IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	)	
and	)	
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT,	)	
Petitioners,	)	No. 03-3440 (DKC)
v.	)	
VAUGHN CLARKE,	)	
Respondent.	)	

PETITIONERS' OPPOSITION TO VAUGHN CLARKE'S EXPEDITED MOTION FOR STAY PENDING APPEAL

INTRODUCTION

Respondent Vaughn Clarke has filed a motion seeking a stay pending his appeal of this Court's February 6, 2004 order enforcing an administrative subpoena against him. Petitioners oppose this request. 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.

ARGUMENT

Respondent asserts that stays of subpoena enforcement orders pending appeal are regularly granted. Memorandum in Support of Respondent Vaughn Clarke's Expedited Motion for Stay Pending Appeal (hereinafter Stay Memo.) at 2. 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).[1]

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 of his claim that the subpoena should not be

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[1] In the related case of United States v. Brendsel, No. 03-MC-57 (E.D. Va.), Respondent Leland Brendsel similarly sought a stay of Judge Leonie Brinkema's February 2, 2004 order enforcing OFHEO's administrative subpoena. That Respondent also sought a two-week extension of time as an alternative remedy. Judge Brinkema denied both the motion for a stay and the request for an extension of time. See Exhibit A.

enforced. Rather, he argues that he has raised "important and substantial arguments." Stay Memo. at 3. 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 6, 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."

Respondent also argues that he has a likelihood of success on the merits on his request to take discovery. Stay Memo. at 3. However, Petitioners provided a thorough explanation of why Respondent is not entitled to any discovery in this matter, and this Court concluded that discovery is not warranted. See Pets' Reply at 8 n.5; Pets' Reply to Letter at 5-9; Opinion of February 6, 2004 at 12 n.7. Respondent offers no explanation as to why the Fourth Circuit would be any more likely to find in his favor on this matter than this Court was.

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 3-4. 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. See Stay Memo. at 4. OFHEO has been seeking this testimony from Respondent since July. See Declaration of David W. Roderer ¶¶ 19-12.[2] It has already been forced to wait far too long for the information Respondent possesses.[3] The Federal Home Loan Mortgage Corporation ("Freddie Mac") and OFHEO are currently in the process of trying to institute reforms, as seen in the Report of the Special Examiners and in the Consent

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[2] 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.

[3] Respondent contends that OFHEO has not pursued his testimony with any urgency. Stay Memo. at 4. 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. ¶¶ 9-20; 2d Roderer Decl. ¶ 8. When that failed, OFHEO issued the October 10 subpoena. Roderer Decl. at 21. Respondent failed to appear on October 27, and OFHEO filed the enforcement proceeding on December 3. Id. at ¶ 22. 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.

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. ¶ 4-5, 8. If OFHEO is forced to wait months or, 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 Financial Officer and Executive Vice President 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. ¶¶ 23-26; 2d Roderer Decl. ¶¶ 4-5, 9. 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.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court deny Respondent's request for a stay.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

THOMAS MICHAEL DIBIAGIO
United States Attorney

ARIANA ARNOLD, Maryland Bar # 23000
Assistant United States Attorney

/s/

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

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