

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

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| ADMINISTRATIVE PROCEEDING |) | RESPONDENTS’ REPLY IN |
| |) | SUPPORT OF ITS |
| File No. 2015-CFPB-0029 |) | MOTION TO STAY |
| |) | |
| In the matter of: |) | |
| |) | |
| INTEGRITY ADVANCE, LLC and |) | |
| JAMES R. CARNES |) | |
| _____ |) | |

**RESPONDENTS’ REPLY IN SUPPORT OF THEIR MOTION TO STAY
PROCEEDINGS PENDING RESOLUTION OF RELATED CASE ON APPEAL**

The Court should rely upon well-established case law and stay this proceeding pending disposition of the appeal in *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. June 19, 2015), currently before the D.C. Circuit.¹ The Supreme Court held in *Landis v. North American Co.*, 299 U.S. 248 (1936), that a stay is lawful and appropriate when, as here, it is “so framed in its inception that its force will be spent within reasonable limits,” and when the moving party shows 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.*” *Id.* at 255, 257 (emphasis added). The Court should stay this proceeding.

First, the Court has the power to stay the proceeding, and indeed, its order denying motion to dismiss acknowledges that a critical issue in the proceeding – whether the Bureau’s unfair, deceptive, or abusive acts or practices (“UDAAP”) claims as to Respondent Carnes are

¹ Respondents note that CFPB Rule 400(b) allows for an extension of the 300-day deadline. 12 C.F.R. § 1081.400(b).

time-barred – hinges on the statute of limitations issue litigated in the *PHH* case currently on appeal. That case addresses the question squarely on point here, too, of whether there is a statute of limitations for CFPA claims brought in this forum, much as there is a three-year statute of limitations for such claims brought in federal district court.²

Second, denying Respondents’ motion to stay would substantially prejudice them. Respondents would be required to fully litigate a case, when it is possible – indeed, likely, based on the oral argument in *PHH* – that the D.C. Circuit will hold that CFPA claims in this forum are subject to a statute of limitations. Such a holding would mean that the Court would be required to address whether the Bureau’s UDAAP claims as to Respondent Carnes are time-barred; this, of course, is a threshold question that does not even go to the underlying merits of this case.³

Finally, the Bureau will suffer no prejudice if the Court grants a stay. Here, the Bureau’s “newest” piece of potential evidence is more than three years old. There is no possibility that

² The Court’s order explains that it is “bound to apply the [CFPB] Director’s interpretation [of the UDAAP statute of limitations issue], which was clearly set out in *PHH*.” *Id.* at 28. The Order also acknowledges that *PHH* is on appeal and pending in the D.C. Circuit. *Id.* at 20 n.3.

³ The Bureau responds with a discussion of the purported actual date of discovery, which merely underscores why a stay is warranted in this proceeding – because the Court did not address the issue in the Order Denying Motion to Dismiss. The Bureau contends that there is “no argument—that the Bureau knew or should have known of Respondents’ unlawful conduct as of November 18, 2012” because the civil investigative demand was not served until seven weeks later on January 7, 2013. Bureau’s Opp’n (Dkt. 94) at 7. In effect, the Bureau has taken the illogical position that the date of discovery of actions that invoke the Bureau’s enforcement authority is a date to be determined by the Bureau – the date on which it chooses to file a civil investigative demand. *Id.* at 7–8. The Bureau also asserts in its Opposition “[t]he UDAAP claims in this proceeding are limited to conduct that occurred on or after July 21, 2011.” *Id.* However, the Bureau did not plead the UDAAP claims that way in the Notice of Charges, which alleged that the relevant time period for Respondents’ conduct dated back to *May 15, 2008*, Notice of Charges (Dkt. 1) ¶ 12, suggesting that the Bureau was aware of the alleged conduct much earlier than January 1, 2013. A statute of limitations, in this context, functions as a check on the extensive powers that the federal government, through an agency, can bring to bear, and must be analyzed as such.

evidence will grow stale or that witnesses will lose their already-fading memories if the Court grants a stay. In addition, Integrity Advance has not made loans in three-and-a-half years, and there is, thus, no concern about a need to halt any allegedly harmful conduct. The Bureau is also a litigant in both cases; in fact, it would seem to favor the Bureau to have the D.C. Circuit resolve the threshold statute of limitations issue on appeal in *PHH* before proceeding here.

The Bureau's only apparent argument in opposition is that the Court lacks the authority to stay the proceeding. That, too, is without merit. In fact, the Bureau ignores well-established law that provides that administrative law judges can routinely stay cases. For example, in *In the Matter of Certain Spiral Grilled Products Including Ducted Fans & Components Thereof*, the investigative counsel of the U.S. International Trade Commission made an argument virtually identical to the Bureau's argument here, namely that the agency's regulations prohibit a stay. Those arguments were rejected, as that court explained that "[g]uidance as to when a stay would be appropriate is found in the long and full jurisprudence associated with the granting of stays in the District Courts. The leading case on the issue of stays is *Landis v. North American Co.*, 299 U.S. 248 (1936)." Order No. 4: Denying Respondents' Motion for Stay, USITC Inv. No. 337-TA-426 (Mar. 15, 2000). Similarly, an administrative law judge for the Environmental Protection Agency ("EPA") concluded that even though the EPA's Rules of Practice contain no ostensible mechanism for staying a matter, well-established case law does supply the necessary authority to do so. There, too, the court relied on *Landis*. See *In the Matter of Ray & Jeanette Veldhuis, Respondents*, CWA-9-99-0008, 2002 WL 2005526, at *4 (ABAWQWCN Aug. 13, 2002).

Moreover, contrary to the Bureau's assertion, Respondents have not requested an "indefinite stay" of the proceedings. Bureau's Opp. (Dkt. 94) at 2–3. Specifically, Respondents

request that the Court stay proceedings pending the D.C. Circuit’s decision in *PHH Corp. v. CFPB*, that is the only appeal automatically afforded to PHH. In such instances, a stay is not for an “indefinite” period of time. Indeed, a mere five months ago, a federal district court confronted this exact question of “indefiniteness” in *Davenport v. HansaWorld, USA*, No. 2:12-CV-233-KS-MTP, 2016 WL 320953 (S.D. Miss. Jan. 25, 2016) and stayed that case, pending disposition of a related case on appeal. There, the court determined that

Because the stay requested is dependant [*sic*] on a ruling by the Mississippi Supreme Court in the related state proceeding, Defendant contends that there is no way of knowing when the stay would end, making it “indefinite” in nature. However, if this alone were enough to make a stay impermissibly indefinite, the district court would never have the power to stay a case pending a decision in a related action, as it is impossible to predict when such decisions by other courts will be handed down

In the current case, the Court feels that any stay granted would be within reasonable limits. The stay would last only until the appeal *currently pending* in the state appellate court reaches a disposition. These limits are “susceptible of prevision and description” as required by the Supreme Court in *Landis*. See 299 U.S. at 257, 75 S. Ct. 163.

Id. at *2 (emphasis added). The Bureau’s argument would prevent a case from ever being stayed, which, of course, would contravene well-established principles that favor judicial economy.⁴ The Bureau’s assertions of “indefiniteness” are hollow and certainly do not justify

⁴ This is exactly the type of situation in which a stay is justified. See, e.g., *Karoun Dairies, Inc. v. Karlacti, Inc.*, No. 08CV1521 AJB WVG, 2013 WL 4716202, at *5 (S.D. Cal. Sept. 3, 2013) (“[I]nconsistent rulings would waste judicial time and resources as well as impose further hardship and inequity to the parties. Based on these considerations, the Court concludes a stay serves the interest of judicial economy.”); see also *Munoz v. PHH Corp.*, No. 1:08CV0759 AWI DLB, 2011 WL 4048708, at *3–4 (E.D. Cal. Sept. 9, 2011) (granting a motion to stay pending resolution of a U.S. Supreme Court case that would provide direct authority on issues relevant to the district court case, even though the Supreme Court had granted certiorari only three months earlier, and reasoning that “[t]here is no rational reason to proceed further in this case until the standing issue has been clarified by the Supreme Court” and that “a stay will reduce the additional expenditure of the parties’ time and resources”).

denying the stay in this matter, especially given the substantial prejudice that Respondents will suffer if required to litigate a case in which a threshold question remains unresolved.

Furthermore, the Bureau cites inapposite cases that, if anything, support a stay. For example, in *Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262 (11th Cir. 2000), the federal district court *sua sponte* stayed the federal case pending conclusion of a Bahamian court's review of a related case. The Bahamian litigation predated the federal court litigation by over one year, and at the time the court issued the stay, the federal case already had been pending for four years. *Id.* at 1263–64. Although expressing concern that “the record indicates that the Bahamian case is not progressing quickly,” the Eleventh Circuit also observed that a district court *can* “stay a case pending the resolution of related proceedings in another forum, [provided that the court] limit[s] properly the scope of the stay.” *Id.* at 1264. Here, the related case at issue, *PHH*, was filed with the D.C. Circuit less than a year ago; oral argument was held in April 2016, and a decision from the court is forthcoming in the next several months. Moreover, it goes without saying that there is much greater certainty surrounding the D.C. Circuit's proceedings than of a court in the Bahamas, and the “indefiniteness” concerns in *Ortega Trujillo* are not present here. *See also Davenport*, 2016 WL 320953, at *2 (“[A]s the state appeal has been pending since the Notice of Appeal [204-2] was filed on July 31, 2015, the Court anticipates that a resolution will be reached in the appeal within a year, if not much sooner. The duration of the stay, then, would not be unreasonable.”).

Finally, Respondents acknowledge that resolution of the statute of limitations issue by the D.C. Circuit in *PHH* would bar the UDAAP claims brought against Respondent Carnes; Respondents have not argued that the UDAAP claims as to Integrity Advance are time barred. However, given the interconnectedness of the facts and claims in the instant proceeding, a stay of

the entire proceeding is warranted. Indeed, in the Notice of Charges, the Bureau does not plead *any independent conduct* on the part of Respondent Carnes. Rather, the Bureau contends that Respondent Carnes is liable solely because of his position as the President and Chief Executive Officer of Respondent Integrity Advance. *See* Notice of Charges (Dkt. 1) ¶ 9 (“Carnes was an active and involved CEO who was personally responsible for all of Integrity Advance’s policies and procedures. . . . Therefore, Carnes engaged in the deceptive and unfair practices alleged herein along with Integrity Advance.”). Thus, because Respondent Carnes’s liability is premised upon the conduct of company, a stay of the entire proceeding is warranted pending resolution of the D.C. Circuit’s decision in *PHH*.

For the foregoing reasons, Respondents respectfully request that the Court grant Respondents’ Motion to Stay Proceedings Pending Resolution of Related Case on Appeal and stay the instant proceeding until the D.C. Circuit issues its decision in *PHH v. CFPB Corp.*

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 25th day of May, 2016, I caused a copy of the foregoing Answer to be filed by electronic transmission (e-mail) with the 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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