UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of: **INTEGRITY ADVANCE, LLC** **and** **JAMES R. CARNES,** **Respondents.**	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STAY**

ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STAY

Respondents move to stay this proceeding, but cite no authority under the Rules of Practice permitting such a stay. In fact, the Rules do not provide for a stay at this juncture. *See* 12 C.F.R. Pt. 1081 (Rules). Rather, the Rules require an *expedited* proceeding. The presiding Administrative Law Judge (ALJ) "shall make every effort at each stage of a proceeding to avoid delay," *id.* § 1081.101, and must file his recommended decision within 300 days of the filing of the Notice of Charges or must request additional time from the Director, *id.* § 1081.400(a), (b). Indeed, the Rules expressly define the limited situations in which proceedings can be stayed. *See, e.g.*, 12 C.F.R. §§ 211, 406, 407. In this context, Respondents' failure to provide a legal basis for the presiding ALJ's authority to issue an indefinite stay until final resolution of the appeal of another proceeding is, by itself, fatal to their motion.

Landis v. North American Co., 299 U.S. 248 (1936) and its progeny make clear that a district judge's authority to stay a proceeding derives from "the power inherent in *every court* to control the disposition of the causes on its docket with economy of time and effort for itself, for

counsel, and for litigants." *Id*. at 254 (emphasis added). While a court has certain inherent authorities, these authorities are derived from its status as a court, a specific type of institution with its own constitutionally derived authorities. *See generally Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

An Administrative Law Judge is, by contrast, an executive branch official who may only exercise those authorities granted by Congress. *Cf. Matter of Hipp, Inc.*, 895 F.2d 1503, 1515 (5th Cir. 1990). The Administrative Procedures Act specifically provides that ALJs can "regulate the course of the hearing," but makes clear that this authority is "subject to the published rules of the agency." *See* 5 USC 556(c). And in this case, the Rules require the filing of a recommended decision within 300 days, and the authority to grant an indefinite stay as Respondents request is antithetical to that requirement.

Even assuming *arguendo* that an ALJ presiding over a Bureau administrative proceeding does have authority to grant a stay, Respondents have failed to justify a stay in this case. A stay of a proceeding is an extraordinary remedy that is generally disfavored by courts, particularly when the stay is of indefinite duration, such as the one sought by Respondents. Respondents essentially argue that the stay should issue for reasons of judicial economy and the costs to the parties, but courts reject stays on precisely these grounds. Furthermore, given that a ruling in the other proceeding would not eliminate any of the claims in this proceeding, staying this proceeding makes no sense. Therefore, Enforcement Counsel respectfully requests that Respondents' motion be denied.

The Administrative Rules Governing this Proceeding Do Not Provide for a Stay Under these Circumstances

Respondents point to no authority within the Rules or any statute that would allow the Administrative Law Judge to grant their request to stay this proceeding until the appeal of

another matter is fully resolved, which could take years. Granting such a stay would fly counter to the express intent of the Rules, which state that the proceeding should be conducted "expeditiously" and that the ALJ and counsel for all parties "must make every effort at each stage of a proceeding to avoid delay." 12 C.F.R. § 1081.101. Indeed, the Rules require that the entire proceeding—from filing of the Notice of Charges to filing of the recommended decision—take place in 300 days, or approximately 10 months. *Id.* § 1081.400(a). The Rules also expressly indicate the limited situations in which a stay is appropriate. *Id.* §§ 1081.211, 406, 407. None of these situations apply here.[1] Granting Respondents' requested stay in this proceeding would run contrary to the Rules' requirement that the proceeding be completed within 300 days, a result that puts this request beyond the ALJ's authority.

Respondents' vague claims that their requested stay is "in the interest of justice" or that their stay would not cause the Bureau "undue hardship," Mot. at 4, 6-7, do not alter the fact that their requested stay is not contemplated by the Rules and indeed would undermine their express intent. Furthermore, as is discussed in more detail below, Respondents' claims are wrong, the government does have an interest in allowing its enforcement proceedings to continue. Finally, denying the stay presents no risk of inconsistent decisions. Respondents can preserve these issues and appeal any adverse rulings.

[1] Indeed, Respondents raised their statute of limitations argument in their motion to dismiss, and the Administrative Law Judge relied on the Director's Decision and Order in the PHH proceeding in denying that motion. Ord. Deny Mot. Dismiss at 29. Respondents could have moved for certification of this issue and sought a stay on that ground under Rule 211—although Enforcement Counsel would have opposed any such attempt—but Respondents failed to do so, and the time for so doing has lapsed.

Respondents Have Failed to Present a Clear Case of Hardship or Inequity Necessary to Justify an Indefinite Stay

Assuming *arguendo* that the ALJ has the authority to grant the requested stay and that the standard in *Landis v. North American Co.*, 299 U.S. 248 (1936), is the appropriate standard, Respondents have failed to demonstrate that a stay should issue here. A stay is an unusual remedy that disrupts the normal course of litigation and should only be granted under extraordinary circumstances. *Landis*, 299 U.S. at 255. Overarching a court's stay analysis "is the court's paramount obligation to exercise jurisdiction timely in cases properly before it." *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). *Landis*, on which Respondents rely, held that a stay should only be granted in rare circumstances, stating that "the suppliant must make out a *clear case of hardship or inequity* in being required to go forward, if there is even a *fair possibility* that the stay for which he prays will work damage to someone else. Only in *rare circumstances* will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis*, 299 U.S. at 255 (emphasis added).

Interests such as judicial economy or the expense and time required to litigate a case are insufficient to justify an indefinite stay such as the one sought by Respondents. *Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262, 1265 (11th Cir. 2000) (rejecting a stay pending a trial and exhaustion of appeals in a related proceeding in a different forum); *Beijing Tong Ren Tang (USA), Corp. v. TRT USA Corp.*, No. C-09-00882 RMW, 2009 WL 5108578, at *2 (N.D. Cal. Dec. 18, 2009) (rejecting a stay based on judicial economy because defending a suit did not qualify as a clear case of hardship or inequity under *Landis*).[2]

[2] In the preliminary injunction/temporary restraining order context, it is well established that engaging in litigation does not constitute harm justifying relief. *See, e.g.*, *Renegotiation Bd. v.*

In fact, the *Landis* Court itself rejected an attempt to stay one case pending a decision on appeal in another. *Landis*, 299 U.S. at 248. The Court reversed a stay that was fashioned to continue until after a decision in a District Court case and the determination of any appeal therefrom, and remanded the proceeding. *Landis*, 299 U.S. at 257. Subsequent courts have interpreted *Landis* to mean that "[g]enerally, stays should not be indefinite in nature." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (reversing a stay in part because it provided no specific deadline for when it would terminate); *see also*, *Lipford v. Carnival Corp.*, 346 F. Supp. 2d 1276, 1278 (S.D. Fla. 2004).

Similarly, courts have rejected stays when the parties have moved to stay only part of the proceeding.[3] *See, e.g., Sam Galloway Ford, Inc. v. Universal Underwriters Ins. Co.*, 793 F. Supp. 1079 (M.D. Fla. 1992); *Johnson v. Navient Sols., Inc.*, No. 115CV00716LJMMJD, 2015 WL 8784150, at *2 (S.D. Ind. Dec. 15, 2015). In *Sam Galloway Ford,* upon which Respondents rely, the court denied a stay because it found that there were many other issues in the case that were independently dispositive. "This Court does not view helpful precedent regarding a single issue as an "exceptional circumstance" when there are multiple issues to be decided and when many of those issues have an inclination to be dispositive." 793 F. Supp. at 1081. In *Johnson*, the

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Bannercraft Clothing Co., 415 U.S. 1, 24 (1974); *I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 25 (D.C. Cir. 1986). In fact the United States District Court for the District of Columbia recently rejected Respondents' request for a temporary restraining order staying this proceeding pending the PHH appeal. Minute Entry, *Integrity Advance and James Carnes v. CFPB*, 1:16-cv-00872-RJL (D.D.C. May 10, 2016). Respondents had argued that they were harmed by being forced to litigate this proceeding. Mot. for TRO, *Integrity Advance*, 1:16-cv-00872-RJL 2, 23 (filed May 9, 2016). In rejecting Respondents' request, the court stated from the bench that Respondents had failed to show harm.

[3]Although Respondents' motion appears to ask for a stay of the entire proceeding, Respondents arguments only raise the issue of whether a three year statute of limitations applies to Enforcement Counsel's UDAAP claims against Carnes. It makes no mention of Enforcement Counsel's claims against Integrity Advance, which include UDAAP claims as well as EFTA and TILA claims.

court denied the stay finding that even though the Supreme Court had granted certiorari in another case that would clarify the law on one of plaintiff's arguments about standing under the TCPA, the ruling would not change plaintiff's arguments about standing under the FCRA. 2015 WL 8784150, at *2.

Respondents have not demonstrated the clear case of hardship or inequity required under *Landis*. Respondents have argued that the Administrative Law Judge should stay this entire proceeding because the D.C. Circuit may reach a different decision as to whether the statute of limitations in 12 U.S.C. § 5564(g)(1) applies to an administrative proceeding brought under 12 U.S.C. § 5563. In order to justify their requested stay, Respondents make only vague references to the "interests of justice." But at its heart, their argument is just that the D.C. Circuit may reverse a decision on which the Administrative Law Judge relied. As is discussed above, this type of judicial economy argument simply is not sufficient to justify a stay, especially where—as here—the decision in question would not eliminate the proceeding in its entirety.

Further, although Respondents claim without explanation or support that they "are not requesting a stay of indefinite duration," Mot. at 6, waiting for a decision on the PHH appeal would be both indefinite and immoderate. The PHH appeal has been argued before a panel of the D.C. Circuit Court of Appeals, but it is unknown when the panel will issue its decision. After that decision is issued, a party could seek rehearing, rehearing *en banc*, petition for *certiorari*, or all of the above. A final resolution of the *PHH* matter may not come for years.

Respondents' requested stay would substantially delay the ultimate resolution of the Bureau's claims – prejudicing the Bureau's ability to enforce the law and harming consumers who will have to wait longer to receive any relief for the violations that Integrity Advance and Carnes committed against them.

A PHH Decision Would Have No Impact on this Case

Even if the ALJ had authority to issue the requested stay, and even if Respondents had demonstrated that a stay might be appropriate—which they have not—the Administrative Law Judge still should deny Respondents' motion because even if § 5564(g)(1) applied to this proceeding, it would not bar the UDAAP claims in this matter. Respondents have cited several cases for the proposition that a court may stay a proceeding when another pending decision may be dispositive to the case.[4] Of course for these cases to be relevant, the *PHH* decision would have to be dispositive here. It is not. Respondents have no plausible argument that the Bureau's CFPA claims could be completely barred by the application of a three year statute of limitations.

Specifically, in order for a decision in *PHH* to affect the UDAAP claims in this matter, Respondents would have to demonstrate that the Bureau "discovered" Respondents' unlawful conduct by November 2012. Respondents have made no such showing. In their motion to dismiss, Respondents argued that the Bureau knew of their unlawful conduct as of July 21, 2011 (the designated transfer date) or January 4, 2012 (the date of Director Cordray's recess appointment). Both of these suggestions are meritless on their face. The UDAAP claims in this proceeding are limited to conduct that occurred on or after July 21, 2011. Respondents' position would require the Bureau to have known about Respondents' unlawful conduct before some or all of it even happened (depending on which of Respondents' dates are used). Furthermore, the Office of Enforcement issued its first civil investigative demand on January 7, 2013, and

[4] *Int'l Painters & Allied Trades Indus Pension Fund v. Painting Co.*, 569 F. Supp. 2d 113 (D.D.C. 2008) (Mot. at 3); *Fed Home Loan Mortgage Corp v. Kama*, 2016 WL 922780 (D. Haw. 2016) (Mot. at 3). Respondents also cite *Fergerstrom v. PNC Bank*, N.A No CIV. 13-00526DKW, 2014 WL 1669101 (D. Haw. Apr. 25, 2014), for this proposition, although in that case a class action was stayed after two other related class actions had also been stayed, pending the resolution of three similar class actions. More importantly, the non-moving party did not oppose the request for the stay.

Respondents did not even make their last production in response to the CID until December 2013. Thus, Respondents' position also requires the Bureau to "know" of Respondents' unlawful conduct before the Office of Enforcement even investigated that conduct. Even if § 5564(g)(1) applied to this proceeding, Respondents have made no plausible argument—because there simply is no argument—that the Bureau knew or should have known of Respondents' unlawful conduct as of November 18, 2012, the date three years prior to the filing of the Notice of Charges in this matter. Therefore, even if it is ultimately determined that § 5564(g)(1) applies to proceedings brought under § 5563, applying that rule in this proceeding would not affect the Bureau's claims, and for that reason, the Administrative Law Judge should deny Respondents' motion.

CONCLUSION

Given the expedited nature of these proceedings, the Rules of Practice do not provide for a stay of administrative proceedings except in certain specific circumstances that are not applicable here. Respondents have cited no authority holding otherwise. Even if this Court did have inherent authority to issue a stay, Respondents have not established a "rare case" that would justify such extraordinary relief. Most fundamentally, however, they are asking for a stay pending the resolution of an appeal that should have no bearing on the outcome of this proceeding. Accordingly, Respondents have not established that a stay is appropriate and Enforcement Counsel respectfully requests that their motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May 2016, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' Motion to Stay, to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather. L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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