modifications to lessen any burden of the CID but that Respondent had declined these invitations.

The self-serving affidavits Respondent offers from its president and its accountant do not meet the standard courts have imposed in considering claims of impending insolvency. *See, e.g.*, *Sunni, LLC v. Edible Arrangements, Inc.*, No. 14-cv-461, 2014 WL 1226210, at *11 (S.D.N.Y. Mar. 25, 2014) (movants failed to show 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"); *Auto Sunroof of Larchmont, Inc. v. Am. Sunroof Corp*., 639 F. Supp. 1492, 1494 (S.D.N.Y. 1986) (movant failed to meet its burden where it offered "only the self-serving statement of its President that its business will collapse").

For example, both affiants state that Respondent previously spent $75,000 in response to an earlier CID.[4] Even accepting that figure at face value, it includes

[4] After Respondents objected to that earlier CID, claiming it failed to satisfy the requirement in 12 U.S.C. § 5562(c)(2) that it describe the nature of the conduct under investigation and relevant provisions of law, the Bureau withdrew it and issued this CID, which provided additional details about the scope of the Bureau's investigation. Although Respondent did produce certain information to the Bureau in response to the prior CID, Respondent later clawed back significant portions of

Respondent's costs in *contesting* that earlier CID, including in litigation, and thus does not answer the different question here: the cost of *complying* with this CID. *See* Resp't's Ex. G, ¶ 13 (Moroney Aff.), ECF No. 23-8.

More fundamentally, Respondent is not entitled to a stay on the basis of alleged pecuniary injuries when it could have taken steps to avoid those injuries but chose not to. The Bureau has repeatedly invited Respondent to negotiate ways that the burden of the CID could be mitigated, but Respondent has failed to engage. *See* Resp't's Ex. F at 35 (District Judge: "[P]etitioner has been ready and willing and able to work with [Respondent] to try to accommodate some of [its] concerns, and those have not been met with any real dialogue."); Resp't's Ex. I at 3 (order resolving Respondent's administrative petition to quash or modify the CID; observing that Respondent had repeatedly failed to propose any specific modifications to the CID, despite having the chance to do so), ECF No. 23-10.

For these reasons, Respondent has not made a sufficient showing of irreparable harm as would justify a stay in these circumstances.

CONCLUSION

Because Respondent has not shown that any of the relevant factors support a stay pending appeal in this case, the Court should deny Respondent's motion.

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that production based on confidentiality claims that the district court has now considered and rejected. *See* Resp't's Ex. A at 76-77 (Enf. Hr'g Tr.).

Dated: January 15, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This filing complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(A). It contains 3,048 words, excluding the portions exempted by Rule 32(f).

/s/ Kevin E. Friedl
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