PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Commissioner
Rebecca Kelly Slaughter
Alvaro M. Bedoya

IN THE MATTER OF FLEETCOR TECHNOLOGIES, INC., a corporation, and RONALD CLARKE, individually and as an officer of FleetCor Technologies, Inc.	Docket No. D-9403

RESPONSE IN OPPOSITION TO MOTION TO LIFT STAY OF ADMINISTRATIVE PROCEEDINGS

On December 20, 2019, the FTC sued FleetCor Technologies, Inc. and its CEO, Ronald Clarke, under Section 13(b) of the FTC Act. *See* Compl., ECF No. 1, *FTC v. FleetCor Techs., Inc.*, No. 1:19-cv-05727-AT (N.D. Ga. Dec. 20, 2019). While the FTC's motion for summary judgment in the district court was pending, Complaint Counsel filed an identical Part 3 complaint. Part 3 Compl. (Aug. 11, 2021). Complaint Counsel and Respondents agreed to stay this administrative proceeding until "after the federal court . . . adjudicated the merits" of the federal court proceeding. *See* Notice at 2 (Feb. 11, 2022). The district court then granted summary judgment for the Commission and entered a permanent injunction. Order for Permanent Injunction, ECF No. 355 (June 8, 2023). Defendants intend to appeal those decisions, both as to liability and remedy.

Based solely on the preclusive effect of the district court order subject to appeal, Complaint Counsel has now moved to lift the stay of the administrative proceedings so that it can "proceed immediately to dispositive motion practice" and obtain a liability finding and a cease and desist order. *See* Motion to Lift Stay ("Mot."), at 5. In other words, Complaint Counsel seeks to obtain a judgment on liability and a cease-and-desist order (effectively an injunction) from the Commission based solely on the district court decision, "without discovery or other pretrial [or trial] proceedings." *Id.*

The Commission should deny this motion and maintain the stay during the pendency of the appeal of the federal court action. Allowing Complaint Counsel to obtain an order of liability and a cease and desist order based solely on a district court decision that is subject to appeal would be severely prejudicial to the Respondents. Indeed, it would eviscerate their right to an appeal. Under Complaint Counsel's proposed procedure, even if Respondents prevail on their appeal and obtain a reversal of the district court's decision, the Commission would still have an administrative finding of liability and a cease and desist order that was based solely on that now-reversed district court decision. Perversely, Respondents would be under the same injunctive provisions even though the entire basis for the finding of liability and the appropriateness of an injunction was reversed. It is black letter law that it is prejudicial and a miscarriage of justice to

"perpetuat[e] a judgment that rests on nothing more than a subsequently reversed judgment." Wright & Miller, 18A Fed. Prac. & Proc. Juris. § 4433 (3d ed.).[1]

On the other hand, there are no efficiencies to be gained by lifting the stay. Defendants are now subject to the District Court's injunction and will remain so unless and until it is reversed on appeal. The Commission should maintain the stay until Respondents complete their appeal of the district court's judgment. At that point the administrative action can proceed swiftly and efficiently.

LEGAL STANDARD

In deciding whether to stay an administrative proceeding, the Commission applies the same standard applied by federal district courts. *See, e.g.*, *In re Dynamic Health of Fla., LLC*, 2004 WL 1814180, at *2 (FTC Aug. 2, 2004) (quoting *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980)). The Commission thus considers whether (1) the stay will prejudice nonmoving party; (2) the stay will simplify issues and streamline trial; and (3) the stay will reduce the burden of litigation on parties and court. *Sultan v. Dixon*, 2022 WL 657396, at *1 (M.D. Fla. Mar. 4, 2022). Based upon these factors, a stay is appropriate "to await a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case." *Miccosukee Tribe of Indians of Fla. V. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009).

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[1] The FTC's original motion, which was returned as incorrectly addressed to the ALJ, cited to this key section of Wright & Miller. In its submission to the Commission, however, the FTC removed that citation noting that it made a "minor revision[] to the content of the motion." D. Hanks Email, June 23, 2023.

ARGUMENT

Courts and leading commentators have unanimously recognized that a stay is warranted, if not essential, "when, as here, a prior case which may have preclusive effect over the instant proceedings is pending on appeal." *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 233 F. Supp. 3d 69, 87 (D.D.C. 2017). That is because proceeding in a second case based on the claimed preclusive effect of a decision on appeal creates "[s]ubstantial difficulties" given that "a second judgment based upon the preclusive effects of [a] first judgment should not stand if the first judgment is reversed." Wright & Miller, 18A Fed. Prac. & Proc. Juris. § 4433 (3d ed.). Therefore, the standard in a case like this is to "stay[] trial and perhaps pretrial proceedings pending resolution of the appeal in the first action." *Id.* In addition, all three factors favor a stay.

I. Lifting the Stay While the District Court's Judgment Is Pending on Appeal Would Prejudice The Respondents.

Complaint Counsel contends that the stay should be lifted because (1) the federal court action involved the "same issues" as this Part 3 proceeding and (2) "a possible or pending appeal does not diminish the preclusive effect of a district court's determinations." Mot. 6–8. But this ignores the central question: whether lifting the stay and entering judgment based solely on the preclusive effect of the district court decision, that may be vacated or reversed on appeal, would be prejudicial to Respondents.

There can be no serious dispute that Respondents may be heavily prejudiced by lifting the stay. Lifting the stay could eviscerate their rights to an appeal and

leave them bound by a district court decision that has actually been reversed on appeal.

It is well established that the serious prejudice and injustice of granting relief "on the basis of a judgment that is subsequently over-turned," *Martin v. Malhoyt*, 830 F.3d 237, 264 (D.C. Cir. 1987), makes it "advisable for [a] court that is being asked to apply [a] judgment as res judicata to stay its own proceedings to await the ultimate disposition of the judgment . . . on appeal." *DeBoom v. Raining Rose, Inc.*, 456 F. Supp. 2d 1077, 1080 (N.D. Iowa 2006) (quoting Restatement (Second) of Judgments § 16 cmt. b); *N. Nat. Gas Co. v. L.D. Drilling, Inc.*, 2010 WL 3892227, at *19 (D. Kan. Sept. 29, 2010) (same); *Univ. of Colo. Health*, 233 F. Supp. 3d at 88 ("The Court thus stays this action pending the resolution of the pending appeal in [related case 1] at the D.C. Circuit, and the D.C. Circuit's opinion in [related case 2] if an appeal is taken.").

A stay during the appeal is particularly important for cases, like this one, where the issues in a prior case subject to appeal are "directly related" or "similar." *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009); *Bailey v. Six Flags Ent. Corp.*, 2019 WL 8277272, at *7 (N.D. Ga. Dec. 15, 2019) (issuing stay "despite some differences between the fact pattern presented here and that of [related appeal]"); *Sultan*, 2022 WL 657396, at *1 (issuing stay where the "same and potentially dispositive issue [was] currently before the Eleventh Circuit"). In fact, so long as the matters share sufficient similarities,

"[t]he parties need not be the same or the issues identical" for a stay to be warranted. *Jackson v. Dozier*, 2018 WL 4376467, at *3 (M.D. Ga. Aug. 14, 2018).

This is not a close call; Complaint Counsel repeatedly stresses in its motion, the facts and issues in this proceeding are "identical in substance" to what was resolved in federal court, and Complaint Counsel intends to seek a summary decision solely "based on the determination made in the district court action." *E.g.*, Mot. 2. Complaint Counsel is not attempting to try any issue in this administrative proceeding at all. It is trying to rely solely on the federal court action—and that action should be final before it does so. If the Court of Appeals reverses the federal district court's grant of summary judgment, that will end this administrative case and there should be no cease and desist order. There is no reason to "run the risk of [entering a final order] on the basis of a judgment that may be subsequently overturned." *Stevens v. Stover*, 702 F. Supp. 302, 307 (D.D.C. 1988). Rather, "the best interests of justice, and of judicial economy, will be served by staying these proceedings to await the ultimate disposition of the judgment on appeal." *Local Contractors, Inc. v. Remtec, Inc.*, 1992 WL 6302, at *2 (E.D. La. Jan. 3, 1992). The potential prejudice to the Respondents makes this not only a good case for a continued stay but "*an excellent one*." *Miccosukee Tribe of Indians*, 559 F.3d at 1198 (affirming stay pending "a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case").

Complaint Counsel would suffer no prejudice by maintaining the stay. Defendants are currently bound by the injunction, so there is no benefit (or any

need) for a cease and desist order to prevent ongoing harm. The injunction does that already. And there is no basis to obtain any monetary relief when the appeal is still pending.

II. Maintaining The Stay Would Simplify The Issues And Streamline The Trial

Nor can there be any doubt that maintaining the stay will simplify the issues and streamline any follow-on proceedings. Once the appeal is complete, Respondents' liability and the scope of the injunction will be conclusively resolved. At that stage any follow-on proceedings can proceed quickly and efficiently.

The alternative approach will lead to unnecessary jurisdictional and procedural chaos. Complaint Counsel has stated that it plans to quickly "return to the district court for monetary relief" once it obtains a cease and desist order. Mot. 2–3. That monetary relief is consumer redress that would be distributed to FleetCor customers, which would be impossible to recoup once paid. Three courts will be burdened by how to handle the procedural mess created by pursuit of the administrative proceeding on the basis of a judgment that is still on appeal: (1) the Court of Appeals that will hear the appeal from the cease and desist order, (2) the Eleventh Circuit that will hear the direct appeal from the district court action, and (3) the district court that will hear the follow-on 19(b) action.

The far more efficient approach is for the Commission to abide by the well-settled principle that "care should be taken in dealing with judgments that are final but still subject to direct review," *Martin*, 830 F.2d at 264. After all, a federal agency's obligation "to consider a matter expeditiously is not a mandate to be

arbitrary, capricious, irrational or sloppy," *Puerto Rico Maritime v. Fed. Maritime Comm'n*, 678 F.2d 327, 336 (D.C. Cir. 1982). Where, as here, "deferral [would] avoid[] the complicated unravelling that might become necessary if a judgment . . . outside the rendering forum[] is over turned on direct review," the solution is clear. *In re Pro. Air Traffic Controllers Org.*, 699 F.2d 539, 544–45 (D.C. Cir. 1983). The Commission should continue the stay until after the Eleventh Circuit issues its mandate on FleetCor's appeal from the district court judgment.

III. Maintaining The Stay Will Reduce The Burden On The Parties And The Court

Continuing the stay also will reduce the burden on the parties and the courts by avoiding potentially unnecessary litigation. If Respondents prevail on their appeal of the district court's decision, no administrative proceeding will be necessary. Any proceedings already conducted would have been entirely wasteful. The Commission can conserve its resources, as well as the resources of the courts, by waiting until the appeal is complete.

If the Commission prevails on the appeal, then the administrative proceeding can proceed quickly and efficiently with key issues already decided.

CONCLUSION

The Commission should maintain the stay for the same reason it granted it in the first place. Maintaining the stay will avoid prejudice to Respondents and the possible inappropriate result of having a cease and desist order based solely on a vacated district court decision. No cease and desist order is required to protect consumers, as the district court's injunction is already in place. In order to

maintain an orderly and efficient process, the stay should remain until the appeal is complete.

Dated: July 3, 2023

Respectfully submitted,

/s/ Mark D. Hopson

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2023, I filed the foregoing document electronically using the FTC's E-filing system, which will send notification of such filing to:

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I further certify that on July 5, 2023, I caused the foregoing document to be served via electronic mail to:

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A substantively identical copy of the foregoing document was served via email and hard copy on the above recipients on July 3, 2023.

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