UNITED STATES OF AMERICA
BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU

In the Matter of: **Phoenix Title Loans, L.L.C.,** **Respondent.**	**Administrative Proceeding** **File No. 2016-CFPB-0020**

THE CONSUMER FINANCIAL PROTECTION BUREAU'S OPPOSITION TO PHOENIX TITLE LOANS, L.L.C.'S
MOTION TO FILE RESPONSE BEYOND DEADLINE

The Consumer Financial Protection Bureau ("CFPB" or "Bureau") submits this Opposition to Phoenix Title Loans, L.L.C.'s ("Phoenix" or "Company") Motion to File Response Beyond Deadline and in support thereof submits as follows:

I. Introduction

The Bureau initiated this matter by filing a Notice of Charges on September 20, 2016. The Bureau accomplished service of the Notice of Charges on the registered agent for Phoenix on September 21, 2016. Respondent's Answer was due on October 5, 2016. On October 17, 2016, at 4:20 pm EST, Phoenix's General Manager, William Kidwell ("Mr. Kidwell"), left a voicemail for Enforcement Counsel in which he confessed he had "made a tremendous mistake" and had failed to file an Answer to the Notice of Charges. In addition, Mr. Kidwell indicated in his voicemail that he thought he had made a call to Enforcement Counsel previously, but after reviewing his records realized he had not done so. That same day at 5:04 pm EST, Enforcement Counsel received an email from

Mr. Kidwell, acknowledging receipt of the Notice of Charges and requesting that Enforcement Counsel "Please advise what, if anything that I can do at this point to show your office that we fully understand the weight of this action and that I do understand my responsibilities with regards to the filing of a timely response which I clearly did not do." Exhibit A. On October 19, 2016, at 8:01 EST, Enforcement Counsel responded and informed Mr. Kidwell that the Bureau was willing to discuss the possibility of settling this matter, but the Bureau opposed any request for an extension of time for Phoenix to file an Answer. Exhibit B. On October 21, 2016, Phoenix filed its motion requesting an extension of time to file an Answer.

II. Standard of review

Requests for extensions of time limits are governed by 12 C.F.R. § 1081.115. That section provides that the hearing officer may extend time limits "for good cause shown." 12 C.F.R. § 1081.115(a). Further, when considering a motion for extension of time, "the hearing officer should adhere to a policy of strongly disfavoring granting such motions, except in circumstances where the moving party makes a strong showing that the denial of the motion would substantially prejudice its case." *Id.* at § 1081.115(b). Further, in determining whether to grant any motion to extend time, the hearing officer must also consider five factors:

> (1) The length of the proceeding to date;
> (2) The number of postponements, adjournments or extensions already granted;
> (3) The state of the proceedings at the time of the motion;
> (4) The impact of the motion on the hearing officer's ability to complete the proceeding in the time specified by §1081.400(a); and
> (5) Any other matters as justice may require.

Id.

To establish good cause to excuse a delay in filing an answer, the moving party must show "that the delay was excusable under the circumstances" and that it "exercised due diligence in attempting to meet the filing deadline." *Zamot v. Merit Sys. Prot. Bd.*, 332 F.3d 1374, 1377 (Fed. Cir. 2003). In other words, the party seeking an extension of time must show "that a deadline cannot reasonably be met despite the diligence of the party seeking the extension." *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998). Thus, "the focus of the inquiry is upon the moving party's reasons for seeking" an extension of time. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (citation omitted). Indeed, "[i]f that party was not diligent, the inquiry should end." *Id.* The moving party does not need to show "an utter impossibility, but only that the delay was excusable in light of the particular facts and attending circumstances where diligence or ordinary prudence has been exercised." *Alonzo v. Dep't of Air Force*, 4 M.S.P.R. 180, 184 (1980).

III. Phoenix has not shown good cause for its failure to file a timely Answer

Phoenix seeks to justify its failure to timely respond to the Bureau's Notice of Charges by claiming that its general manager failed to calendar the matter and then forgot about the case due to an "honest human mistake." Resp't's Mot. to File Resp. Beyond Deadline 2 ("Resp't's Mot."). Phoenix does not argue that it was not "notified of the time limit or otherwise aware of it," nor does it claim "circumstances beyond [its] control" affected its ability to comply with the time limit. *Alonzo at 184*. In fact, by using the excuse that it failed to calendar the Answer due date, Phoenix essentially admits that it was not diligent in attempting to comply with the filing deadline. Simple failure to remember a date does not justify failing to comply with required timelines. Indeed, if

"'inadvertently' overlook[ing] is 'excusable neglect,' then the standard would be rendered meaningless." *Ramseur v. Barreto*, 216 F.R.D. 180, 182 (D.D.C. 2003); *see also Institute for Policy Studies v. U.S.C.I.A.*, 246 F.R.D. 380, 383-384 (D.D.C. 2007) (quoting *Lowry v. McDonnell Douglas Corp.* 211 F.3d 457, 464 (8th Cir. 2000) (noting that, if a simple failure to properly calendar a litigation deadline was deemed good cause "to excuse an untimely filing, 'it [would be] hard to fathom the kind of neglect that we would not deem excusable'").

Further, despite the Company's representations to the contrary, this is not a case where the Company immediately contacted the Bureau to resolve the matter. Phoenix did not make any effort to contact the Bureau until three and a half weeks after the Company was served with the Notice of Charges and nearly two weeks after its Answer was due. Although the Company represents in its motion that it missed the filing deadline because it had left messages for Enforcement Counsel and was waiting on a return call, Phoenix's first attempts to contact the Bureau via phone and email did not occur until October 17, 2016. Thus, the Company's justification that it forgot about the filing deadline because it was waiting to be contacted by the Bureau is misleading.

In considering the five factors set forth in 12 C.F.R. § 1081.115(b), the Bureau acknowledges that the proceeding is only one month old and no extensions have been previously granted, thereby making it unlikely that extending Phoenix's time to file an Answer would adversely affect the hearing officer's ability to adhere to the timeline found in 12 C.F.R. § 1081.400(a). But other factors weigh strongly against the Company's motion.

First, the motion was not filed until two full weeks after the Company's Answer was due. The Company called and emailed Enforcement Counsel on October 17, 2016

acknowledging its failure to contact the Bureau sooner and its failure to file an Answer. Even after learning on October 19, 2016 that it would need to request leave of the Court to file a late Answer and that the Bureau would oppose any request for extension of time, Phoenix still waited another two days before filing its motion. Not only has Phoenix failed to show good cause for its failure to timely file an Answer, it has also displayed a lack of good faith by attempting to mislead the hearing officer about when the Company first attempted to contact the Bureau about this case.

IV. Any prejudice caused by a denial of an extension of time is of Phoenix's own making.

Extensions of time should be "strongly disfavored" absent a showing that a denial of the extension would "substantially prejudice" the moving party's case. 12 C.F.R § 1081.115(b). Phoenix's failure to timely file an Answer is deemed to constitute a waiver of its right to appear and contest the allegations against it, *see* 12 C.F.R. § 1081.201(d), and the Bureau acknowledges that such a waiver could prejudice Phoenix's case. But a showing of substantial prejudice does not excuse failure to demonstrate good cause for an extension. Here, Phoenix has failed to establish even a modicum of good cause for its failure to timely file its Answer. Thus, any prejudice that might result from the denial of an extension of time is of Phoenix's own making. While Phoenix is currently proceeding *pro se*, it should not be treated as a typical unsophisticated *pro se* litigant. The Company is a financial service business that has been in business for nine years and must comply with myriad state and federal regulations regarding consumer lending. The members of Phoenix own at least ten other corporate entities, including multiple financial services businesses and property management companies. Further, the Company itself professes that it is "very much aware of the importance of the weight of the charges that have been

brought against" it, Resp't's Mot. 1, yet it failed to immediately respond to the charges or even to review them with counsel prior to filing its request for an extension of time. *See* Resp't's Mot. 2 (requesting the extension so that the Company can review the charges "possibly with counsel"). Thus, because Phoenix has caused the prejudice that would result from a denial of its motion and has failed to establish good cause for its request for an extension of time to file its Answer, its motion should be denied.

V. Conclusion

For the foregoing reasons, the Court should deny Phoenix's Motion to File Response Beyond Deadline.

Date: October 31, 2016

Respectfully submitted,

/s/ Rebecca Coleman

Rebecca Coleman
Amanda Krause
Enforcement Attorneys
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
(202) 435-7544 – Telephone
Rebecca.Coleman@cfpb.gov

Attorneys for Consumer Financial Protection Bureau

Certificate of Service

I hereby certify that on the 31st day of October 2016, I caused a copy of the foregoing Opposition to Phoenix Title Loans, L.L.C.'s Motion to File Response Beyond Deadline, to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), Administrative Law Judge Christine L. Kirby, and served by email on the Respondent at the following address:

William M. Kidwell
General Manager
Phoenix Title Loans, L.L.C.
Max.kidwell@atlascapitalllc.com

____/s/_____
Rebecca Coleman