IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
and	)	
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT,	)	
Petitioners,	)	Misc. No. 03-MC-57
v.	)	
LELAND BRENDSEL,	)	
Respondent.	)	

PETITIONERS' OPPOSITION TO LELAND BRENDSEL'S EXPEDITED MOTION FOR STAY PENDING APPEAL OR, IN THE ALTERNATIVE, FOR A TEMPORARY EXTENSION

INTRODUCTION

Respondent Leland Brendsel has filed a motion seeking a stay pending his appeal of this Court's February 2, 2004 order enforcing an administrative subpoena against him. In the alternative, Respondent seeks a two-week extension of the deadline this Court set, requiring Respondent to comply with the subpoena within two weeks of the date of the Court's order. Petitioners oppose both of these requests. The stay should be denied because Respondent's likelihood of success on the merits is minimal, at best; Respondent will incur no significant irreparable injury; the delay would be a hardship for the Office of Federal Housing Enterprise Oversight ("OFHEO"); and the public interest favors denial of the stay. The extension of time should be denied because Respondent has had more than six months to prepare himself to give

testimony, and OFHEO has waited too long already to learn what Respondent knows about the restatement of earnings at the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "the enterprise").

ARGUMENT

I. PETITIONERS OPPOSE THE REQUEST FOR A STAY.

Respondent asserts that stays of subpoena enforcement orders pending appeal are regularly granted. Memorandum in Support of Leland Brendsel's Expedited Motion for Stay Pending Appeal or, in the Alternative, for a Temporary Extension (hereinafter Stay Memo.) at 3. The cases to which Respondent cites are simply examples of cases in which district or appellate courts chose to stay the enforcement of a subpoena pending an appeal. There also have been many cases in which courts have denied requests to stay the enforcement of subpoenas pending appeal. See, e.g., United States v. Am. Target Advertising, Inc., 257 F.3d 348, 350 (4th Cir. 2001) (noting that district and appellate courts denied motions to stay); United States v. Chevron U.S.A., Inc., 186 F.3d 644, 647 (5th Cir. 1999) (same); Nat'l Labor Relations Bd. v. North Bay Plumbing, Inc., 102 F.3d 1005, 1007 (9th Cir. 1996) (same); Reich v. Nat'l Eng'g & Contracting Co.,13 F.3d 93, 95 (4th Cir. 1993) (noting that district court declined to stay its order pending appeal); FTC v. Browning, 435 F.2d 96, 98 n.1 (D.C. Cir. 1970) (same).

What determines whether courts stay enforcement of subpoenas pending appeal is the application to the facts of the case of four factors, as described in Long v. Robinson, 432 F.2d 977 (4th Cir. 1970).

> Briefly stated, a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4)

that the public interest will be served by granting the stay.

Id. at 979. Application of these four criteria to the facts of this case leads inexorably to the conclusion that this motion for a stay should be denied.

The first factor is likelihood of success on the merits. Respondent does not even claim that it is likely that he will succeed on the merits. Rather, he argues that he has raised "important and substantial arguments." Stay Memo. at 4. The stay should be denied where the party seeking the stay has not met his burden of showing that he will likely prevail on the merits. Cf. EEOC v. Lockheed Martin Corp., Aero & Naval Sys., 116 F.3d 110, 112 (4th Cir. 1997). Respondent's assertion cannot be said to meet that burden. Furthermore, it is not at all likely that Respondent will prevail on the merits. As has been articulated in the briefs filed in this Court, the subpoena should be enforced because 1) it was issued for a lawful purpose within the statutory authority of the agency that issued it; (2) the agency has satisfied statutory requirements of due process; (3) the documents and testimony requested are relevant to that purpose; and (4) the subpoena demand is reasonable and not unduly burdensome. Respondent's attempts to argue that the examination is not a safety and soundness examination, that the examination is over, that the basis for seeking the testimony was pretextual, or that the subpoena is otherwise outside of OFHEO's authority are unavailing, for the reasons articulated in this Court's February 2, 2004 opinion. Nor, given this Court's thorough rejection of each of his arguments, can it be said that Respondent even raises "important and substantial arguments."

The second factor is irreparable injury. Respondent claims that having to provide testimony to OFHEO constitutes irreparable injury because the purpose of the appeal is to prevent the giving of such testimony. Stay Memo. at 4. However, if Respondent testifies, that

does not necessarily constitute irreparable harm or moot his appeal. See Reich v. Muth, 1993 WL 741997 *4-5 (E.D. Va. July 28, 1993), aff'd 34 F.3d 240 (4th Cir. 1994). Certainly with respect to the documents sought pursuant to the subpoena, Respondent's appeal would not be mooted by production at this time. See United States v. Am. Target Advertising, Inc., 257 F.3d 348, 350 n.1 (4th Cir. 2001) (citing Church of Scientology of Cal. v. United States, 506 U.S. 9, 13 (1992)). If Respondent were successful on appeal, the documents could be returned to him. See EEOC v. Optical Cable Corp., 1998 WL 236930 *2-3 (W.D. Va. May 1, 1998).

The third factor is harm to other parties. Contrary to Respondent's contention, OFHEO will suffer harm if the stay issues. OFHEO has been seeking this testimony from Respondent since July. See Declaration of David W. Roderer ¶¶ 10-16.[1] It has already been forced to wait far too long for the information Respondent possesses.[2] Freddie Mac and OFHEO are currently in the process of trying to make reforms, as seen in the Report of the Special Examiners and in the Consent Order. The information that Respondent has with regard to the policies, practices, and events leading up the delay and restatement of earnings could play a vital role in making these reforms successful. See 2d Roderer Decl. ¶ 3-4, 8. If OFHEO is forced to wait months or,

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[1] The first declaration of David W. Roderer was attached to Petitioners' opening papers. It will be cited as Roderer Decl. The second declaration of David Roderer was attached to Petitioners' reply brief. It will be cited as 2d Roderer Decl.

[2] Respondent contends that OFHEO has not pursued his testimony with any urgency. Stay Memo. at 5 n.1. This statement is belied by the history of this subpoena enforcement. OFHEO attempted to negotiate an agreeable date with Respondent from July until October. Roderer Decl. ¶¶ 10-24. When that failed, OFHEO issued the October 10 subpoena. Id. at 25. Respondent failed to appear on October 27, and OFHEO filed the enforcement proceeding on December 3. Id. at ¶ 27. The intervening month's delay was necessitated by the introduction of the Department of Justice as litigator and the preparation of the opening documents filed in this Court.

potentially, much longer for a ruling by the Fourth Circuit, it will be much more difficult to use the information. In addition, if Respondent is aware of practices that are continuing of which OFHEO may as yet be unaware, continued delay will interfere with OFHEO's ability to regulate Freddie Mac properly and may impede Freddie Mac's safety and soundness as a whole. Furthermore, OFHEO is now in the process of examining the role of third parties and determining whether actions need to be taken against such parties. See 2d Roderer Decl. ¶ 4. If OFHEO does not learn now what Respondent knows about third parties, that examination will be far less productive than it could otherwise be. In short, Respondent possesses extremely useful information that is highly relevant to OFHEO's ability to perform as a regulator, and delays have been and will continue to be harmful. See Fed. Maritime Comm'n v. NY Terminal Conf., 373 F.2d 424, 426 (2d Cir. 1967) ("The investigation has thus been stalled in its tracks for eight months, quite needlessly as this opinion shows. We commend Judge Levet for declining to grant a stay of his order enforcing the subpoenas; it is apparent that, on our part, we must look on motions for stays of administrative subpoenas pending appeal with even more circumspection that [sic] in the past.").

The fourth factor is the public interest. Contrary to Respondent's assertion that there is a strong public interest in ensuring that OFHEO has not exceeded its statutory authority, Stay Memo. at 5, the public interest disfavors a stay. If the subpoena is enforced immediately, Respondent's main concern is that he will be forced to provide testimony and documents, in which scenario, the public interest is minimal. Balanced against that is the fact that Respondent, as the former Chief Executive Officer and Chairman of the Board of Freddie Mac possesses information that is important to an ongoing examination of the safety and soundness of Freddie

Mac. Roderer Decl. ¶¶ 29-30; 2d Roderer Decl. ¶¶ 3-5. Freddie Mac plays an important public role in the secondary mortgage market. Roderer Decl. ¶ 5. The public has far more interest in ensuring that the regulation of Freddie Mac is based upon accurate information and performed in a timely manner than in whether Respondent is required to give testimony. Furthermore, Respondent's argument hinges on his claim that OFHEO has exceeded its authority. As has been made clear in the briefs in this case, as well as in this Court's opinion, OFHEO did not exceed its authority in issuing the subpoena. Thus, there is no potential public interest on the side of Respondent, but there is substantial public interest on the side of Petitioners.

II. PETITIONERS OPPOSE RESPONDENT'S REQUEST FOR AN EXTENSION OF TIME.

Respondent alternatively requests a two-week extension of time to permit Respondent to seek a stay from the Fourth Circuit and to prepare for testimony. Stay Memo. at 5-6. The history of this administrative subpoena is a series of attempts by Respondent to stall and delay providing testimony to OFHEO in every manner possible. Cf. Roderer Decl. ¶¶ 10-27. This request for an additional two weeks is part and parcel of that pattern. This Court saw fit to give Respondent fourteen days in which to comply with its Order. That was a fair and reasonable quantity of time, and there is no reason to provide Respondent with any more.

With respect to the argument that Respondent needs the time to seek a stay from the Fourth Circuit, Petitioners refer the Court to the arguments made in the first part of this brief explaining why Respondent is not entitled to a stay. If this Court denies Respondent's request for a stay, his burden to convince the Fourth Circuit to issue a stay would be even higher. See Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970) ("Ordinarily, when a party seeking a stay

makes application to an appellate judge following the denial of a similar motion by a trial judge, the burden of persuasion on the moving party is substantially greater than it was before the trial judge."); accord Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., 550 F.2d 189, 193 (4th Cir. 1977). This Court is not required to grant extra time to permit Respondent to engage in a futile attempt at seeking a stay from the Fourth Circuit, nor should it.

With respect to Respondent's contention that he needs time to prepare his testimony, Petitioners would note that he has had almost seven months since OFHEO first expressed interest in obtaining his testimony. That should be more than sufficient preparation time. Respondent alleges the existence of a February 10 deadline in the administrative proceeding. Stay Memo at 6. This suggests that Respondent will have from February 10 through February 15 available to prepare for the February 16 deposition, as the significant motions will have been completed and filed. There is no reason offered why that amount of time is insufficient.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court deny Respondent's request for a stay or for an extension of time.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

PAUL J. MCNULTY
United States Attorney

DENNIS SZYBALA, Va. Bar 22785

Assistant United States Attorney

OF COUNSEL:
DAVID FELT
OFHEO
1700 G Street, N.W.
Washington, D.C. 20552
Tel: (202) 414-3750

ARTHUR R. GOLDBERG, D.C. Bar 180661
MARCIA N. TIERSKY, Ill. Bar 6270736
Attorneys, Department of Justice
20 Mass. Ave., N.W., Room 7206
Washington, D.C. 20530
Tel: (202) 514-1359
Fax: (202) 616-8470
E-mail: marcia.tiersky@usdoj.gov
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2004, a copy of Petitioners' Opposition to Leland Brendsel's Expedited Motion for Stay Pending Appeal or, in the Alternative, for a Temporary Extension was sent by first class mail, postage prepaid, to:

Brendan V. Sullivan, Jr.
Williams & Connolly, LLP
725 12th Street, N.W.
Washington, D.C. 20005

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