IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellee, Case No. 23-55259

v.

CASHCALL, INC., *et al.*,

Defendants-Appellants,

APPELLEE CONSUMER FINANCIAL PROTECTION BUREAU'S RESPONSE IN OPPOSITION TO MOTION TO STAY BRIEFING

Defendants (collectively, "CashCall") ask to postpone the start of briefing for up to a year or more to await the Supreme Court's ruling on an issue this Court has already held that CashCall forfeited multiple times over. CashCall says (at 4) that delay is needed "to conserve the parties' resources" by saving it from having to brief the forfeited issue. But the burden of completing that section of CashCall's brief will not be significant. Certainly it is not enough to warrant so long a delay to the briefing schedule and, ultimately, to the final resolution of this long-running public enforcement action and the payment of redress to consumers. The Court should deny CashCall's motion and allow briefing to proceed in the usual course.

BACKGROUND

1. CashCall asks to delay the start of briefing until the Supreme Court issues a decision in *CFPB v. Community Financial Services Ass'n of Am., Ltd.*, No. 22-448 (U.S. cert. granted Feb. 27, 2023) ("*CFSA*").

CFSA involves a claim that the statutory provisions funding the Bureau violate the Appropriations Clause.[1] With the exception of the Fifth Circuit decision under review in *CFSA*, every court to have considered this argument has rejected it. *See, e.g.*, *CFPB v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 181-83 (2d Cir. 2023) (finding "no support" for the Fifth Circuit's holding "in Supreme Court precedent," "the Constitution's text," or "the history of the Appropriations Clause"); *PHH Corp. v. CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc) ("The way the CFPB is funded fits within the tradition of independent financial regulators."), *abrogated on other grounds by Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020); *CFPB v. CashCall, Inc.*, 2023 WL 2009938, at *3 (C.D. Cal. Feb. 10, 2023) (collecting numerous other cases). Indeed, no other court has *ever* held that

[1] Like many other agencies, the Bureau is funded through its organic statute rather than annual spending bills. The Bureau's funds come from the receipts of the Federal Reserve System, of which the Bureau is a part. 12 U.S.C. § 5491(a). For fiscal years 2013 and later, Congress set the cap on the amount that the Bureau can draw at approximately $597.6 million, which is 12% of the total operating expenses of the Federal Reserve System as reported in 2009. *Id.* § 5497(a)(2)(A). The capped amount is adjusted annually only for inflation. *Id.* § 5497(a)(2)(B).

an act of Congress violated the Appropriations Clause. *See* Br. for Pet. at 11, *CFSA*, 2023 WL 3385418.

The Supreme Court is set to hear *CFSA* next term, meaning that a decision is unlikely until the first half of 2024, and potentially not until June of that year.

2. This is the second appeal in this case. In the first, this Court affirmed that CashCall engaged in illegal and deceptive practices when it demanded and collected payments that consumers did not actually owe on loans that state laws had rendered void. *CFPB v. CashCall, Inc.*, 35 F.4th 734, 747 (9th Cir. 2022). The Court held that the district court had incorrectly assessed civil penalties at a lower tier that did not account for CashCall's recklessness and accordingly vacated the penalty award and instructed the district court to reassess it at a higher tier. *Id.* at 749. And the Court held that the district court had made an error of law in denying restitution and remanded for reconsideration of that remedy as well. *Id.* at 751.

The Court also rejected CashCall's claim—not offered until "months after oral argument" and "eight years after this litigation first began"—that the Court should "hold that the Bureau's structure violates the Appropriations Clause." *Id.* at 743. "CashCall forfeited that argument twice over by failing to present it to the district court or in its briefing before us on appeal," the Court concluded. *Id.*

On remand, the district court applied this Court's instructions to reassess monetary relief. The court accounted for CashCall's recklessness when assessing

the civil penalty and determined that $33.3 million was the appropriate penalty amount. *CashCall*, 2023 WL 2009938, at *4-5. The court ordered CashCall to pay $134 million in legal restitution—an amount that would restore "consumers to their status quo before entering into the loans" by returning to them the total (minus refunds) of the un-owed interest and fees that consumers paid over and above the amounts they had received from CashCall in loan proceeds. *Id.* at *9.

CashCall attempted to raise the same funding challenge it had attempted to raise on appeal and that this Court held was "forfeited … twice over." The district court rejected that challenge on three independent grounds. First, it held that, "given the Ninth Circuit's conclusion that Defendants' challenge to the CFPB's funding structure can be and has been forfeited," the law of the case foreclosed its review of that claim. *Id.* at *2-3. Second, it held that, even if law of the case did not prevent it from reaching the claim, it would decline to do so given CashCall's unjustified years-long delay in raising it. *Id.* at *3. Third, the court explained that, even if it *were* to consider the claim, it would join every other court besides the Fifth Circuit and reject it. *Id.*

LEGAL STANDARD

"Federal courts have inherent power 'to control the disposition of the causes on [their] docket[s] with economy of time and effort for [themselves], for counsel, and for litigants.'" *Sarkar v. Garland*, 39 F.4th 611, 617 (9th Cir. 2022) (quoting

Landis v. North American Co., 299 U.S. 248, 254 (1936)). In exercising that power, courts "must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55.

The party seeking a stay bears the burden to show that a stay is warranted. *See id.* "'[I]f there is even a fair possibility that the stay ... will work damage to some one else,' the party seeking the stay 'must make out a clear case of hardship or inequity'" from being required to move forward. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (quoting *Landis*, 299 U.S. at 255).

ARGUMENT

CashCall has not met, and could not meet, its burden to justify the lengthy delay it seeks to the start of this appeal.

1. The Bureau brought this action nearly a decade ago to address CashCall's illegal lending operation and secure redress for the borrowers CashCall deceived. The scope of CashCall's operations—and its violations—was vast. CashCall collected nearly a quarter-billion dollars in interest and fees from consumers across the country on loans that were in fact void. *CashCall*, 35 F.4th at 741. On remand, the district court ordered CashCall to pay back $134 million of that as restitution to consumers it deceived.

Delay to this appeal means delay to the return of money to consumers who were subject to practices this Court has already affirmed were illegal and

deceptive. The Bureau will not be able to distribute amounts owed to affected consumers until this appeal is resolved if CashCall, as it has indicated it intends to do, posts bond or other security to avoid paying the judgment against it until the appeal has concluded. And the more time that passes, the more difficult it will be to locate and reimburse consumers. That risk is especially acute here given the length of time that has already passed since CashCall's relevant violations, some of which occurred as far back as 2011. The Bureau and affected consumers thus would be harmed by lengthy and unnecessary delays to the resolution of this case. And more generally, both the public and the Court have strong interests in the orderly and expeditious resolution of litigation—particularly cases such as this one brought to protect the public from unlawful conduct—interests that would be harmed by the pointless delay CashCall requests.

2. CashCall seeks to put off even the start of briefing, and thus the ultimate resolution of this case, for up to a year or more to await decision in *CFSA*. Yet the only argument it offers in support of its request is the claim (at 4-5) that a year-long delay to the start of briefing will "conserve the parties' resources and promote judicial efficiency."

Under this Court's precedent, CashCall's claims that it need be spared the ordinary effort of litigating its appeal is a non-starter. Because there is—at minimum—"a fair possibility that the stay ... will work damage to some one else,"

CashCall "must make out a clear case of hardship or inequity." *Lockyer*, 398 F.3d at 1112 (quoting *Landis*, 299 U.S. at 255). And this Court has squarely held that the ordinary cost of "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Id.* Thus, CashCall's complaints about the burden of filing its brief are not proper considerations here.

Even if they were, the burden on the parties of briefing CashCall's claims about the Bureau's funding will be minimal. Given that the Supreme Court will resolve the merits of that funding challenge in *CFSA*, CashCall need not expend significant effort laying out the substance of that challenge here. As for CashCall's related argument that it has not forfeited (and in fact couldn't possibly forfeit) the funding claim—notwithstanding this Court's prior ruling that "CashCall forfeited that argument twice over," *CashCall*, 35 F.4th at 743—CashCall has already briefed that issue in the district court. The effort required to repeat those arguments here will not be significant—particularly as compared to the burden CashCall has already voluntarily chosen to incur, and to impose on the Court, by seeking this stay in the name of burden-reduction.

CashCall also asserts (at 7) that having to brief its funding arguments at this time will "unnecessarily distract from the other substantial appellate issues here." But in the prior appeal, the parties proved fully capable of briefing, and the Court

of adjudicating, numerous issues at once, including CashCall's constitutional claims about the for-cause removal provision in the Bureau's statute, its claim that it had not violated the law, and both sides' arguments about both civil penalties and restitution. If anything, the issues in this appeal should be narrower than those in the first appeal. There is no cause for concern that CashCall and its experienced counsel will be unable to articulate their arguments with clarity, regardless of whether CashCall files its opening brief on schedule or one year from now, as it requests.

CashCall further errs in claiming (at 9) that a stay of briefing would "result in substantial savings of … judicial resources." It will impose no special burden on the Court if CashCall is required to brief its appeal—and the Bureau to respond—as normal. Although CashCall warns (at 9) that supplemental briefing could possibly be needed when *CFSA* is decided, that is hardly unusual. In the prior appeal, for example, the Court ordered supplemental briefing on CashCall's constitutional objections to the removal provision as well as the impact of *Liu v. SEC*, 140 S. Ct. 1936 (2020) on restitution. *See* Order, *CFPB v. CashCall, Inc.*, No. 18-55407 (9th Cir. Feb. 12, 2021), ECF No. 73. And if the Supreme Court

resolves *CFSA* by rejecting the Fifth Circuit's unprecedented view of the Appropriations Clause, a short letter under Rule 28(j) may be all that is required.[2]

3. The requested stay would be particularly unwarranted because the issue in *CFSA* is one that this Court has already held that CashCall forfeited. This appeal should not be halted to await a ruling on an issue not even presented here.

As the district court noted, "the argument regarding the CFPB's funding structure is not novel and has long been available to Defendants." *CashCall*, 2023 WL 2009938, at *3. Yet CashCall did not seek to raise this issue until many years into this litigation, and months after oral argument before this Court. The Court, and the district court on remand, correctly held that the issue had been forfeited.

CashCall contends (at 6) that the funding claim remains available to it because it suffers some form of "constitutional injury each time the CFPB takes an action that requires the expenditure of new funds." Even assuming *arguendo* that CashCall could suffer a cognizable injury from the mere act of the Bureau filing a brief in court, that would be irrelevant to whether CashCall had properly preserved

[2] CashCall says (at 8) that the Bureau's petition for certiorari in *CFSA* cited this case as "one of the cases likely to be affected by the [*CFSA*] decision." That is inaccurate. The Bureau merely (and correctly) cited this case as one of many in which defendants have invoked the Fifth Circuit's erroneous outlier decision in an attempt to avoid liability for their violations of law. *See* Pet. for Cert. at 29, *CFSA*, 2022 WL 16951308 (explaining that "defendants in several CFPB enforcement cases have already sought dismissal or similar relief based on the decision" and citing this case, among others).

the underlying issue of whether Congress violated the Appropriations Clause when it passed a law authorizing the Bureau to spend money. What's more, CashCall's contention that its funding claim is essentially unwaivable (at least so long as the Bureau continues to litigate this case) is flatly inconsistent with this Court's ruling that CashCall forfeited the claim and with its remand to the district court to resolve a limited set of remedial issues and enter judgment for the Bureau.

CashCall fares no better in claiming (at 7) that the decision in *CFSA* could constitute "an intervening change in controlling authority" that would excuse its forfeiture. The law of the case here is not that the Bureau's funding is valid (though it is) but that CashCall failed to timely raise this issue before the district court or this Court. There is no reason to expect that *CFSA* is going to change the rules of forfeiture—including because the government has not suggested that the challengers in that case failed to timely raise the funding claim—and thus no reason to think that *CFSA* will require revisiting this Court's prior ruling on CashCall's forfeiture.

But there is no need to belabor the point here. CashCall can advance its arguments why the funding claim is not forfeited when it files its opening brief in the ordinary course, not after the one-year extension of time that it requests.

CONCLUSION

For all these reasons, the Court should deny CashCall's motion.

Dated: May 19, 2023

Respectfully submitted,

/s/ Kevin E. Friedl

Seth Frotman
General Counsel
Steven Y. Bressler
Deputy General Counsel
Kristin Bateman
Assistant General Counsel
Kevin E. Friedl
Senior Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
(202) 435-9268
kevin.friedl@cfpb.gov

CERTIFICATE OF COMPLIANCE

This filing complies with Federal Rule of Appellate Procedure 27(d)(2)(A). It contains 2,408 words, excluding the portions exempted by Rule 32(f).

/s/ Kevin E. Friedl
Kevin E. Friedl