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19 **UNITED STATES DISTRICT COURT**

20 **NORTHERN DISTRICT OF CALIFORNIA**

21 **SAN FRANCISCO DIVISION**

22 Consumer Financial Protection
23 Bureau,

24 Plaintiff,

25 v.

26 Freedom Debt Relief, LLC and
27 Andrew Housser,

28 Defendants.

Case No. 3:17-cv-6484-EDL

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO STAY;
DECLARATION OF LAWRENCE D.
BROWN IN SUPPORT;
DECLARATION OF KATE FULTON IN
SUPPORT**

Judge: Hon. Elizabeth D. Laporte

Date: January 16, 2018

Time: 9:00 a.m.

Courtroom: E, 15th Floor

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1 **INTRODUCTION**

2 Defendants ask for an indefinite stay of this law-enforcement action by
3 suggesting there is “confusion” about whether the President lawfully designated
4 John M. Mulvaney to serve as Acting Director of the Consumer Financial
5 Protection Bureau. There is no such “confusion.” Mr. Mulvaney is the Bureau’s
6 Acting Director, and he has authorized the Bureau to oppose Defendants’
7 motion.

8 Defendants provide no valid basis for the indefinite stay they seek. And if
9 granted, such a stay would extend Defendants’ ability to victimize thousands of
10 American consumers through the unlawful practices alleged in the Complaint
11 while prejudicing the Bureau’s ability to prosecute this action. The Court should
12 therefore deny their motion to stay and allow the case to proceed.

13 **BACKGROUND**

14 An investigation by the Consumer Financial Protection Bureau revealed
15 that Defendants Freedom Debt Relief, LLC (Freedom) and Andrew Houser – a
16 consumer-debt-settlement company and its co-CEO, respectively – have engaged
17 in deceptive and abusive acts and practices that harm consumers. The unlawful
18 conduct alleged in the Complaint is ongoing:

- 19 • Defendants have induced consumers to enroll and remain enrolled in
20 Defendants’ debt-settlement program by telling consumers that all
21 creditors were willing to negotiate with Defendant Freedom when
22 they knew that was not true.¹
- 23 • In fact, certain creditors have policies against negotiating consumer-
24 debt settlements with Defendant Freedom. In those instances,
25 Defendants are limited to “coaching” consumers, who must, on their

26
27 ¹ Compl. ¶¶ 23–26.

1 own, then negotiate directly with the creditors. Defendants have
2 failed to disclose these facts to consumers at enrollment.²

- 3 • Further, Defendants have instructed consumers in these
4 circumstances to mislead their creditors by concealing consumers'
5 enrollment in Defendants' debt-settlement program and
6 misrepresenting the source of settlement funds. Defendants have not
7 disclosed to consumers at enrollment that Freedom's debt-settlement
8 program may require consumers to mislead their creditors.³
- 9 • Defendants have also failed to disclose that when consumers
10 negotiate settlements on their own, Defendants still charge
11 consumers a full fee – usually thousands of dollars per enrolled
12 debt.⁴
- 13 • Defendants have represented that they would not charge any fee
14 until they settled a debt and consumers have made a settlement
15 payment to the creditor. In fact, Defendants have charged consumers
16 a full fee when Defendants haven't successfully settled the
17 consumer's debt and the consumer hasn't made a settlement
18 payment, including when the consumer, not Defendants, settled the
19 debt and when a creditor, in the absence of a binding settlement,
20 stopped collecting from a consumer.⁵
- 21 • Defendants require consumers to place funds in an account at an
22 insured financial institution, but fail to provide a clear and
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24 ² *Id.* ¶¶ 23, 27.

25 ³ *Id.* ¶¶ 28-30.

26 ⁴ *Id.* ¶ 27.

27 ⁵ *Id.* ¶¶ 31-35.

1 conspicuous disclosure prescribed by the Telemarketing Sales Rule:
2 that consumers are entitled to receive all funds in the account (other
3 than funds earned by Defendants) if the consumers choose to
4 withdraw from Defendants' debt-settlement program.⁶

5 Upon completion of the Bureau's investigation, the parties engaged in
6 extended settlement negotiations, including numerous telephone conferences
7 and email exchanges.⁷ Ultimately, on November 8, 2017, after six weeks of
8 negotiation without any meaningful progress on the material terms of a
9 settlement, the Bureau filed the Complaint.⁸ Defendants have waived service of
10 summons,⁹ and their answers are due by January 22, 2018.

11 Sixteen days after the Bureau filed this action, Richard Corday resigned as
12 Bureau Director, effective at midnight on November 24, 2017. The same day, the
13 President designated Mr. Mulvaney to serve as Acting Director of the Bureau.¹⁰
14 Mr. Mulvaney has assumed all duties and responsibilities of Acting Director of
15 the Bureau, and Bureau operations have continued with the understanding that
16 Mr. Mulvaney is the Acting Director.¹¹

17 On November 26, 2017, CFPB Deputy Director Leandra English challenged
18 the designation of Mr. Mulvaney as Acting Director in a complaint seeking a
19 declaratory judgment and injunctive relief "to prevent [the President and Mr.
20 Mulvaney] from appointing, causing the appointment of, recognizing the
21 appointment of, or acting on the appointment of an Acting Director of the
22

23 ⁶ *Id.* ¶¶ 9, 16.

24 ⁷ Declaration of Lawrence D. Brown (Brown Decl.) ¶¶ 2-4.

25 ⁸ *Id.* ¶ 5; Dkt. 1.

26 ⁹ Dkt. 17, 18.

27 ¹⁰ Declaration of Kate Fulton (Fulton Decl.) ¶¶ 3-4.

28 ¹¹ *Id.* ¶¶ 5-10.

1 Consumer Financial Protection Bureau via any mechanism other than that
 2 provided for by 12 U.S.C. § 5491(b)(5)(B).¹² On November 28, 2017, the D.C.
 3 District Court denied an Emergency Motion for Temporary Restraining Order
 4 filed by Ms. English.¹³ The court heard Ms. English's motion for preliminary
 5 injunction on December 22, 2017, and has yet to rule.¹⁴

6 Defendants in this case request a stay "until (1) the court in *English v.*
 7 *Trump* makes a final, non-appealable ruling as to the identity of the Acting
 8 Director of the CFPB, and (2) that Acting Director determines it is the intention of
 9 the Bureau that this action should continue."¹⁵

10 ARGUMENT AND AUTHORITIES

11 I. There is no "confusion" at the Bureau regarding Mr. Mulvaney's 12 authority as Acting Director.

13 Defendants seek to stay this action indefinitely based on their unsupported
 14 claim that there is "confusion" and "uncertainty" at the Bureau as a consequence
 15 of the *English v. Trump* litigation. Not only is the premise of this argument false,
 16 the argument itself does not follow. Mr. Mulvaney has assumed all duties and
 17 responsibilities as Acting Director of the Bureau, and Bureau operations have
 18 continued with the understanding that Mr. Mulvaney is the Acting Director.¹⁶
 19 Moreover, Defendants provide no cogent reason why their concocted
 20 "confusion" and "uncertainty" from the pendency of *English v. Trump* would
 21 even justify a stay here.
 22

23 _____
 24 ¹² *English v. Trump*, No. 1:17-cv-02534-TJK (D. D.C. filed Nov. 26, 2017), Dkt. 1.

25 ¹³ *Id.*, Dkt. 13.

26 ¹⁴ *Id.*, Dkt. 46.

27 ¹⁵ Def'ts' Br. at 9.

28 ¹⁶ Fulton Decl. ¶¶ 5-10.

1 **II. Defendants fail to meet their burden for a stay.**

2 This Court recently applied the following framework in determining
3 whether to grant a stay:

4 Where it is proposed that a pending proceeding be stayed, the
5 competing interests which will be affected by the granting or
6 refusal to grant a stay must be weighed. Among those
7 competing interests are the possible damage which may result
8 from the granting of a stay, the hardship or inequity which a
9 party may suffer in being required to go forward, and the
10 orderly course of justice measured in terms of the simplifying
11 or complicating of issues, proof, and questions of law which
12 could be expected to result from a stay.¹⁷

13 This Court has admonished that “[i]f there is ‘even a fair possibility’ of
14 harm to the opposing party, the moving party ‘must make out a clear case of
15 hardship or inequity in being required to move forward.’”¹⁸ “The burden is on
16 the movant to show that a stay is appropriate.”¹⁹

17 Indefinite stays, such as that requested here, are disfavored and require an
18 even greater showing by the moving party. The Ninth Circuit has repeatedly
19 stated that as a general matter “stays should not be indefinite in nature.”²⁰ And
20 “[i]f a stay is especially long or its term is indefinite, [the Ninth Circuit] require[s]

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23 ¹⁷ *Edwards v. Oportun, Inc.*, 193 F. Supp. 3d 1096, 1100–01 (N.D. Cal. 2016)
(quoting *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005)).

24 ¹⁸ *Id.* at 1101 (quoting *Landis v. North American Co.*, 299 U.S. 248, 255 (1936)).

25 ¹⁹ *Id.* (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)).

26 ²⁰ *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir.
27 2007).

1 a greater showing to justify it.”²¹

2 Here, Defendants seek such an indeterminate stay: until “the court in
3 *English v. Trump* makes a final, non-appealable ruling as to the identity of the
4 Acting Director of the CFPB.” Defendants do not explain, however, why the
5 pendency of the *English* litigation warrants staying this action. Defendants do not
6 contend that the Bureau lacks authority to prosecute this action. Should
7 Defendants attempt to do so through an appropriate motion, the Bureau would
8 vigorously contest such a motion – *in this court*.

9 Defendants cannot, therefore, justify staying this proceeding pending the
10 outcome of the separate *English* litigation in the D.C. Circuit, particularly given
11 the indefiniteness of the requested stay. It is impossible to predict when, if ever,
12 the *English* litigation will produce a “final, non-appealable ruling as to the
13 identity of the Acting Director.” The parties are currently litigating a motion for
14 preliminary relief, but the district court’s disposition of that motion will be
15 neither “final,” nor “non-appealable.”²² Likewise, any review of that decision by
16 the Court of Appeals would not be “final,” as the plaintiff can (but may elect not
17 to) continue litigating the merits of the case in the district court. A “final”
18 judgment of the district court could be appealed, but it is unclear when – if
19 ever – a non-appealable decision reviewing that judgment would be rendered.

20 Remarkably, Defendants compound their problem by requesting that the
21 case be stayed even after such a ruling – until the Acting Director ultimately in
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23 ²¹ *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000); see also *Dependable Highway*
24 *Exp.*, 498 F.3d at 1066 (holding that courts should not grant a stay to await the
25 resolution of other proceedings “unless it appears likely the other proceedings
26 will be concluded within a reasonable time”) (quoting *Leyva v. Certified Grocers of*
California, Ltd., 593 F.2d 857, 864 (9th Cir. 1979)).

27 ²² See 28 U.S.C. 1292(a).

1 place following any such ruling “determines it is the intention of the Bureau that
2 this action should continue.” Such a further condition on the lifting of the stay
3 only adds to its indefiniteness.

4 As demonstrated below, there is more than a fair possibility that the
5 indefinite stay sought by Defendants would prejudice the Bureau and harm
6 consumers. Defendants have made no clear case of hardship or inequity from
7 being required to move forward in this action, and they have certainly not made
8 the *greater* showing required for an indefinite stay. Nor do Defendants show how
9 a stay would promote the orderly course of justice; indeed, their proposal would
10 have precisely the opposite effect. In sum, this is not a close case: Defendants’
11 motion must be denied.

12 **A. There would be a substantial risk of prejudice to the Bureau and**
13 **harm to consumers if the Court were to stay this case.**

14 1. *Prejudice to the Bureau*

15 As was the case in *Edwards*, the indefiniteness of the requested stay
16 heightens the prejudice to the Bureau. In *Edwards* and also in another case,
17 *Lathrop v. Uber Techs., Inc.*,²³ the moving parties requested stays pending
18 resolution of separate proceedings in the D.C. Circuit. In both cases the district
19 court found that the indefiniteness of such a stay would increase the risk of
20 prejudice to the non-moving party. In *Lathrop*, the district court denied the stay
21 because its indeterminate length would “increase the difficulty of reaching class
22 members, and increase the risk that evidence will dissipate.”²⁴ Significantly, the
23 *Lathrop* court observed that “the D.C. Circuit is unlikely to be the final step in the
24 litigation” because the unsuccessful party “is almost certain to appeal to the

25 _____
26 ²³ No. 14-cv-05678-JST, 2016 WL 97511 (N.D. Cal. Jan. 8, 2016).

27 ²⁴ *Id.* at *4 (cited in *Edwards*, 193 F. Supp. 3d at 1101).

1 Supreme Court. Thus, even the most optimistic estimate of the time required for
2 a decision from the D.C. Circuit significantly understates both the delay a stay
3 might engender and the concomitant prejudice to Plaintiff.”²⁵

4 Here, a stay until a “final, non-appealable ruling” in *English v. Trump*
5 would prejudice the Bureau in a number of ways. During such a stay, formal
6 discovery would be foreclosed, and the Bureau would be largely or entirely
7 inhibited from gathering information, testimony, and documents from third
8 parties such as former employees of Defendants and creditors.

9 Defendants may assert that the Bureau’s pre-filing investigation obviates
10 the need for discovery once the stay is lifted and that any prejudice to the Bureau
11 would therefore be minimal. But this assertion would be inaccurate. The Bureau
12 will need to conduct substantial discovery, including into records and
13 information that Freedom falsely denied having in response to the Bureau’s civil
14 investigative demands (CIDs). For example, Freedom denied having information
15 about creditors with policies against negotiating consumer debt-settlements with
16 Freedom, but later-produced company documents and company testimony
17 belied this claim.²⁶ And Freedom denied that it could conduct a system search to
18 identify instances where consumers negotiated their own debt settlements (with
19 only “coaching” from Freedom); instead, Freedom proposed a manual review of
20 a sample of files and provided estimates. But a later-produced company email
21 showed that Freedom was in fact able to generate a system-search report giving
22 figures for the number of consumers involved in such settlements.²⁷

25 ²⁵ *Id.*

26 ²⁶ Brown Decl. ¶¶ 6-9.

27 ²⁷ *Id.* ¶¶ 10-11.

1 Dissipation of evidence is a serious risk – particularly from an extended
2 stay.²⁸ Witnesses’ memories fail, and business records disappear or are routinely
3 destroyed – a particular risk for third-party entities not currently under any
4 preservation obligations. The above instances of Freedom being less than
5 forthcoming about the availability of information requested in Bureau CIDs
6 heightens that risk here. And, similar to *Lathrop*, a stay of indeterminate length
7 increases the difficulty the Bureau will have in reaching affected consumers, both
8 for purposes of evidence gathering and providing any ordered redress.

9 2. *Harm to Consumers*

10 Consumers would be harmed by an indefinite stay in a number of ways.
11 Such a stay would delay any payment of redress to a particularly vulnerable and
12 needy group of consumers: those so significantly in debt that they turned for
13 help to a debt-settlement company.

14 An indefinite stay would prolong the harm consumers suffer as a result of
15 Defendants’ continued unlawful practices. As alleged in the Complaint and
16 summarized above, Defendants use misrepresentations and omissions to
17 deceptively induce consumers to enroll and remain enrolled in their debt-
18 settlement program, including leading consumers to believe that Defendants can
19 and will negotiate with creditors whom Defendants know have a policy against
20 negotiating with Freedom. Once enrolled, consumers are subject to further harm,
21 such as Defendants’ deceptive fee-charging and abusive practices relating to
22 creditors who refuse to negotiate with Freedom. A stay would only extend
23 Defendants’ opportunity to engage in these unlawful practices that harm
24 consumers (while enriching Defendants).

25
26 _____
27 ²⁸ *Lathrop*, 2016 WL 97511, at *4.

1 Defendants assert, with zero evidentiary support, that one of the practices
2 alleged in the Complaint is “almost entirely historical”²⁹ and has been all but
3 discontinued as a result of the company’s “more recent relationship with a law
4 firm.”³⁰ But company documents and testimony show that the practice –
5 requiring consumers to negotiate debt-settlements on their own – is ongoing.
6 And Defendants continue to enroll consumers with creditors that refuse to
7 negotiate with Freedom.³¹ These practices, as well as the other unlawful conduct
8 described in the Complaint and above, would continue to harm consumers
9 through any stay.

10 Consumers who, but for Defendants’ deceptive practices, may not have
11 enrolled or remained enrolled in Defendants’ debt-settlement program are
12 subject to additional, ongoing harm. At Defendants’ instruction, consumers stop
13 paying their creditors – even consumers who were not delinquent on any debts
14 at the time of enrollment. Defendants tell consumers that they will need to
15 remain in the program and continue depositing funds into dedicated accounts
16 until there are sufficient funds to make settlement offers to their creditors, at
17 which time Defendants will negotiate debt-settlements. Defendants know, but do
18 not disclose to consumers, that some of their creditors have policies against
19 negotiating with Freedom.

20 As a consequence, consumers having debts with these creditors are misled
21 into continuing month after month to remain delinquent on their accounts with
22 the expectation that Freedom will ultimately negotiate settlements on their
23 behalves. These consumers are subject to myriad secondary harm: increasingly
24

25 ²⁹ Def’ts’ Br. at 6.

26 ³⁰ *Id.* at 2 n.1.

27 ³¹ Brown Decl. ¶¶ 12-13.

1 insistent and aggressive collection calls; damage to their credit; mounting fees,
2 interest, and penalties assessed against delinquent debts; threatened or actual
3 collection lawsuits, with the potential for judgments and wage garnishments;
4 and heightened stress from persistently delinquent debts that Defendants
5 promised to settle. Consumers whom Defendants have deceptively induced to
6 enroll and remain in Defendants' program also forgo other options, such as non-
7 profit credit counseling, that may provide quicker and cheaper debt-relief
8 without the damage to consumers' credit caused by Defendants' program.

9 As in *Edwards*, "there is no certain way to determine when a ruling will be
10 forthcoming," and a decision by the D.C. District Court (or even the D.C. Circuit)
11 "may not be the end of litigation."³² Accordingly, for the above reasons, this
12 Court should conclude "that there is a fair possibility of harm to Plaintiff" from
13 the requested indefinite stay.³³

14 **B. Defendants cite no legitimate hardship that would result from the**
15 **denial of a stay.**

16 Because there is far more than "'a fair possibility of harm'" to the Bureau
17 and consumers, Defendants "'must make out a clear case of hardship or inequity
18 in being required to move forward.'"³⁴ Not only have Defendants failed to make
19 such a clear case of hardship, but they have made no legitimate case at all.
20 Defendants' only asserted hardship is the same as that unsuccessfully proffered
21 in *Edwards* and elsewhere: expending resources in defense of a lawsuit.³⁵ But as
22 the Ninth Circuit has made clear, "being required to defend a suit, without more,
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24 ³² See *Edwards*, 193 F. Supp. 3d at 1101.

25 ³³ *Id.*

26 ³⁴ See *id.* (quoting *Landis*, 299 U.S. at 255).

27 ³⁵ See Def'ts' Br. at 1.

1 does not constitute a 'clear case of hardship or inequity' within the meaning
2 of *Landis*."³⁶ In any event, if Defendants believe that the Bureau cannot prosecute
3 this action while Mr. Mulvaney serves as its Acting Director, they are free to
4 make that argument as part of an appropriate motion.

5 **C. The proposed stay would not promote the orderly course of justice.**

6 A third factor courts consider in determining whether to grant a stay is
7 whether it would promote the orderly course of justice, measured in terms of the
8 simplifying or complicating of issues, proof, and questions of law which could be
9 expected to result from a stay.³⁷ Defendants plainly fail to show how their
10 requested stay would serve any of these interests.

11 Defendants do not assert that a ruling in *English v. Trump* would resolve or
12 simplify any legal or factual issue raised by the Complaint. Nor do Defendants
13 contend that there are any questions regarding the Bureau's legal authority to file
14 or prosecute this action that must be decided by *English v. Trump*. Defendants
15 simply propose to tie up a governmental-enforcement action indefinitely without
16 any clear explanation as to how a ruling in *English v. Trump* would simplify this
17 action or facilitate its disposition.

18 Again, the Bureau's position is clear: Mr. Mulvaney currently serves as the
19 Bureau's Acting Director. If Defendants believe that the Bureau cannot continue
20 this action with Mr. Mulvaney as Acting Director, they can make that argument

21 ³⁶ See *Lockyer*, 398 F.3d at 1112; accord *Dependable Highway Exp.*, 498 F.3d at 1066;
22 *Dister v. Apple-Bay E., Inc.*, No. C-07-01377-SBA, 2007 WL 4045429, at *4 (N.D.
23 Cal. Nov. 15, 2007); *In re ConAgra Foods, Inc.*, No. 11-cv-05379-MMM (AGRx),
24 2014 WL 12580052, at * 8 (C.D. Cal. Dec. 29, 2014); *Nussbaum v. Diversified*
25 *Consultants, Inc.*, No. 15-cv-600, 2015 WL 5707147, at *2 (D. N.J. Sept. 28, 2015)
(party seeking stay fails to make out a clear case of hardship based only on
26 avoiding "unnecessary discovery and motion practice").

27 ³⁷ See *Edwards*, 193 F. Supp. 3d at 1101.

1 in a dispositive motion that this Court can resolve on the merits, as opposed to
2 staying this action pending a decision in another court that may never come and
3 that will not bind Defendants in any event. Defendants' proposed stay would
4 inhibit, not promote, the orderly course of justice.

5 **CONCLUSION**

6 For these reasons, the Court should deny Defendants' Motion to Stay
7 Proceedings.

8 Dated: December 26, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on December 26, 2017, via ECF upon counsel of record in this action.

/s/ Maxwell S. Peltz

Maxwell S. Peltz

From Article at GetOutOfDebt.org

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