

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

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In the Matter of:)	ORDER DIRECTING PARTIES TO
)	IDENTIFY ISSUES FOR REMAND
INTEGRITY ADVANCE, LLC and)	HEARING
JAMES R. CARNES,)	
)	
Respondents.)	

ORDER DIRECTING PARTIES TO IDENTIFY ISSUES FOR REMAND HEARING

On May 28, 2019, Director Kathleen L. Kraninger issued an *Order Directing a Remand to the Bureau’s Administrative Law Judge*. In the order, Director Kraninger concluded that, consistent with *Lucia v. SEC*, 138 S. Ct. 2044 (2018) and the Bureau’s Rules of Practice for Adjudication Proceedings, this matter may be remanded to the Bureau’s Administrative Law Judge (“ALJ”) without issuing a new notice of charges. She further specifically concluded, after examining relevant documentation, that I had been appointed as the Bureau’s ALJ in a manner consistent with the Appointment’s Clause of the Constitution. Director Kraninger thus ordered that this matter be remanded to me for a new hearing and recommended decision in accordance with Part 1081 of the Bureau’s Rules, 12 C.F.R. Part 1081. Director Kraninger further directed that I am to give no weight to, nor presume the correctness of, any prior opinions, orders, or rulings issued by Judge McKenna. Finally, Director Kraninger directed that I seek submissions from the parties regarding the conduct of further proceedings. Accordingly, I am now seeking the parties’ input regarding issues to be addressed in a new hearing.

Procedural Background:

In her May 28, 2019, Order, Director Kraninger set forth the relevant procedural history. I have also examined the list of filings in this matter. I note the following key dates and events:

Nov. 18, 2015:	Proceeding commenced with filing of a Notice of Charges by the Bureau’s Enforcement Counsel (“Enforcement”) (Doc. 1), naming Integrity Advance, LLC, and its chief executive officer, James R. Carnes, as respondents. The notice contained seven counts alleging violations of the Truth in Lending Act, Electronic Funds Transfer Act, and Consumer Financial Protection Act.
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- Apr. – Jul. 2016: Dispositive motions adjudicated by Judge McKenna:
1) Respondents’ Motion to Dismiss – Denied (Doc. 75);
2) Enforcement’s Motion for Summary Disposition – Granted in part and Denied in part (Doc. 111); and
3) Respondents’ Motion for Summary Disposition – Denied (Doc. 111).
- Jul. 19-21, 2016: Formal hearing conducted (Docs. 150-152).
- Sep. 27, 2016: Judge McKenna issued Recommended Decision (Doc. 176).
- Oct. 3, 2016: Respondents appealed Recommended Decision to Director Cordray (Doc. 177). Respondents relied, in part, on panel opinion in *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) with regard to statute of limitations issue. Based on Judge Randolph’s concurrence in *PHH*, Respondents also raised issue of whether Judge McKenna had been properly appointed in accordance with the Appointments Clause of the Constitution.
- Oct. 13, 2016: Enforcement appealed Recommended Decision to Director Cordray (Doc. 178).
- Jan. 11, 2017: Parties presented oral arguments in support of appeals to Director Cordray.
- Feb. 17, 2017: D.C. Circuit granted Bureau’s petition to rehear *PHH* en banc, and vacated panel’s 2016 opinion.
- Mar. 30, 2017: Director Cordray issued order holding resolution of appeal in abeyance pending D.C. Circuit’s en banc review of *PHH*.
- Jan. 31, 2018: En banc D.C. Circuit issued decision in *PHH*, 881 F.3d 75 (D.C. Cir. 2018), reinstating portion on which Respondents based their appellate statute of limitations’ argument. *PHH* did not resolve the Appointments Clause issue. However, the Supreme Court granted certiorari to address the issue in *Lucia v. SEC*.
- Mar. 15, 2018: Acting Director Mulvaney issued order placing this matter in abeyance pending the Supreme Court’s decision in *Lucia* (Doc. 210).
- Jun. 21, 2018: Supreme Court held in *Lucia v. SEC*, 138 S.Ct. 2044 (2018) that the SEC’s ALJ was an officer of the United States, not an employee, and thus had not been appointed in a manner consistent with the Appointments Clause of the Constitution.

- Jul. 12, 2018: Acting Director Mulvaney issued order directing parties to file a Joint Statement addressing the applicability to this proceeding of the *PHH* and *Lucia* decisions and the possibility of settlement (Doc. 211).
- Aug. 13, 2018: Parties filed Joint Statement (Doc. 212) in which they agreed that settlement was unlikely, that *Lucia* applies in this matter, and that Judge McKenna had not been properly appointed. Respondents argued that the matter should be dismissed because they were not “covered persons” subject to the Bureau’s authority, and because their alleged conduct occurred outside the statute of limitations. They further argued that if there were to be a new proceeding, the Bureau would have to file a new notice of charges. They also argued that the Director was not the “head of a department” and thus could not properly appoint an ALJ. Enforcement argued that the matter should be remanded to the Bureau’s ALJ and left to her to resolve the issues raised by Respondents.
- Sep. 12, 2018: Acting Director Mulvaney ordered additional briefing on whether the Bureau would need to file a new Notice of Charges and whether the Bureau’s ALJ had been properly appointed in accordance with the requirements set forth in *Lucia*.
- May 28, 2019: Director Kraninger issued Order Directing a Remand to the Bureau’s Administrative Law Judge, as discussed above, holding that no new Notice of Charges is required and the Bureau’s ALJ has been properly appointed. Director Kraninger declined to address Respondents’ arguments that this matter is outside the scope of the Bureau’s jurisdiction and is time-barred by the statute of limitations, stating that it is appropriate for these issues to be raised before and addressed by a constitutionally appointed ALJ, in the first instance.

Current Status:

With Director Kraninger’s May 28, 2019, Order, this matter is before me for a new hearing. In determining how to proceed, I am now soliciting the parties input as to the current status of this matter. Specifically, I am ordering the parties to confer and submit a joint statement addressing the following questions:

1. What are the current charges against Respondents? Is Enforcement still pursuing all of the charges set forth in the November 18, 2015, Notice of Charges?
2. Given the passage of time and developments in the law, is settlement now a possibility?

3. If settlement is not a possibility, what preliminary issues need to be addressed before we proceed to a formal hearing? Specifically, it appears to me that the Respondents' challenges to the Bureau's authority over them and its assertion that the claims are time-barred have never been adjudicated. Are these still relevant issues? Are there other preliminary issues?

Once counsel has addressed these questions, I will determine the schedule moving forward to resolve this matter. Note that I am not requiring the parties to submit briefs at this time, but merely identifying issues that may require future briefing.

The parties are **ordered** to submit a **Joint Statement** addressing these questions no later than **June 21, 2019**.

SO ORDERED this 3rd day of June, 2019.

Christine Kirby Digitally signed by Christine Kirby
Date: 2019.06.03 09:56:12
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HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 3rd day of June 2019 at
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Directing Parties to Identify Issues for Remand Hearing* 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
Consumer Financial Protection Bureau

Signed and dated on this 3rd day of June, 2019 at
Washington, D.C.