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15 Attorneys for Defendants

16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA

18 CONSUMER FINANCIAL)
19 PROTECTION BUREAU,)
20 Plaintiff,)
21 v.)
22 CASHCALL, INC., WS)
23 FUNDING, LLC, DELBERT)
24 SERVICES CORPORATION, and)
25 J. PAUL REDDAM,)
26 Defendants.)

CASE NO.: 2:15-cv-07522-JFW (RAOx)
STATEMENT OF DECISION RE
DEFENDANTS' MOTION FOR
CERTIFICATION OF INTERLOCUTORY
APPEAL PURSUANT TO 28 U.S.C. §
1292(b) AND STAY PENDING
RESOLUTION OF INTERLOCUTORY
APPEAL
Hearing Date: January 9, 2017
Time: 1:30 p.m.
Place: Courtroom 7A
Judge: Hon. John F. Walter
Pre-Trial Conf.: TBD
Trial: February 9, 2017

1 Plaintiff, the Consumer Financial Protection Bureau (the “CFPB” or the
 2 “Bureau”), brought this lawsuit alleging that Defendants CashCall, Inc., WS
 3 Funding, LLC, Delbert Services Corp., and J. Paul Reddam violated the provisions in
 4 the Consumer Financial Protection Act of 2010 (“CFPA”) prohibiting unfair,
 5 deceptive, or abusive acts or practices, [12 U.S.C. § 5531\(a\)](#), in servicing and
 6 collecting loans in violation of usury and licensing laws in sixteen states. Dkt 27 ¶
 7 18. On August 31, 2016, this Court issued an order denying Defendants’ motion for
 8 summary judgment and granting the Bureau’s motion for partial summary judgment
 9 on liability (the “Order”). Dkt 213. On December 5, 2016, Defendants moved to
 10 certify the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay
 11 the case pending resolution of the interlocutory appeal (the “Motion”); the Bureau
 12 opposed the Motion on December 11; and Defendants filed a reply brief on
 13 December 19. Dkts 227-29. For the reasons discussed herein, the Court hereby
 14 **GRANTS** Defendants’ Motion.

15 STANDARD

16 This Court is authorized to certify an order for interlocutory appeal where (1)
 17 the order involves a controlling question of law, (2) as to which there is substantial
 18 ground for difference of opinion, and (3) an immediate appeal from the order may
 19 materially advance the ultimate termination of the litigation. [28 U.S.C. § 1292\(b\)](#).
 20 The moving party bears the burden of demonstrating these prerequisites. [Beeman v.](#)
 21 [Anthem Prescription Mgmt., Inc.](#), 2007 WL 8433884, at *2 (C.D. Cal. Aug. 2, 2007).

22 ANALYSIS

23 I. **THE PREREQUISITES FOR INTERLOCUTORY REVIEW UNDER** 24 **SECTION 1292(b) ARE SATISFIED.**

25 A. **The Order Involves A Controlling Question Of Law.**

26 A question of law is controlling if “resolution of the issue on appeal could
 27 materially affect the outcome of litigation in the district court.” [Envtl. World Watch,](#)
 28 [Inc. v. Walt Disney Co.](#), 2014 WL 10979864, at *2 (C.D. Cal. Apr. 2, 2014) (internal

1 quotation marks omitted). Where reversal might terminate all or part of the litigation
2 or the issue on appeal could otherwise prove outcome dispositive, this prerequisite is
3 satisfied. See [Cal. Dep't of Toxic Substances Control v. Hearthside Residential](#)
4 [Corp.](#), 2008 WL 8050005, at *8 (C.D. Cal. Dec. 8, 2008).

5 Defendants have identified four controlling questions of law: 1) Whether
6 under the CFPA, an individual can be held liable for a corporation's attempts to
7 collect unenforceable loans, where the individual lacked contemporaneous
8 knowledge that the loans were unenforceable—and the individual's
9 contemporaneous knowledge was based on legal advice that the loans were
10 enforceable; 2) Whether the CFPB's structure is unconstitutional; 3) Whether a
11 CFPA violation can be predicated on servicing and collecting on loans that are void
12 only because they are deemed to be unenforceable under state law; and 4) Whether
13 the proper test for ascertaining the "true lender" to a loan agreement looks past the
14 contract and its parties, and instead necessitates an investigation of related
15 transactions. These questions are each controlling because appellate resolution in
16 Defendants' favor could eliminate all or part of the CFPB's claims. See [Env'tl. World](#)
17 [Watch](#), 2014 WL 10979864, at *2. Even if an interlocutory appeal does not result in
18 disposition of the litigation, further direction from the Ninth Circuit on these issues
19 would guide the Court and the parties for trial. See [Reese v. BP Expl.\(Alaska\) Inc.](#),
20 [643 F.3d 681, 688 \(9th Cir. 2011\)](#) (upholding § 1292(b) jurisdiction over
21 interlocutory appeal that involved only a subset of claims).

22 The Bureau does not dispute that whether it overstepped its authority in
23 predicating its federal claims entirely on state law violations is a controlling question
24 of law, Dkt 228 at 3, and its challenges to the other issues on the ground that they are
25 not controlling questions of law are not persuasive.

26 First, the Bureau argues that Mr. Reddam's actual knowledge of, or reckless
27 indifference to, the invalidity of the loans serviced and collected is a mixed question
28 of law and fact and thus not proper for interlocutory appeal. The issue meriting

1 interlocutory review, however, is not a factual dispute about what Mr. Reddam knew
2 or was recklessly indifferent to, but a purely legal one—whether Mr. Reddam’s
3 contemporaneous understanding of the enforceability of the loans under state law is
4 relevant to whether he may be held individually liable under the CFPA.

5 Second, the Bureau asserts that the constitutionality of its structure is not
6 controlling because other courts, having held it unsound, have provided a remedy
7 that still allowed the Bureau’s enforcement actions to continue. But the Ninth Circuit
8 may disagree with such a remedy in this case, and “all that must be shown in order
9 for a question to be ‘controlling’ is that resolution of the issue on appeal could
10 materially affect the outcome of litigation in the district court.” *In re Cement*
11 *Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). If the Ninth Circuit concludes
12 that dismissal is the appropriate remedy, this action will be terminated.

13 Third, the Bureau argues that whether it seeks to establish a federal usury limit
14 in contravention of [12 U.S.C. § 5517\(o\)](#) is not controlling, as resolution of the issue
15 would not affect its claims based on certain state licensing laws. But resolution of the
16 entire action is not necessary for an issue to be controlling. Discrete legal issues as to
17 liability are controlling if resolving them would “possibly terminat[e] all or portions
18 of the litigation.” *Koby v. ARS Nat’l Servs., Inc.*, 2010 WL 5249834, at *4 (S.D. Cal.
19 [Dec. 23, 2010](#)).

20 Finally, the Bureau contends that whether the Court applied the appropriate
21 true lender test is not a controlling question because the Court could still have held
22 the Western Sky loan agreements’ choice-of-law provision unenforceable as contrary
23 to public policy. However, the Order did not decide that such provisions are
24 unenforceable as contrary to public policy if Western Sky was the lender, so under
25 the Court’s ruling, this issue is controlling.

26 **B. There Is Substantial Ground For Difference Of Opinion.**

27 A substantial ground for difference of opinion exists where an interlocutory
28 appeal “involves an issue over which reasonable jurists might differ and such

1 uncertainty provides a credible basis for a difference of opinion on the issue.” *Reese*,
2 [643 F.3d at 688](#) (internal quotation marks omitted). This prerequisite “does not turn
3 on a prior court’s having reached a conclusion adverse to that from which appellants
4 seek relief.” *Id.* “A substantial ground for difference of opinion exists where novel
5 and difficult questions of first impression are presented . . . where reasonable jurists
6 might disagree on an issue’s resolution, not merely where they have already
7 disagreed. Stated another way, . . . a novel issue may be certified for interlocutory
8 appeal without first awaiting the development of contradictory precedent.” *Id.* Here,
9 there are substantial grounds for difference of opinion as to each of the four
10 controlling questions of law.

11 1. Whether The CFPA Permits Individual Liability For A “Knowing
12 Misrepresentation” Where The Individual Obtained Legal Advice
That The Statement Was True.

13 In its Order, the Court rejected Mr. Reddam’s argument that he had no actual
14 knowledge of any alleged misrepresentations because his understanding was that the
15 Western Sky loans complied with the law, based on information provided by
16 regulatory counsel at Katten Muchin Rosenman LLP, as well as Western Sky’s
17 counsel, and the sophisticated lenders’ counsel’s acceptance of those opinions. The
18 Court held that Mr. Reddam’s knowledge of the servicing and collecting activity was
19 sufficient to hold him individually liable for the company’s deceptive acts, and that
20 “advice of counsel” is not a valid defense to a CFPA claim. (Order at 14-15.)

21 The general standard for individual liability under the CFPA was addressed in
22 [CFPB v. Gordon, 819 F.3d 1179 \(9th Cir. 2016\)](#), but reasonable jurists might
23 disagree whether professional advice on a legal issue is relevant to the individual’s
24 culpability as to knowledge or recklessness. The Court determined that advice of
25 counsel is not an available defense in this case and that ignorance of the law is not an
26 excuse for violating the law. See [F.T.C. v. Grant Connect, LLC, 763 F.3d 1094, 1102](#)
27 [\(9th Cir. 2014\)](#). Still, a reasonable jurist could conclude that Mr. Reddam’s
28 understanding of the enforceability of debt under state law is relevant to the question

1 whether he could be held individually liable for knowingly or recklessly misleading
2 borrowers. See [F.T.C. v. Garvey](#), 383 F.3d 891, 902 (9th Cir. 2004) (individual
3 spokesperson defendant not liable for company’s misrepresentations where he “had
4 first-hand anecdotal evidence” and other “information that purported to present
5 scientific bases for his claims” from the manufacturer and third parties, so that “[i]t is
6 reasonable for [the defendant] to have found that this information supported the
7 representations he made”).

8 2. Whether The CFPB’s Structure Is Unconstitutional.

9 The Bureau does not dispute that reasonable jurists might disagree with this
10 Court’s holding that the CFPB’s structure is constitutional. See [PHH Corp. v. CFPB](#),
11 [839 F.3d 1, 36 \(D.C. Cir. 2016\)](#); accord [CFPB v. Fomichev](#), Case No. 2:16-cv-
12 [02724-PSG-E, Dkt 40 at 7, 24 \(C.D. Cal. Nov. 17, 2016\)](#) (holding “the combination
13 of the power accorded to the CFPB Director and the limitations on the President’s
14 removal powers violate Article II of the Constitution”). Reasonable jurists might also
15 disagree as to the remedy in this case for such unconstitutionality. See [Ryder v.](#)
16 [United States](#), 515 U.S. 177, 182-83 (1995) (“[O]ne who makes a timely challenge to
17 the constitutional validity” of a government official’s authority “is entitled to a
18 decision on the merits of the question and whatever relief may be appropriate if a
19 violation indeed occurred.”); [Fed. Election Comm’n v. NRA Political Victory Fund](#), 6
20 [F.3d 821, 822 \(D.C. Cir. 1993\)](#) (an agency “lacks authority to bring [an] enforcement
21 action” if its structure “violates the Constitution’s separation of powers”). Contrary
22 to the Bureau’s argument, [PHH Corp.](#) is not determinative of the issue because the
23 court there vacated the Bureau’s order and expressly declined to sanction past or
24 pending Bureau enforcement actions. [Id. at 39 n.19.](#)

25 3. Whether CFPA Violations Can Be Based On State Laws.

26 There are substantial grounds for difference of opinion as to whether CFPA
27 violations can be based on violations of state laws. Indeed, there is a division of
28 authority among Circuit courts regarding the predication of federal violations on

1 state law violations. Compare, e.g., [Currier v. First Resolution Inv. Corp.](#), 762 F.3d
 2 529, 537 (6th Cir. 2014), with [Gallego v. Northland Grp. Inc.](#), 814 F.3d 123, 127 (2d
 3 Cir. 2016); [Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC](#), 480 F.3d 470, 473-
 4 75 (7th Cir. 2007). Moreover, the most relevant case law arises under the FDCPA.
 5 Whether the CFPB permits intrusion into areas of traditional state regulation,
 6 including state contract law, is an issue of first impression in this Circuit. Reasonable
 7 jurists may disagree—particularly in light of the phrase “under Federal law” in
 8 [12 U.S.C. §§ 5511\(a\)](#) and [5531\(a\)](#)—that Congress authorized the Bureau to hold
 9 Defendants liable for attempting to collect loans that are unenforceable as a matter of
 10 state law.

11 In addition, while the Court rejected in its Order Defendants’ contention that
 12 the CFPB is seeking to establish a federal usury limit in contravention of
 13 [12 U.S.C. § 5517\(o\)](#), there is no Ninth Circuit law interpreting [§ 5517\(o\)](#), and
 14 reasonable jurists might disagree regarding the scope of this section. See [Illinois by](#)
 15 [Madigan v. CMK Invs., Inc.](#), 2014 WL 6910519, at *7 n.5 (N.D. Ill. Dec. 9, 2014).

16 4. Whether The Proper Test For “True Lender” Looks Past The
 17 Documents To The Underlying Substance Of The Transactions.

18 Whether the law permits courts to go beyond the face of the loan documents at
 19 issue and investigate related transactions to determine whether another entity is the
 20 “true lender” is a novel and difficult question of first impression in this Circuit.
 21 (Order at 7.) Moreover, reasonable jurists might disagree with the Order’s conclusion
 22 on this important legal question. See [Sawyer v. Bill Me Later, Inc.](#), 23 F. Supp. 3d
 23 1359, 1367, 1369 (D. Utah 2014); [Hudson v. Ace Cash Express, Inc.](#), 2002 WL
 24 1205060, at *3-4, *6 (S.D. Ind. May 30, 2002); see also [Beechum v. Navient Sols.,](#)
 25 [Inc.](#), 2016 WL 5340454, at *7-8 (C.D. Cal. Sept. 20, 2016).

26 The CFPB’s contention that there can be no substantial grounds for difference
 27 of opinion where there is an absence of precedent or conflicting rulings contradicts
 28 the Ninth Circuit’s observation in [Couch v. Telescope Inc.](#), 611 F.3d 629 (9th Cir.

1 [2010](#)), that “a substantial ground for difference of opinion exists where the circuits
2 are in dispute on the question and the court of appeals of the circuit has not spoken
3 on the point.” *Id. at 633*. The CFPB’s arguments on the merits of the appropriate
4 “true lender” test are irrelevant for purposes of the present Motion, as “the question
5 whether a determination is *subject to* a genuine dispute is separate from determining
6 the *merits of that dispute*.” [In re Marciano, 708 F.3d 1123, 1133 \(9th Cir. 2013\)](#)
7 (second emphasis added).

8 **C. Immediate Appeal From The Order May Materially Advance The**
9 **Ultimate Termination Of The Litigation.**

10 “Courts apply pragmatic considerations to determine whether certifying non-
11 final orders will materially advance the ultimate termination of the litigation,” such
12 as whether “an interlocutory appeal of th[e] issue may avoid protracted and
13 expensive (but ultimately unnecessary) litigation and the burdens on the litigants and
14 court system that would result from the denial of § 1292(b) certification.” [Beeman,](#)
15 [2007 WL 8433884, at *2](#). Since “[q]uestions found to be controlling commonly
16 involve the possibility of avoiding trial proceedings, or at least curtailing or
17 simplifying pretrial or trial,” an interlocutory appeal is appropriate where it
18 “promises to advance the time for trial or to shorten the time required for trial.”
19 [Youssofi v. Credit One Fin., 2016 WL 6395086, at *5 \(S.D. Cal. Oct. 28, 2016\)](#)
20 (internal quotation marks omitted). Termination is materially advanced where, as
21 here, the issues presented in an order have “important implications for assigning
22 liability” and, “[s]hould the case proceed as it stands” and “the issue be reversed on
23 appeal, it would require a retrial of the [plaintiff’s] claims.” [City of Los Angeles v.](#)
24 [Nat’l Union Fire Ins. Co. of Pittsburgh, PA, 2014 WL 12573322, at *4 \(C.D. Cal.](#)
25 [Apr. 29, 2014\)](#).

26 Here, interlocutory resolution by the Ninth Circuit of the four controlling
27 questions of law could simplify and curtail the trial on the issue of restitution and/or
28 penalties. The Court is not persuaded by the Bureau’s arguments that an

1 interlocutory appeal would not materially advance the termination of the litigation
2 because trial is set for early February and an interlocutory appeal would delay those
3 proceedings. In *Youssofi*, the court rejected an identical argument, reasoning that “if
4 the length of time spent on appeal were sufficient to defeat a motion for interlocutory
5 appeal, no such appeal could ever be taken.” [2016 WL 6395086, at *5](#). Ignoring
6 pragmatic considerations would foreclose interlocutory appeals in virtually any case
7 where trial could be completed before an appeal. See [City of Los Angeles, 2014 WL](#)
8 [12573322, at *10](#) (vacating February trial date when parties sought certification of
9 summary judgment order decided in December). Therefore, the Court holds that the
10 litigation would be materially advanced by interlocutory review of the Order.

11 **II. A STAY PENDING APPEAL IS APPROPRIATE.**

12 This Court is empowered to stay proceedings pending an interlocutory appeal
13 by both statute and its inherent authority. See [28 U.S.C. § 1292\(b\)](#); [Landis v. N. Am.](#)
14 [Co., 299 U.S. 248, 254 \(1936\)](#). A stay is appropriate where it will promote “economy
15 of time and effort for itself, for counsel, and for litigants.” [Landis, 299 U.S. at 254](#).
16 Courts routinely grant stays while interlocutory appeals are pending. See, e.g., [Scott](#)
17 [Rose v. Stephens Inst., 2016 WL 6393513, at *4 \(N.D. Cal. Oct. 28, 2016\)](#) (“[a] stay
18 will promote judicial economy by delaying trial—the next step in this case—until
19 these novel legal questions [of liability] . . . are resolved” because “[i]f the case
20 proceeded to trial concurrently with the interlocutory appeal, and the Ninth Circuit
21 ultimately disagreed . . . , the court and parties would be forced to redo” the trial); [Su](#)
22 [v. Siemens Indus., Inc., 2014 WL 2600539, at *3 \(N.D. Cal. June 10, 2014\)](#) (staying
23 proceedings where “the potential benefits to resolving the disputed legal questions
24 now outweigh the potential benefits of proceeding to trial now and allowing appeal
25 later”).

26 The Court concludes that a stay of this matter is appropriate while an
27 interlocutory appeal is pending. While the CFPB complains that Defendants have not
28 introduced affirmative evidence of the potential effect of a judgment on them, the

1 Bureau here seeks an award of hundreds of millions of dollars in penalties and/or
2 restitution based on numerous novel or disputed legal theories that this Court has
3 concluded merit interlocutory review. Allowing the trial to proceed under such
4 circumstances would effectively negate the usefulness of the interlocutory appeal.
5 The harm to the Bureau, on the other hand, is minimal.

6 Moreover, the interlocutory proceedings could eliminate the need for a trial
7 altogether. Thus, a stay pending resolution of the interlocutory appeal will promote
8 economy of time and effort for the Court, counsel and the parties by deferring trial
9 until the interlocutory appeal is resolved.

10 **CONCLUSION**

11 **IT IS THEREFORE ORDERED** that Defendants' Section 1292(b) Motion
12 is GRANTED, and the August 31, 2016 Order is certified for interlocutory appeal
13 pursuant 28 U.S.C. § 1292(b). The Court hereby STAYS the case pending resolution
14 of the interlocutory appeal.

15 **IT IS SO ORDERED.**

16 DATED: January 3, 2017



The Honorable John F. Walter
United States District Judge

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