

UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:)	SCHEDULING ORDER
INTEGRITY ADVANCE, LLC and)	
JAMES R. CARNES,)	
Respondents.)	

Background

On August 16, 2019, I conducted a telephonic scheduling conference with the parties in this matter. The Consumer Financial Protection Bureau (CFPB) was represented by enforcement counsel (EC) Benjamin Clark and Stephen Jacques. The Respondents were represented by counsel (RC) Richard Zach, Michael Schwartz, and Christen Tuttle.

Prior to the conference, on August 14, 2019, RC submitted a *Motion to Reopen the Record for a New Hearing*. In the motion, RC raised several arguments, many of which relate to whether the new hearing in this matter will consist merely of a de novo review of the previously created record, or whether that record will need to be supplemented by additional testimonial and documentary evidence. They also raised an argument which is jurisdictional in nature and thus must be resolved before we proceed to the other issues, i.e., whether some or all of the allegations in this matter are time-barred by the statute of limitations.

At the hearing, I informed the parties that I would bifurcate the statute of limitations issue from the issues which are related to the format and content of the new hearing. The parties expressed agreement that it is logical to first resolve the statute of limitations issue, in order to clarify what, if any, counts will go forward to full hearing. At the conference, the parties agreed that the statute of limitations issue had not been fully addressed in the previous hearing record and that the record before me did not contain sufficient factual development to enable me to decide the issue.¹ I, therefore, informed the parties that I would allow for the record to be reopened on this

¹ In the previous hearing, Administrative Law Judge McKenna denied Respondents' motion to dismiss due to a statute of limitations bar because the CFPB Director, Richard Cordray, in another case, *In the Matter of PHH Corp., et al.*, 2014-CFPB-0002, Decision of the Director at 10 (June 4, 2015), had determined that statute of limitations do not apply to CFPB administrative proceedings under 12 U.S.C. § 5563. The *PHH* case was on appeal to the United States Court of Appeals for the D.C. Circuit at the time Judge McKenna made his decision on Respondents' motion to dismiss

issue so that I would have a sufficient factual basis to make a ruling as to whether any or all of the allegations are time-barred. Enforcement counsel requested that I reconsider supplementing the record and allow briefing on the issue of reopening it, but as everyone was in agreement that the record had not been fully developed and the issue must be resolved before moving forward, I denied this request.

I, therefore, directed the parties to confer and provide me with a joint proposal no later than August 23, 2019, as to how they would like to develop the factual record on the statute of limitations issue. I suggested to the parties that it would be most efficient if they could agree to a stipulation of fact as to the key events and dates relating to the dates of the alleged offenses, discovery of the alleged offenses, and any other relevant facts; but if they could not agree, then I would consider their proposed method of factual development and make a decision.

On August 23, 2019, I received a *Joint Statement on Fact Development Regarding Statute of Limitations Defense*. In the statement, the parties state that they have been unable to agree upon a procedure for supplementing the record. They have, therefore, set forth their respective positions and proposed schedules.

RC's Position

RC's position is that they are entitled to fact discovery on the issue of when the CFPB discovered the alleged violations of the Consumer Financial Protection Act by Respondents and that such information is in the possession of the CFPB. On August 23, 2019, they submitted a subpoena for records relating to the discovery date and proposed a schedule. RC asserts that on August 23, 2019, EC presented them with a more than four-page brief arguing that supplementing the record is not appropriate and that there are sufficient facts in the record already. RC asserts that inclusion of EC's arguments in the joint filing is inappropriate and request that, in the event I decide to reconsider my decision to allow discovery on this issue based on EC's arguments, they be permitted adequate time to respond to EC's brief.

EC's Position

due to a statute of limitations bar. However, Judge McKenna determined that he was bound by the Director's determination that the statute of limitations was inapplicable to administrative proceedings. Therefore, the dates of the alleged violations, discovery of the alleged violations, and actions related to investigating and charging the violations were irrelevant and never fully developed in the factual record before me. However, later, when this matter was on appeal before the Director, Director Cordray's statute of limitation's ruling in *PHH* was reversed by the United States Court of Appeals for the D.C. Circuit which held that statutes of limitations do, in fact, apply to CFPB administrative proceedings, *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (finding *inter alia* that the statute of limitations applies to claims brought in CFPB's administrative forum); and 881 F.3d 75 (D.C. Cir. 2018) (*en banc* panel reversed some parts of the previous panel's decision, but reinstated the portion relating to the applicability of the statute of limitations). However, due to other unrelated issues concerning the proper appointment of Administrative Law Judges (*See, Lucia v. SEC*, 138 S. Ct. 2044 (2018)), this matter was put on hold and the statute of limitations issue was never readdressed. Ultimately, this case was remanded to me for a new hearing on May 28, 2019. So, to date, the effect of the D.C. Circuit Court's decision in *PHH* regarding the applicability of the statute of limitations in this matter has never been addressed and the factual record has not been developed to the extent necessary for me to make a ruling on this issue.

EC's position is that they have already produced all necessary factual information pursuant to the *Rules of Practice for Adjudication Proceedings*, 12 C.F.R. § 1081.206, establishing the date of discovery of the alleged violations and that Respondents thus have sufficient information with which to make their statute of limitations' arguments. They also state that they have previously stipulated to, or informed Respondents that they are willing to stipulate to, other facts about the investigation. EC thus asserts that there already exists a true and factual record that I may use to decide a motion for summary disposition regarding Respondents' statute of limitations' defense. EC further asserts that the relevant date for determining whether the statute of limitations has run under the Consumer Financial Protection Act is the "date of discovery" of the violation, rather than the date the CFPB "should have discovered" the violation, 12 U.S.C. § 1054(g). EC asserts that Respondents were not denied an opportunity before the previous hearing to develop evidence relating to the statute of limitations defense and have not provided specific grounds and justification for seeking supplementation of the record. Furthermore, they assert that recent developments in the law do not touch on what constitutes the "date of discovery" or alter elements that parties asserting a statute of limitations defense must prove. Finally, EC argues that Respondents are seeking a level of discovery that goes beyond what is permitted by the Rules of Practice for Adjudication Proceedings.

Discussion

At the August 16, 2019, scheduling conference, I made the decision to reopen the record on the statute of limitations issue based upon the parties' verbal agreement that the previously created record did not contain sufficient factual development of the issue. Although EC requested an opportunity to brief the issue, I did not see this as necessary given that the parties had agreed that the record was deficient in this respect and I denied the briefing request. However, EC has, in effect, briefed the issue anyway by inserting its arguments into what was to be a joint statement regarding the best way to supplement the record, and apparently providing these arguments to RC on the very day that the joint statement was due, thus foreclosing the possibility of response. I do not condone this tactic. EC should have made a proper motion for reconsideration. In fairness, I will therefore treat EC's arguments as a motion for reconsideration of my decision to reopen the record for supplementation on the statute of limitations issue to allow both sides to fully set forth their positions. Deadlines will be set forth in the schedule below.

Since EC now represents that it has already produced and/or stipulated to the relevant information that RC needs to make its statute of limitations defense, I will expect counsel for both sides to confer and clarify the relevant documentation. At this stage of the proceedings, both sides have new counsel, so it is possible that they are not familiar with the specific documentation in question. If such factual information or stipulations thereto are contained within the previously compiled record which I have available to me, then EC will identify the specific document numbers and pages for me to review.

If, after conferring, the parties can reach agreement that the relevant facts regarding dates (even if they disagree on the specific "date of discovery") were addressed previously, although they may be contained in discovery documentation and not exist in the record before me, they may submit a joint stipulation of fact regarding the relevant information and I will set a briefing

schedule for the merits of the statute of limitations issue with instructions as to specific questions that I would like addressed.

In the event the parties cannot agree, then we will follow the briefing schedule set forth below. If, after reviewing all briefs, I find the factual information in the record to be sufficient for the parties to make their arguments, I will set a briefing schedule for the merits of the statute of limitations issue. In the event that I find it is insufficient, then I will address RC's subpoena at that time and allow EC the opportunity to submit a motion to quash. The parties are to review Rules of Practice for Adjudication Proceedings 1081.206 and 1081.208 for the applicable standards. In accordance with Rule 1081.101, it is my intent to conduct this adjudication proceeding fairly and expeditiously and I expect the parties to make every effort to avoid delay.

Accordingly, the following schedule will apply:

1. No later than **September 11, 2019**, the parties will confer and review previously provided documentation relevant to the statute of limitations issue and provide **a joint update** as to whether, upon further review, they *agree* that the documentation addresses the relevant dates sufficiently for them to make their respective arguments as to when the statute of limitations began to run. Note that I do not necessarily expect the parties to agree on the "date of discovery," but I only expect that the information in question will provide sufficient information for the parties to make their respective arguments. If there are relevant documents in the previously created record that is before me, the parties will identify the documents and page numbers.
2. If, after conferring, the parties can reach *agreement* that the relevant facts regarding dates were previously provided, although they may not be in the record before me, they may submit a joint stipulation of fact to me by **September 18, 2019**, regarding the relevant factual information and I will subsequently set a briefing schedule for the merits of the statute of limitations issue with instructions as to specific questions that I would like addressed.
3. If, after conferring and reviewing documentation, the parties *disagree* as to whether the necessary information has been provided, then EC will submit a brief (15 page limit) to me setting forth its position as to whether record supplementation is necessary no later than **September 18, 2019**.
4. RC will submit a response brief (15 page limit) no later than **October 4, 2019**.
5. EC will submit a reply brief (6 page limit) no later than **October 15, 2019**.

SO ORDERED.

Christine L.
Kirby

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Kirby
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HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 30th day of August 2019 at
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Scheduling Order* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 30th day of August, 2019
at Washington, D.C.