

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING)	RESPONDENTS' MOTION
File No. 2015-CFPB-0029)	FOR RECONSIDERATION OF THE
In the matter of)	DIRECTOR'S DENIAL OF
INTEGRITY ADVANCE, LLC and)	RESPONDENTS' MOTION
JAMES R. CARNES)	TO STAY APPEAL AND REMAND TO
)	HEARING OFFICER
)	

**RESPONDENTS' MOTION FOR RECONSIDERATION OF THE
DIRECTOR'S DENIAL OF RESPONDENTS' MOTION TO
STAY APPEAL AND REMAND TO HEARING OFFICER**

Respondents Integrity Advance, LLC and James R. Carnes (together, “Respondents”), respectfully request that the Director reconsider his decision denying Respondents’ Motion to Stay Appeal and Remand to Hearing Officer (Dkt. 179) the ongoing appeal in this matter. Dkt. 180. Respondents respectfully request an expedited review and decision on this matter, given the parties’ briefing schedules on appeal and impending deadline for Opening Briefs, which are now due on November 4, 2016. *Id.* at 3.

ARGUMENT

The Director should reconsider his denial of a stay in this matter pending resolution of the crucial threshold questions regarding statutes of limitation addressed in the D.C. Circuit’s recent opinion in *PHH Corp. v. CFPB*, No. 15-1177, 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016). At a minimum, a stay of these proceedings is warranted until November 25, 2016, which is when any petition for panel rehearing *en banc* in *PHH* is due. *See* Fed. R. App. P. 40(a)(1)(B) (a petition for panel rehearing is due “within 45 days after entry of judgment”). At that time, the

scope of any appeal by the Bureau will be more readily apparent. A brief stay would, therefore, allow all parties here to proceed in the most efficient and fully-informed manner.

The balance of the equities favors a stay in this matter.¹ Respondents acknowledge the Director's concern that the statute of limitations question addressed in *PHH* would take additional time to resolve should the Bureau seek further appellate review of that issue. On balance, however, this concern is outweighed by the waste of agency resources and Respondents' resources to continue litigating the precise issue already on appeal and which is dispositive on nearly all of the Bureau's claims here. To proceed when such a threshold issue is – at best – unsettled runs contrary to the principles of fairness and economy. Therefore, reconsideration is appropriate for several reasons.²

¹ Courts have frequently granted stays in the analogous situation where a district court is asked to “weigh competing interests and maintain an even balance” in determining whether to stay proceedings pending the resolution of independent proceedings in which the same legal questions or defenses are presented. *See, e.g. Fairview Hosp. v. Leavitt*, 2007 WL 1521233, at *1-2 (D.D.C. May 22, 2007) (granting a stay where, on balance, it would “promote efficiency and conserve party and judicial resources” and where the “legal defenses are nearly identical in both cases”) (citing *Landis v. N. Am. Co.*, 229 U.S. 248, 254 (1936)); *IBT/HERE Employee Representatives' Council v. Gate Gourmet Div. Americas*, 402 F. Supp. 2d 289, 292-93 (D.D.C. 2005) (stating that “litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests”); *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003) (noting that “courts have broad discretion to stay all proceedings in an action pending the resolution of independent proceedings elsewhere.”).

² Respondents respectfully disagree with the Director's assertion that Respondents failed to satisfy the requirements of Rule 205(f) of the Bureau's Rules of Practice for Adjudicative Proceedings, 12 C.F.R. § 1081.205(f), by stating, albeit in a footnote, that Respondents met and conferred with Enforcement Counsel before filing Respondents' Motion to Stay Appeal and Remand to Hearing Officer. *See Order*, Dkt. 180 at 1-2. This is especially true, given the parties' practices regarding meet and confer obligations in this matter. Nonetheless, out of an abundance of caution, Respondents have appended to this Motion a certification attesting that Respondents satisfied the requirements of Rule 205(f) for this Motion and also for Respondents' Motion to Stay Appeal and Remand to Hearing Officer. *See infra* pp.8-9.

First, at a minimum, a limited stay of this matter until the Bureau’s November 25, 2016 deadline in *PHH* for submitting a petition for rehearing *en banc* will provide the parties with additional clarity and allow for the most efficient resolution of this threshold question in light of the panel opinion in *PHH*. In the event of an appeal of the issue of whether statutes of limitation apply to CFPB administrative proceedings, the D.C. Circuit *en banc*, or the Supreme Court will be deciding an issue that has a precise and direct impact on the outcome of this matter. The D.C. Circuit’s panel opinion clearly states that the “Dodd-Frank Act incorporates the statutes of limitations in the underlying statutes enforced by the CFPB in administrative proceedings.” *PHH*, 2016 WL 5898801, at *5. Absent a stay of this matter pending the Bureau’s potential appeal of the statute of limitations question, it is possible – maybe, even likely – that the Director will issue his final decision in this matter consistent with his previous decision in *PHH* on the statute of limitations issue, notwithstanding the D.C. Circuit’s decision. *See Order*, Dkt. 180 at 2 (stating that the Director will address the impact on this matter of *PHH* “once that decision is finalized”).³

Second, absent a stay, Integrity Advance will have to unnecessarily expend substantial resources to continue to litigate the entire case, including the statute of limitations issue, when the D.C. Circuit has already issued a decision on this question. Indeed, in *PHH*, the D.C. Circuit ruled it was appropriate to stay the Director’s decision pending appellate review, including review of the statute of limitations issue, implicitly recognizing the importance of avoiding harm while resolving critical questions. *See PHH*, August 3, 2015 Order at 1 (granting PHH’s motion

³ The Director recently commented to the Mortgage Bankers Association that “the Bureau has made clear that it respectfully disagrees with the panel’s decision and is considering its options for seeking further review.” *See Prepared Remarks of Richard Cordray*, October 25, 2016, available at <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-mortgage-bankers-association/>.

to stay and holding that PHH satisfied the “stringent requirements” for a stay, including a showing of irreparable harm absent a stay). It is manifestly unfair for the Director to continue this matter now, in light of the unequivocal decision by the D.C. Circuit, in hopes that the Bureau prevails before the D.C. Circuit *en banc* or the United States Supreme Court.

Third, a stay is warranted because the D.C. Circuit’s opinion in *PHH* directly impacts the threshold question of whether nearly all of the Bureau’s claims are time-barred.⁴ As to the Bureau’s claims under TILA and EFTA, which carry a one-year limitations period,⁵ the record below makes clear that Enforcement Counsel did not file its Notice of Charges (“Notice”) until nearly three years after Integrity Advance originated its final loan. *See Recommended Decision*, Dkt. 176 at 14. Respondents therefore maintain that the statutes of limitation had run and that the Bureau did not timely file its Notice as to its TILA and EFTA claims. Indeed, Enforcement Counsel has never argued that anything other than a one-year limitations period would apply but for the Director’s decision in *PHH*. Therefore, it is undisputed that if the D.C. Circuit’s panel opinion in *PHH* is applied here, the Bureau’s TILA and EFTA claims are time-barred. It is therefore reasonable to stay this matter now pending further appellate resolution of the statute of limitations question in *PHH*.

⁴ Indeed, the D.C. Circuit specifically cited the Bureau’s Opposition to Respondents’ Motion to Dismiss *in this matter* to show that the “CFPB’s argument that it is not bound by any statute of limitations in administrative proceedings would extend to all 19 of the consumer protection laws that Congress empowered the CFPB to enforce.” *PHH*, 2016 WL 5898801 at *38. “By its terms . . . Section 5563 ties the CFPB’s administrative adjudications to the statutes of limitations of the various federal consumer protection laws it is charged with enforcing.” *Id.*

⁵ The Bureau’s TILA claim, under which the ALJ has recommended a finding of damages in excess of \$38 million, carries a one-year statute of limitations “from the date of the occurrence of the violation.” *See* 15 U.S.C. § 1640(e); *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508, at *32–*33 (S.D. Ind. Mar. 6, 2015). The Bureau’s claim under the EFTA, 15 U.S.C. § 1693m(g), carries the same one-year limitations period as TILA.

With respect to the statute of limitations for the Bureau’s UDAAP claims, 12 U.S.C. § 5564(g)(1), Respondents have raised substantial questions about when this three-year limitations period began to run, particularly as to Mr. Carnes. *See, e.g.*, Brief in Support of Respondents’ Motion to Dismiss the Notice of Charges, Dkt. 28-A at 18–19. Under this limitation period, the agency must bring an action within three years of when it discovers, or by reasonable diligence could have discovered, the basis of the action. *See id.* at 16–19 (citing *Merck & Co. v. Reynolds*, 559 U.S. 633, 645 (2010) and *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013)).

Fourth, the hearing officer is best situated to further develop the administrative record, particularly as to the factual question of “date of discovery,” notwithstanding the Director’s authority to engage in *de novo* review of the matter on appeal from a Recommended Decision by the hearing officer. *See* 5 U.S.C. § 557 (providing that the hearing officer should “initially decide the case”); *see also* 12 U.S.C. § 5563. Fairness justifies this approach, as the law is clear that the hearing officer “serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime.” *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980). Further, remand would avoid placing the Director in the position to concurrently act as both the “trial court” and the appellate body. This is especially true here, where the factual issue to be further developed involves determining when the Bureau knew or should have known of the basis of the allegedly unlawful conduct. It would be grossly unfair for the Director to sit in judgment over questions involving his own actions and knowledge. Indeed, as the Bureau’s own Enforcement Policies and Procedures Manual requires, the Director himself decides whether to authorize administrative actions. *See* CFPB Enforcement Policies and Procedures Manual at 2-6, *available at* https://www.venable.com/files/upload/CFPB_Enforcement_Policies_and_Procedures_Manual.pdf.

CONCLUSION

The Director should reconsider his decision denying a stay and remand in this matter.

Staying this case now will avoid the unnecessary expenditure of resources appealing the exact statute of limitations issue addressed in *PHH*. Moreover, resolution of the statute of limitations question in *PHH* will directly impact nearly all of the Bureau's claims. Respondents acknowledge the Director's authority to review this matter *de novo*, but the hearing officer is nonetheless better suited in this instance to further develop the factual record with which he is already familiar. To the extent the Director is not inclined to remand the matter to the hearing officer, Respondents maintain that a stay of this matter is still necessary and appropriate to avoid manifest unfairness and waste of resources.

Respectfully submitted,

Dated: October 27, 2016

By: /s/ Allyson B. Baker

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**RULE 205(f) CERTIFICATION
FOR RESPONDENTS' MOTION FOR RECONSIDERATION**

Pursuant to Rule 205(f) of the Bureau's Rules of Practice for Adjudicative Proceedings, 12 C.F.R. § 1081.205(f), counsel for Respondents certify that on October 27, 2016 they conferred with Enforcement Counsel in a good faith effort to resolve the issues raised by this Motion for Reconsideration and have been unable to resolve the matter by agreement.

/s/ Andrew T. Hernacki
Andrew T. Hernacki, Esq.

**RULE 205(f) CERTIFICATION
FOR RESPONDENTS' MOTION TO STAY
APPEAL AND REMAND TO HEARING OFFICER**

Pursuant to Rule 205(f) of the Bureau's Rules of Practice for Adjudicative Proceedings, 12 C.F.R. § 1081.205(f), counsel for Respondents certify that on October 18, 2016, they conferred with Enforcement Counsel in a good faith effort to resolve the issues raised by Respondents' Motion to Stay Appeal and Remand to Hearing Officer and have been unable to resolve the matter by agreement.

/s/ Andrew T. Hernacki
Andrew T. Hernacki, Esq.

CERTIFICATION OF SERVICE

I hereby certify that on the 27th day of October, 2016, I caused a copy of the foregoing Respondents' Motion for Reconsideration of the Director's Denial of Respondents' Motion to Stay Appeal and Remand to be filed by electronic transmission (e-mail) with the CFPB's Office of Administrative Adjudication (CFPB_Electronic_Filings@cfpb.gov), U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Heather L. MacClintock (Heather.L.MacClintock@uscg.mil), and Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), and served by electronic mail on the following parties who have consented to electronic service:

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