

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SONOMA,

Plaintiff,

v.

FEDERAL HOUSING FINANCE AGENCY;
EDWARD DeMARCO, in his capacity
as Acting Director of FEDERAL
HOUSING FINANCE AGENCY; FEDERAL
HOME LOAN MORTGAGE CORPORATION;
CHARLES HALDEMAN, JR. in his
capacity as Chief Executive
Officer of FEDERAL HOME LOAN
MORTGAGE CORPORATION; FEDERAL
NATIONAL MORTGAGE ASSOCIATION;
MICHAEL J. WILLIAMS, in his
capacity as Chief Executive
Officer of FEDERAL NATIONAL
MORTGAGE ASSOCIATION,

Defendants.

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No. C 10-3270 CW

ORDER GRANTING IN
PART AND DENYING
IN PART
DEFENDANTS'
EXPEDITED MOTION
TO STAY
PRELIMINARY
INJUNCTION PENDING
APPEAL (Docket No.
143)

Defendants Federal Housing Finance Agency (FHFA) and Acting
Director Edward DeMarco, pursuant to Federal Rule of Civil
Procedure 62(c), move this Court to stay its September 13, 2011
order granting in part Sonoma County's motion for a preliminary
injunction. In the event that the Court denies Defendants'

1 request for a stay pending disposition of their appeal to the
2 Ninth Circuit, Defendants seek a limited ten-day stay of the
3 preliminary injunction to permit the FHFA to request a stay
4 pending appeal from the Ninth Circuit. Having considered the
5 parties' submissions, the Court GRANTS IN PART Defendants'
6 expedited motion, permitting a limited ten-day stay to allow the
7 FHFA to seek a stay from the Ninth Circuit, but DENIES imposition
8 of a stay pending resolution of the appeal.
9

10 DISCUSSION

11 "A stay is not a matter of right, even if irreparable injury
12 might otherwise result." Nken v. Holder, 129 S. Ct. 1749, 1760
13 (2009) (citation and internal quotation marks omitted). Instead,
14 it is "an exercise of judicial discretion," and "the propriety of
15 its issue is dependent upon the circumstances of the particular
16 case." Id. (citation and internal quotation and alteration marks
17 omitted). The party seeking a stay bears the burden of justifying
18 the exercise of that discretion. Id.
19

20 The standard for determining whether to grant a stay pending
21 appeal is similar to the standard for issuing a preliminary
22 injunction. Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663
23 (9th Cir. 1988). A party seeking a stay must establish that he is
24 likely to succeed on the merits, that he is likely to suffer
25 irreparable harm in the absence of relief, that the balance of
26 equities tips in his favor, and that a stay is in the public
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1 interest.¹ Nken, 129 S. Ct. at 1761 (noting overlap with Winter
2 v. Natural Resources Defense Council, 555 U.S. 7 (2008)). The
3 first two factors of this standard "are the most critical." Id.
4 Once these factors are satisfied, courts then assess "the harm to
5 the opposing party" and weigh the public interest. Id. at 1762.

6 Defendants contend that they are entitled to a stay under the
7 substantial question test. The parties do not dispute that the
8 appeal presents a substantial case raising serious legal
9 questions. However, Defendants have failed to demonstrate that
10 the FHFA will suffer irreparable injury absent a stay and that the
11 public interest requires the issuance of a stay.

12 The Court has granted limited injunctive relief, permitting
13 the FHFA to maintain its directives against PACE programs, while
14 requiring it proceed with the notice-and-comment process. Sonoma
15 County initially asked that the FHFA issue an Advance Notice of
16 Proposed Rulemaking (ANPR) by September 16, 2011, with a thirty-
17 day comment period. The FHFA cited other agency obligations and
18 proposed, instead, thirty days for the issuance of an ANPR and a
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23 ¹ An alternative to this standard is the "substantial questions"
24 test. Under this test, "serious questions going to the merits and
25 a balance of hardships that tips sharply towards the plaintiff"
26 can support the issuance of a stay, "so long as the plaintiff also
27 shows that there is a likelihood of irreparable injury and that
28 the injunction is in the public interest." See Alliance for the
Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011)
(holding that the substantial questions test, for purposes of a
motion for preliminary injunction, survives Winter, 555 U.S. at
7).

1 sixty-day comment period. The FHFA's desired schedule was adopted
2 in the preliminary injunction.

3 The FHFA argues that it will suffer irreparable harm absent a
4 stay because the preliminary injunction will thwart its ability to
5 react in a timely and effective fashion to further developments in
6 the PACE programs and other matters that may pose risks to the
7 Enterprises. This reasoning is not persuasive. The Court's order
8 leaves in place the FHFA's and the Enterprises' directives with
9 respect to the PACE programs. Nor does the injunction require
10 that the FHFA commence the notice-and-comment process regarding
11 any other issue.
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13 Furthermore, Defendants claim that the preliminary injunction
14 will impose a burden on the FHFA's limited financial and personnel
15 resources. Yet the FHFA's supporting declaration fails to
16 identify any agency activity that will be undermined through the
17 diversion of funds or staff time. The declaration's assertion of
18 the particular benefits of informal guidance over formal
19 rulemaking does not establish that the FHFA will be irreparably
20 harmed by the preliminary injunction.
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22 The balance of hardships tips in favor of Sonoma County. The
23 stay would cause further harm to Sonoma County because it would
24 delay the opportunity for the county, its residents and other
25 stakeholders to submit input through a formal process for the
26 FHFA's consideration. Contrary to Defendants' suggestion, general
27 opportunities to speak publicly about the issues at hand and the
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1 ability of members of the public to launch websites in support of
2 PACE programs, such as PACENOW.org in this instance, do not
3 provide adequate substitutes for the notice and comment process
4 afforded by the Administrative Procedures Act.

5 Finally, the public interest is served through allowing the
6 Court's narrow grant of injunctive relief to go into effect. As
7 noted earlier, the order does not disturb the FHFA's and
8 Enterprises' current PACE policies. Rather, the injunction is
9 limited to commencing the notice and comment process to allow for
10 public input on this issue and insure deliberative, transparent
11 decision-making by the FHFA. The notice and comment process does
12 not mandate a specific outcome or eliminate the FHFA's authority
13 to render its decision. Thus, contrary to the FHFA's contention,
14 the injunction will not produce poor public policy results. Nor
15 does the preliminary injunction impose any sweeping limitation on
16 the FHFA's supervisory authority.

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19 The Court denies Defendants' request to stay enforcement of
20 the preliminary injunction until resolution of the FHFA's appeal.
21 However, the Court grants Defendants' alternative request for a
22 ten-day stay to seek a stay from the Ninth Circuit. If the FHFA
23 pursues a stay from the Ninth Circuit, the motion shall be filed
24 within that time period. In the event that the Ninth Circuit does
25 not resolve the FHFA's motion for a stay within ten days after
26 this order, this Court's stay shall continue until the Ninth
27 Circuit resolves the motion.
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Pursuant to the Court's preliminary injunction, no later than thirty days after September 13, 2011, the date the injunction was issued, the FHFA is required to publish an ANPR relating to the July 6, 2010 statement and its February 28, 2011 letter. This Court's ten-day stay and any continuation of the stay to allow the Ninth Circuit to rule on the FHFA's request shall toll the thirty-day deadline for an ANPR. As stated in the preliminary injunction, if necessary, the parties may seek an extension of any deadlines, including the April 30, 2012 deadline for the FHFA to publish its final rule in the Federal Register.

IT IS SO ORDERED.

Dated: 9/30/2011



CLAUDIA WILKEN
United States District Judge