UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and KIMBERLY A. PISINSKI,

Plaintiffs,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Defendant.

Civil Action No. 13-cv-01112 (CKK)

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ENJOINING CFPB FROM PROSECUTING ITS SECOND-FILED ACTION

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TABLE OF AUTHORITIES

INTRODUCTION

This is Plaintiffs' second request for an injunction to restrain the Consumer Financial Protection Bureau (Bureau) from pursuing an enforcement action against Plaintiff Morgan Drexen, Inc. (Morgan Drexen). Plaintiffs voluntarily withdrew their first request, filed just over a month ago, even though the Bureau's counsel made clear to Plaintiffs, including in telephonic hearings before this Court, that the Bureau would not commit to staying its hand while Plaintiffs pursued their constitutional claim in this Court. Now that the Bureau has filed its enforcement action, Plaintiffs seek a second bite at the apple. This time, however, Plaintiffs have jettisoned any attempt to demonstrate that the traditional injunction criteria have been met. Instead, they argue that they are entitled to an injunction simply because they "won" the race to the courthouse steps.

Plaintiffs' motion should be denied. The law does not give the subjects of government enforcement actions the right to dictate the venue and timing for the resolution of their affirmative defenses by filing "preemptive strike" declaratory judgment actions. The sole issue raised in this action can be resolved (if necessary) together with the rest of the controversy between the parties in the Bureau's pending enforcement action. And the precedent is clear that where, as here, a declaratory judgment will serve no useful purpose, courts should decline to entertain a request for declaratory relief. As a result, Plaintiffs are not entitled to a ruling on their constitutional challenge to the Bureau's structure, let alone an injunction of the Bureau's enforcement action. Plaintiffs' motion for a preliminary injunction should be denied.

BACKGROUND

This case arises out of the Bureau's investigation of Morgan Drexen for potential violations of the Telemarketing Sales Rule, 16 C.F.R. part 310, the Dodd-Frank Wall Street

Reform and Consumer Protection Act, and other laws. On April 22, 2013, the Bureau informed Morgan Drexen that it was "considering enforcement action" against the company and its Chief Executive Officer, Walter Ledda. *See* Declaration of Randal M. Shaheen, Dckt. #3-5 (Shaheen Decl.) Ex. 32. In accordance with its "Notice and Opportunity to Respond and Advise" process, the Bureau invited Morgan Drexen to offer its views on why the Bureau should not file such an action. *See id*. Morgan Drexen took advantage of that opportunity by submitting a written response to the Bureau on May 8, 2013. Shaheen Decl. Ex. 33.

On July 22, 2013, before the Bureau had taken any further public action, Morgan Drexen (joined by Kimberly A. Pisinski) filed the instant action in this Court claiming that the Bureau's structure violates the constitutional separation of powers and requesting declaratory and injunctive relief. On the same day, Plaintiffs filed their first motion for a preliminary injunction asking the Court to prohibit the Bureau "from taking any further action with respect to Plaintiffs until after the final hearing in this matter and only as permitted by Court order." *See* Motion for a Preliminary Injunction, Dckt. #3, at 1.

This Court held two telephonic hearings on July 24 and 25, 2013, to discuss the briefing schedule. During those hearings, counsel for the Bureau indicated that the Bureau would not commit to refraining from filing an enforcement action against Morgan Drexen during the pendency of this lawsuit:

> THE COURT: . . . Can I make an assumption that from the defendant's perspective, since you indicate that they [*i.e.*, the civil investigative demands] were not self-enforcing, that during this period of time you would not be filing an enforcement action?
>
> MR. COLEMAN: Your Honor, that determination is not mine to make.
>
> THE COURT: Okay.
>
> MR. COLEMAN: I don't know the answer to that.

> THE COURT: It would be helpful to obviously have some sense of whether you're doing it in terms of the context of how long a period of time. I indicated that this would be an expedited schedule and I would make an expedited decision. It would be helpful, probably, not to have an enforcement action, which they're claiming is unconstitutional, going on at the same time. That was my question.
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> MR. COLEMAN: Your Honor, I understand your concern. And as the record already demonstrates, we have suggested to the plaintiff in this matter, the defendant [in] an enforcement action, . . . that they were in violation of the law. *We have not yet determined whether or not to file an enforcement action, and I can't commit to what we will do in that regard during the course of our briefing here.*
>
> THE COURT: Okay. All right. Well, whenever you make a decision about it, it would be helpful if you let the Court know.
>
> MR. COLEMAN: Of course, Your Honor, . . .

7/25/13 Tr. at 5:10-6:11 (emphasis added). Notwithstanding the Bureau's reservation of its ability to bring an enforcement action, "Plaintiffs consented to withdraw their [3] motion for preliminary injunction and both parties consented to instead proceed with an expedited briefing on the merits of Plaintiffs' Complaint." Order of July 25, 2013, Dckt. #8. Plaintiffs withdrew their preliminary injunction motion on August 7, 2013. Notice of Withdrawal of Preliminary Injunction Motion, Dckt. #12.

On August 20, 2013, the Bureau filed an enforcement action against Morgan Drexen and Mr. Ledda in the U.S. District Court for the Central District of California. *CFPB v. Morgan Drexen*, No. 8:13-cv-1267. In the action, the Bureau alleges that Morgan Drexen and Mr. Ledda have violated federal laws by charging consumers illegal up-front fees for debt-relief services and deceiving consumers about the likelihood that they would become debt free by working with Morgan Drexen. On the same day, the Bureau filed a notice with this Court advising it of the Bureau's filing of its enforcement action, and attaching the Bureau's complaint. Notice, Dckt. #14. The next day, counsel for the Bureau in the enforcement action sent to counsel for Morgan Drexen a request for waiver of service pursuant to Federal Rule of Civil Procedure 4(d). *See*

Letter from Gabriel O'Malley to Randal Shaheen dated Aug. 21, 2013 (attached as Exhibit 1). If Morgan Drexen agrees to waive service, it will have 60 days from the date of the request—that is, until October 21, 2013—to answer or otherwise respond to the complaint. *See* Fed. R. Civ. P. 4(d)(3).

On August 22, 2013, Plaintiffs filed their second motion for a preliminary injunction, asking the Court to enjoin the Bureau "from prosecuting its second-filed action in the U.S. District Court for the Central District of California." *See* Motion for a Temporary Restraining Order and Preliminary Injunction, Dckt. #15, at 1.[1]

ARGUMENT

A preliminary injunction is an "extraordinary remedy" that will be issued only if the plaintiff demonstrates (1) a substantial likelihood of success on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20-22 (2008).

Plaintiffs do not even attempt to satisfy this standard to support their second motion for a preliminary injunction.[2] Instead, Plaintiffs argue that the Bureau's initiation of its enforcement action somehow entitles Plaintiffs to the same relief they sought in their first motion for a

[1] Although, Plaintiffs label their motion as one seeking both a temporary restraining order and a preliminary injunction, Plaintiffs are asking the Court to enjoin the Bureau until this case is finally resolved, not for 14 days as permitted for temporary restraining orders under Federal Rule of Civil Procedure 65(b)(2). *See* Points and Authorities in Support of Motion for a Temporary Restraining Order and Preliminary Injunction Enjoining CFPB From Prosecuting Its Second-Filed Action ("Pl. PI Mem."), Dckt. #15-1, at 8. Accordingly, for simplicity's sake, the Bureau refers to Plaintiffs' motion as a motion for a preliminary injunction.

[2] As the Bureau demonstrated in its recently filed memorandum in support of its motion to dismiss, Plaintiffs will not suffer irreparable harm in the absence of injunctive relief nor are they likely to prevail on the merits of their claim. *See* Defendant's Memorandum in Support of its Motion to Dismiss, or in the Alternative, for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment (Def. Mem.), Dckt. # 17-1.

preliminary injunction, but this time on the sole ground that they managed to file their declaratory judgment action first. This argument is meritless.

Courts have consistently rejected the proposition that "an injunction favoring [a] first-filed action [is] a mandatory step." *Columbia Plaza Corp. v. Sec. Nat'l Bank*, 525 F.2d 620, 627 (D.C. Cir. 1975); *see also Thayer/Patricof Educ. Funding, LLC v. Pryor Resources, Inc.*, 196 F. Supp. 2d 21, 29 (D.D.C. 2002) ("The first-filed rule is not rigidly or mechanically applied."). To be sure, "considerations of '[w]ise judicial administration, [including] conservation of judicial resources and comprehensive disposition of litigation,'" generally counsel in favor of avoiding "duplicative litigation." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). But, here, such considerations counsel in favor of dismissing Plaintiffs' declaratory judgment action, not in favor of enjoining the Bureau's enforcement action.

When federal courts determine whether to defer to or enjoin a parallel federal proceeding, "[n]o one factor is necessarily determinative." *Colo. River*, 424 U.S. at 818. Rather, a "carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* at 818-19. And, although courts ordinarily have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," *id.* at 817, "'[t]here is . . . nothing automatic or obligatory about the assumption of jurisdiction by a federal court' to hear a declaratory judgment action," *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (quoting E. Borchard, *Declaratory Judgments*, 313 (2d ed. 1941)). Rather, "[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Id.*

As the Bureau demonstrated in its recently filed memorandum, the factors courts consider when deciding whether to exercise their discretion to adjudicate a declaratory judgment action counsel in favor of dismissing this lawsuit. *See* Def. Mem. at 17-21. Entertaining Plaintiffs' request for declaratory relief will "serve no useful purpose." *Wilton*, 515 U.S. at 288. Morgan Drexen is not seeking to determine whether its conduct is lawful so that it may structure its affairs accordingly[3]; it "is instead in the position of one who desires an anticipatory adjudication, at the time and place of its choice, of the validity of the defenses it expects to raise against . . . claims it expects to be pressed against it."[4] *Hanes Corp. v. Millard*, 531 F.2d 585, 592 (D.C. Cir. 1976).

But, "[t]he anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse."[5] *Id.* at 592-93. As the Seventh Circuit put it: "The wholesome purpose of the declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum . . . . The federal declaratory judgment is not a prize to the winner of the race to the courthouse." *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 750 (7th Cir. 1987) (internal citations and quotations omitted). Accordingly, "[c]ases construing the interplay between declaratory judgment actions

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[3] *See* Pl. PI Mem. ¶ 22 (observing that this is not "a garden-variety declaratory judgment claim (where a plaintiff requests a declaration that its conduct is not unlawful)").

[4] *See also* Pl. PI Mem. ¶ 9 ("Morgan Drexen disputes [the allegations contained in the Bureau's complaint] based upon the *identical* constitutional argument that is set forth in Plaintiffs' pending motion for summary judgment already filed in this Court.") (emphasis in original).

[5] *See also Int'l Painters and Allied Trades Indus. Pension Fund v. The Painting Co.*, 569 F. Supp. 2d 113, 116 (D.D.C. 2008) (observing that the first-to-file rule should not be applied when "'the first-filing plaintiff has launched a preemptive strike declaratory judgment action in the face of an impending . . . suit.'") (quoting *Fed'n Internationale De Football Assoc. v. Nike, Inc.*, 285 F. Supp. 2d 64, 67 (D.D.C. 2003)); *Thayer/Patricof*, 196 F. Supp. 2d at 30-31 (same).

and suits based on the merits of underlying substantive claims create, in practical effect, a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit." *AmSouth Bank v. Dale*, 386 F.3d 763, 791 n.8 (6th Cir. 2004) (quoting *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.-UAW v. Dana Corp.*, 1999 WL 33237054, at *6 (N.D. Ohio Dec. 6, 1999)).

Indeed, the equitable considerations that generally lead courts to reject preemptive declaratory judgment actions are heightened in the context of a government enforcement action. Plaintiffs' request for a mechanical application of the so-called "first-to-file" rule, if granted, would seriously impede the efficient operation of both the government's enforcement agencies and the courts. By Plaintiffs' reasoning, any subject of a government investigation could delay the government's prosecution of a pending enforcement action simply by filing a preemptive declaratory judgment action seeking a ruling on some potential defense (however meritless). Not only would this unnecessarily impede the government's enforcement efforts, it would encourage "'an unseemly race to the courthouse, and quite likely, numerous unnecessary suits.'" *EEOC v. Univ. of Penn.*, 850 F.2d 969, 978 (3d Cir. 1988) (quoting *Tempco*, 819 F.2d at 750).

Fortunately, courts have recognized as much and held that the first-to-file rule "should not apply when at least one of the party's motives is to . . . preempt an imminent . . . enforcement action." *Id.*; *see also POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 44-45 (D.D.C. 2012) (dismissing a declaratory judgment action filed two weeks prior to an administrative enforcement action, in part, on the ground that "granting declaratory relief would require the resolution of an anticipatory defense."); *Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72, 76 & n.3, 78-80 (D.D.C. 2009) (dismissing a declaratory judgment action filed three months prior to the filing of an

enforcement action on the grounds that the plaintiff was engaged in "procedural fencing" and was asking the Court to "adjudicate an anticipatory affirmative defense").

Other equitable considerations, including "the desirability of avoiding piecemeal litigation," *Colo. River*, 424 U.S. at 818, Morgan Drexen's location in the Central District of California, and the early stage of the respective proceedings, likewise support dismissal of Plaintiffs' lawsuit. *See Furniture Brands Int'l, Inc. v. U.S. Int'l Trade Comm'n*, 804 F. Supp. 2d 1, 6-7 (D.D.C. 2011). By contrast, Plaintiffs have provided no ground for enjoining the Bureau's enforcement action other than a "mechanical application" of the first-to-file rule.[6] *Columbia Plaza*, 525 F.2d at 627. Plaintiffs' second motion for a preliminary injunction should be denied.

[6] Concerns regarding "duplicative motions practice" or "multiple and inconsistent decisions on the issue of the CFPB's constitutionality," Pl. TRO. Mem. at 6, are solely attributable to Plaintiffs' decision to file this preemptive declaratory judgment action, and can and should be addressed by dismissing Plaintiffs' lawsuit without reaching the merits of their constitutional claim.

CONCLUSION

For these reasons, the Bureau respectfully requests that the Court deny Plaintiffs' motion for a temporary restraining order and preliminary injunction.

Respectfully submitted,

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