IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. FLEETCOR TECHNOLOGIES, INC., and RONALD CLARKE, Defendants.	:	CIVIL ACTION NO. 1:19-cv-5727-AT

ORDER

In April of 2021, the Supreme Court held in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021) that the Federal Trade Commission cannot obtain equitable monetary relief under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), the provision under which the FTC brings its claims in this action. In the aftermath of this tidal wave of change to over 40 years of prior precedent and practice, the FTC filed the instant Motion to Stay or, in the Alternative, Voluntarily Dismiss [Doc. 182]. Defendants FleetCor Technologies, Inc. and its CEO Ronald Clarke staunchly oppose this motion. After the benefit of full briefing and a hearing on January 7, 2022, and for the reasons that follow, the Court **DENIES** the FTC's Motion in full.

I. Background

In December of 2019, the FTC filed this action against Defendants FleetCor and Clarke under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), alleging that FleetCor and Clarke made deceptive representations to customers and charged hidden, unauthorized fees in connection with FleetCor's "fuel card" products, all in violation of Section 5 of the FTC Act. (*See generally* Complaint, Doc. 1.) The FTC initially sought both injunctive and equitable monetary relief in this Court.[1]

In April of 2021, the Supreme Court held in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021) that the FTC does not have statutory authority to obtain equitable monetary relief under Section 13(b) of the FTC Act, contrary to then-binding precedent in nearly every court of appeals, including the Eleventh Circuit. To preserve the possibility of obtaining monetary relief for injured consumers, the FTC now asks the Court to stay this action while it pursues claims against FleetCor and Clarke in the agency's administrative litigation process, after which the FTC would be authorized legally to return to this federal court to seek monetary relief under Section 19(a)(2) of the FTC Act.[2] In line with this request,

[1] Under Section 13(b) of the FTC Act, the FTC may seek to obtain a temporary restraining order, a preliminary injunction, or, "in proper cases," a court-ordered permanent injunction directly from a district court without any prior administrative adjudication. *See AMG*, 141 S.Ct. at 1346 (citing 15 U.S.C. § 53(b)).

[2] The FTC Act permits the Commission to use both its own administrative proceedings and court actions in exercising its authority to prevent unfair methods of competition and unfair or deceptive acts or practices. *See AMG*, 141 S.Ct. at 1345. Under Section 5 of the Act, the Commission may file a complaint against a claimed violator, adjudicate the claim before an Administrative Law Judge, who may—after conducting a hearing an issuing a report—issue a cease-and-desist order. *Id.* at 1346 (citing 15 U.S.C. § 45(b)). The defendant may elect to seek review before the full Commission and eventually in a court of appeals. If judicial review upholds the Commission or

the FTC filed an administrative complaint against Defendants before the agency on August 11, 2021. (*See* Administrative Complaint, Doc. 182-5.) That proceeding is currently stayed to allow this Court to decide the FTC's instant motion in this action.

In the alternative to staying this case, the FTC asks the Court to dismiss this action without prejudice so that it may pursue the same course—litigating liability in the administrative proceeding before returning to federal court to seek money damages under Section 19(a)(2) of the FTC Act—albeit with a less favorable statute of limitations period.

The procedural timeline of this case is important in providing context for the discussion below of the pending motion. As noted, this action was filed in December 2019. No motion to dismiss was filed and the parties proceeded through discovery throughout 2020 and into the beginning of 2021. That discovery was extensive. As discussed below, Defendants produced over 1.4 million pages of documents, over 12 witnesses for deposition, and over 6,700 gigabytes of FleetCor's transactional data. (Declaration of Benjamin Mundel, Doc. 183-1 ¶ 7; Declaration of Robert Stonebraker, Doc. 183-2 ¶ 6).

On April 16, 2021, the FTC filed its Motion for Summary Judgment (Doc. 122) accompanied by more than 250 exhibits. Less than a week later, on April 22,

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the FTC ruling is not appealed, the cease-and-desist order becomes final, and Section 19 of the Act then authorizes the FTC to seek consumer redress in the form of a refund of money or return of property before a district court. *Id.* (citing 15 U.S.C. § 57b). However, the consumer relief available under Section 19 can only be sought, under present circumstances, where the Commission has issued a final cease-and-desist order applicable to the defendant. *Id.*

the Supreme Court's decision in *AMG* was issued, foreclosing the possibility of equitable monetary relief for the FTC on the current claims.

On May 17, 2021, Defendants then filed a cross Motion for Partial Summary Judgment and Opposition to the FTC's Motion for Summary Judgment (Doc. 161). On June 18, the FTC filed a reply (Doc. 167) as well as a Motion to Exclude the Expert Testimony of Yoram (Jerry) Wind (Doc. 171). Dr. Wind is one of three experts proffered by Defendants in support of their summary judgment arguments. Defendants submitted an additional reply in support of their partial summary judgment motion (Doc. 178) and responded to the FTC's *Daubert* motion (Doc. 179). The FTC replied in support of its motion to exclude on August 2, 2021 (Doc. 181).

Finally, the FTC then filed the instant Motion to Stay or, in the Alternative, Voluntarily Dismiss on August 13, 2021, the day after filing its administrative complaint against Defendants. FTC counsel has indicated that the decision to file the administrative complaint against Defendants was made by the Commission on August 10, 2021. FTC counsel informed Defendants of this decision that same day, August 10. (*See* Email Correspondence, Doc. 184-7.)

In response to the FTC's instant motion, Defendants argue that they will suffer legal prejudice if the Court grants either of the FTC's requests. The Court discusses the parties' positions below.

II. The FTC's Request to Stay Proceedings

The FTC first argues that the Court should stay the action pending the outcome of the administrative proceeding, which both involve "identical allegations," because the stay would benefit injured consumers, the general public, the FTC, and the Court. (Brief in Support of Motion to Stay ("Mot."), Doc. 182-1 at 5-6.) The FTC filed the administrative complaint on August 11, 2021 and "anticipates that the administrative proceedings will run promptly" such that the Court would reopen this case on or around August 1, 2022. (*Id*. at 6.) Defendants respond that: a stay under present circumstances is unprecedented, any stay would last years (not months), the request is for an impermissible purpose to circumvent statute of limitations constraints, and a stay would be prejudicial to Defendants and duplicative considering that the parties have already submitted summary judgment briefs. (Def. Resp., Doc. 183 at 23-25.)

"A variety of circumstances may justify a district court stay pending the resolution of a related case in another court." *Ortega Trujillo v. Conover & Co. Communications, Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000). A district court has "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Indeed, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254-55. "How this can best be done calls for the exercise of

judgment, which must weigh competing interests and maintain an even balance." *Id.*

Thus, where a district court exercises its discretion to stay a case pending the resolution of a related proceeding, the court "must properly limit the scope of the stay." *Ortega*, 221 F.3d at 1264*; CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 (11th Cir. 1982) (explaining that the stay must not be "immoderate"). In considering whether a stay is "immoderate," courts examine the scope of the stay, including its length, and the reasons for the stay. *Ortega*, 221 F.3d at 1264; *see also, Landis*, 299 U.S. at 254 (noting that a stay must be "kept within the bounds of moderation" and thus a "stay of indefinite duration in the absence of a pressing need will constitute an abuse of discretion"). Courts should also consider the "public welfare" in determining whether to stay proceedings. *Clinton*, 520 U.S. at 707 (citing *Landis*, 299 U.S. at 254). "The proponent of the stay bears the burden of establishing its need." *Id.* at 708. Further, the proponent of the stay "must make out 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 some one else." *Landis*, 299 U.S. at 255.

Here, the burden is on the FTC to establish the need for the stay. *Clinton*, 520 U.S. at 708. Both in briefing and at the January 7, 2022 hearing, the FTC argued that its purpose in seeking a stay is to protect and compensate thousands of allegedly injured consumers for significant money losses—in the amount of more than $ 550 million, according to the FTC—caused by Defendants' allegedly

deceptive and misleading practices. (*See* Reply, Doc. 184 at 2.) The FTC further contends that the most efficient way to vindicate this public interest is through a stay in this Court, followed by agency adjudication, and then a return to this Court for an assessment of a Section 19 damages action. (*Id.*)

No doubt the FTC is motivated by a meaningful objective. Specifically, the Court recognizes the FTC's significant and compelling public interest in providing remediation to injured consumers on a timely basis. And yet, in weighing the options and competing interests at stake, it is not at all clear to the Court that a stay will provide the most effective or expeditious route for addressing those important public interests. At the January 7 hearing, the Court inquired about the possibility of the FTC pursuing administrative action under Section 5 of the FTC Act *after* this Court has ruled on the merits of the pending motions for summary judgment and, if necessary, conducted a trial. The Court questioned whether, under this proposed course, the FTC could, after agency adjudication, then return to district court to seek monetary relief under Section 19(a)(2). In response, the FTC cited to no barrier that would preclude it from advancing in this manner. Considering this possibility, the Court does not believe that a stay is the most appropriate avenue forward.

The Court also finds that the timeline of necessary future events weighs against a stay. While the FTC envisions that the stay would last only until August of 2022, the Court believes that this is far too optimistic and not a realistic calculation. Under the FTC's proposal, the steps required before this action could

be reopened are many: the Eleventh Circuit would potentially have to address any appeal of the Court's decision to stay the case; the agency proceeding would have to be reopened; the agency would then be required to rule on a potential motion to dismiss in the administrative action; the parties might have to engage in additional discovery; the parties would have to brief, and the agency then decide, summary judgment; a trial would have to be conducted in the administrative proceeding; and then any appeals of the agency's determination would have to be heard and decided by an appellate court. In the Court's view, this series of events could take years, and would certainly take longer than the seven months anticipated by the FTC.[3] In light of these realities, a stay could cross into "immoderate" territory quite quickly. *Ortega*, 221 F.3d at 1264*; CTI-Container,* 685 F.2d at 1288; *Landis*, 299 U.S. at 254 (noting that a "stay of indefinite duration in the absence of a pressing need will constitute an abuse of discretion").

In seriously weighing the competing interests at stake here, the Court also has considered that, when questioned, the FTC was unable to provide the Court with an even somewhat comparable case or circumstance in which any federal agency sought to stay advanced proceedings in one forum to allow the same claims or conduct to proceed in a later-filed proceeding. While the Court is cognizant that the FTC could not have divined how the Supreme Court's decision in *AMG* might shake the foundations of this case, especially at the time this action was filed in

[3] The Court notes that the FTC's briefing discusses a timeline involving a trial beginning in the administrative proceeding on January 25, 2022, a date that has now passed. (Mot. at 4.)

December of 2019, Supreme Court decisions have in the past caused comparable quakes to an agency's prosecution. Similarly, the Court notes that—based on its own research as well as representations from the FTC—it appears that in no other action is the FTC pursuing the strategy it chases here of requesting a stay to litigate liability before the agency only to return to district court seeking monetary relief.

For all of these reasons, the FTC fails to demonstrate that a stay is appropriate. The Court, in its discretion, **DENIES** the FTC's Motion to that extent.

III. The FTC's Request for Dismissal Without Prejudice

In the alternative to requesting a stay, the FTC seeks dismissal of this action without prejudice. This is appropriate, according to the FTC, because (1) voluntary dismissal will not legally prejudice Defendants and (2) the FTC's request is made in good faith. (Mot. at 8-10.) In vehement opposition, Defendants argue that "dismissal at this late stage would be prejudicial to FleetCor's substantial rights" since it would: (1) deprive FleetCor of an absolute damages defense; (2) deprive Defendants of a neutral decisionmaker; (3) unfairly burden Defendants considering the advanced stage of litigation, including the time and resources already spent; and (4) unfairly benefit the FTC to restart its case in a new forum with knowledge of Fleetcor's defensive strategy. (Resp. to Mot. at 8-14.) Defendants secondarily argue that the FTC seeks dismissal in bad faith and that the reasons provided by the FTC are pretextual and would inefficiently extend the litigation. (*Id.* at 15-20.)

A plaintiff seeking to voluntarily dismiss a case after the opposing party has answered must obtain either a stipulation of dismissal signed by all parties or a court order. *See* Fed. R. Civ. P. 41(a)(1)-(2). Federal Rule of Civil Procedure 41(a)(2) provides that "an action may be dismissed at the plaintiff's request by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). A district court enjoys broad discretion in determining whether to allow a voluntary dismissal under Rule 41(a)(2). *See Pontenberg v. Boston Scientific Corp.*, 252 F.3d 1253, 1255 (11th Cir. 2001) (citing *McCants v. Ford Motor Co., Inc.* 781 F.2d 855, 857 (11th Cir. 1986) (noting that "[d]iscretion means the district court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.")). Generally, a voluntary dismissal "should be granted unless the defendant will suffer clear legal prejudice other than the mere prospect of a second lawsuit." *Arias v. Cameron*, 776 F.3d 1262, 1268 (11th Cir. 2015) (citing *Pontenberg*, 252 F.3d at 1255-56); *McCants,* 781 F.2d at 857 ("[I]t is no bar to a voluntary dismissal that the plaintiff may obtain some tactical advantage over the defendant in future litigation.").

"The purpose of Rule 41(a)(2) 'is primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.'" *Arias*, 776 F.3d at 1268 (citing *McCants,* 781 F.2d at 856). The crucial question to be determined is, "[w]ould the defendant lose any substantial right by the dismissal." *Pontenberg*, 252 F.3d at 1255-56 (quoting *Durham v. Florida East Coast Ry. Co.,* 385 F.2d 366, 368 (5th Cir. 1967)). "Another relevant consideration

is whether the plaintiff's counsel has acted in bad faith." *Goodwin v. Reynolds*, 757 F.3d 1216, 1219 (11th Cir. 2014). However, while the court "should keep in mind the interests of the defendant, for Rule 41(a)(2) exists chiefly for the protection of defendants, the court should also weigh the relevant equities and do justice between the parties in each case." *Arias*, 776 F.3d at 1269 (internal citation omitted).

Applying this standard, the Court turns to Defendants' arguments that they will suffer the loss of substantial rights if this case is dismissed without prejudice.

First, Defendants contend that a dismissal without prejudice would deprive them of the absolute defense *AMG* has now provided—that the FTC can obtain no equitable monetary relief under Section 13 of the FTC Act. (Def. Resp. at 8-9.) In reply, the FTC argues that Defendants will not suffer legal prejudice because they still have available the defense *AMG* has afforded under Section 13 of the FTC Act in the administrative proceeding; instead, any monetary relief would be sought under a different provision of law, Section 19(a)(2), before a district court. (Pl. Reply, Doc. 184 at 9-10.)

On this issue, neither side has provided a case with comparable circumstances. Indeed, Defendants rely mostly on cases in which courts held that the defendant in fact ***did not*** suffer legal prejudice. *See e.g., Rosenthal v. Bridgeston/Firestone, Inc.*, 217 F. App'x 498, 500 (6th Cir. 2007) (granting motion to dismiss without prejudice, albeit with condition of payment of attorneys' fees); *Reader v. HG Staffing, LLC*, 2019 WL 1177958, at *3 (D. Nev. Mar. 13, 2019)

(finding that defendants *would not* suffer plain legal prejudice but dismissing case with prejudice because case had been pending for 5 years and plaintiffs were pursuing different claims in state court); *Bright v. Tunica Cty. School Dist.*, 2016 WL 4014966, at *2 (N.D. Miss. July 26, 2016) (finding that defendant *would not* suffer legal prejudice because it was not entitled to Eleventh Amendment immunity regardless of forum, and granting plaintiff's motion to dismiss without prejudice); *Kern v. TXO Production Corp.*, 738 F.2d 968, 971-72 (8th Cir. 1984) (finding that district court did not abuse discretion in granting motion to dismiss without prejudice but did abuse discretion in failing to condition dismissal on payment of attorneys' fees).

Under different circumstances, numerous circuits have adopted the position that the loss of a statute of limitations defense constitutes *per se* legal prejudice. *See e.g., Wojitas v. Capital Guardian Trust Co.*, 477 F.3d 924, 927028 (7th Cir. 2007); *Grover ex rel. Grover v. Eli Lilly & Co.*, 33 F.3d 716, 719 (6th Cir. 1994); *Metro. Fed. Bank of Iowa F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1262 (8th Cir. 1993); *Phillips v. Illinois Cent. Gulf R.R.,* 874 F.2d 984 (5th Cir. 1989). However, the Eleventh Circuit has expressly *not* adopted such a *per se* rule, relying instead on prior precedent counseling consideration of the equities:

> The fact that *McCants* does not render loss of a statute-of-limitations defense *per se* prejudice does not mean that a party that could suffer the loss of such a defense upon a voluntary dismissal without prejudice will necessarily be at the losing end of a motion for voluntary dismissal without prejudice. Rather, *McCants* allows for a motion for voluntary dismissal without prejudice to be denied if a statute-of-

> limitations defense could be lost, provided that consideration of all of the equities in the case warrant such a conclusion.

Arias, 776 F.3d at 1275 (finding that district court did not abuse its discretion in granting motion for voluntary dismissal with conditions that plaintiff pay attorneys' fees and costs incurred in the litigation, if she refiled).

In short, the authority provided by the parties, while somewhat instructive, is not terribly helpful in the peculiar circumstances presented here. In assessing Defendants' argument that it is substantially prejudiced by the loss of the "*AMG* defense," the Court considers that this defense—newly available—would not be "stripped" from Defendants in an administrative proceeding. It would simply be irrelevant because Section 13(b), the relevant statutory provision in *AMG*, is not at issue in the administrative action, nor would it be asserted in any future district court case in which the FTC would seek damages under Section 19 of the FTC Act. This is therefore a different situation than cases involving the loss of a statute of limitations defense as to the same claim. On balance, therefore, the Court finds that Defendants' putative loss of the *AMG* defense does not constitute legal prejudice.

Besides the loss of the defense to an award of equitable monetary relief, Defendants argue that they will be prejudiced by the loss of a neutral decision-maker. (Def. Resp. at 9-12.) Specifically, Defendants cite due process concerns, if liability were to be determined by the FTC itself (sitting as "prosecutor and judge") as opposed to an Article III judge, especially where summary judgment is already

briefed and the FTC has twice voted to authorize suit against FleetCor. (*Id.*) The FTC responds with authority supporting the legitimacy and lawfulness of the administrative process generally. *See FTC v. Cement Institute*, 333 U.S. 683, 702-03 (1948) (holding that it was not a violation of due process for Commission to adjudicate proceedings after having investigated alleged unfair practices and having expressed view that certain industry-wide practices were illegal); *Withrow v. Larkin*, 421 U.S. 35, 58 (1975) ("The fact that the same agency makes [an initial charge and the ultimate adjudication] in tandem and that they relate to the same issues does not result in a procedural due process violation.").

As the FTC's cited authority demonstrates, the "combination of investigative and adjudicative functions does not, without more, constitute a due process violation." *Withrow*, 421 U.S. at 58. Indeed, to find that the FTC cannot adjudicate cases the agency has investigated and prosecuted would run contrary to the FTC Act itself and "defeat the congressional purposes" which prompted the passage of the Act. *Cement Institute*, 333 U.S. at 701. Here, the FTC could have chosen to file the case initially as an administrative action, which would have been entirely proper. The Court doubts Defendants would have raised the same concerns under those circumstances.

Yet, this case is also in an atypical posture, as the administrative complaint was filed after discovery concluded and after summary judgment briefs were filed. As such, this is not the average administrative action where the agency first files charges, the parties then conduct discovery, and only after that is the evidence

assessed. Nonetheless, despite the relative uniqueness of the posture of this case, the Court will not assume bias on the part of the Commission members. *See United States v. Morgan*, 313 U.S. 409, 421 (1941) (noting that those charged by Congress with adjudicatory functions are "assumed to be [individuals] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances"). Similarly, as noted above, the structure of an agency that engages in both investigative and adjudicate functions is commonly used within the federal government and is not inherently improper. *Withrow*, 421 U.S. at 58.

Nor does this structure strip the administrative process of appropriate review protections, despite slight differences in procedure. Defendants point to different appellate standards of review for factual findings made by this Court versus the agency. However, both are deferential. *See Smith v. Haynes & Haynes P.C.*, 940 F.3d 635 (11th Cir. 2019) (noting that court of appeals reviews district court's findings of fact for clear error); *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1227 (11th Cir. 2018) (noting that court of appeals reviews FTC's findings of fact under the "substantial evidence" standard which requires "more than a mere scintilla" of evidence "but less than a preponderance"; *see also, AMG*, 141 S.Ct. at 1346 (explaining that, on review by a court of appeals, "findings of the Commission as to the facts (if supported by the evidence) shall be conclusive") (citing 15 U.S.C. § 45(c)). Defendants also argue that the Federal Rules of Evidence, and specifically the hearsay exception, would not apply in administrative adjudication before the

FTC. Yet, Defendants have not articulated how in particular this difference would alter an evidentiary assessment in this case. In short, it appears to the Court that these minor procedural differences could require some litigation changes in an administrative litigation process and adjudication but would not require serious reshaping of either side's presentation of the relevant evidence.

Defendants next argue that they would be harmed by a dismissal without prejudice at this juncture because they have spent significant time and resources litigating this case, gearing their legal strategy specifically to the procedures and standards applicable to this proceeding. They further assert that much of work will have to be redone in the administrative proceeding. (Def. Resp. at 12-14.) The FTC replies that Defendants' legal expenditures of time and money are insufficient to show legal prejudice and that, in any event, Defendants' legal work to date would retain its value. (Pl. Reply at 8-9.)

The Eleventh Circuit has "declined to adopt a bright-line rule precluding a district court from granting a Rule 41(a)(2) voluntary dismissal without prejudice when a motion for summary judgment is pending." *Arias*, 776 F.3d at 1273. Nevertheless, it is clear from past cases that courts often consider the advanced stage of the litigation as well as the costs of litigation in weighing the equities and determining whether to dismiss without prejudice, and if so, whether to attach monetary conditions on that dismissal. *See id.* (discussing late stage of proceedings and noting that the district court's attachment of conditions of payment of attorneys' fees and costs of litigation upon refiling weighed in favor of affirmance);

Fisher v. Puerto Rico Marine Management, Inc., 940 F.2d 1502, 1503 (11th Cir. 1991) (affirming district court's denial of motion to dismiss without prejudice where plaintiff sought to dismiss and add new theories of recovery and new defendant, explaining that parties had spent much time and expense on discovery and trial preparation and noting that some additional discovery might be required if case was re-filed); *Stephens v. Georgia Dept. of Transp.*, 134 F. App'x 320, 323 (11th Cir. 2005) (affirming district court's denial of motion to dismiss without prejudice where case was two years old, numerous motions had been filed, extensive discovery produced, and motions for summary judgment were pending).

This case was brought in December of 2019. No motion to dismiss was filed and the parties engaged in extensive discovery. Defendants assert that they have expended over $10.3 million dollars in fees and costs defending this suit since it was filed. (Declaration of Robert Stonebraker, Doc. 183-2 ¶ 5), including the extraction and processing of more than 6,704 gigabytes of FleetCor's transactions data, done in response to FTC's discovery requests for financial data to support its damages calculation, at a cost of $574,777.28. (*Id.* ¶ 6.) This $ 10.3 million figure also includes fees and costs related to responding to the FTC's motion for summary judgment and *Daubert* motion after the Supreme Court's decision in *AMG*, in the amount of $686,628.79. (*Id.* ¶ 8.) Defendants have produced in total over 1.4 million pages of documents and more than 12 witnesses. (Declaration of Benjamin Mundel, Doc. 183-1 ¶ 7.)

The parties dispute the extent to which the damages transaction data, summary judgment briefing, and *Daubert* briefing could be re-used in an administrative proceeding before the FTC. While it appears to the Court that a significant amount of the data and legal papers could be repurposed for the alternate proceeding, there is no doubt that differences in legal standards, procedures, and claims might require real time and effort to revamp. The Court questions the plausibility of Defendants' contention that the damage data would be entirely worthless. However, it is reasonable to believe that some differences stemming from the differences between money sought under Section 13(b) versus Section 19(a)(2) could conceivably require some measure of re-hashing of that data, or, at least, the arguments surrounding what the data means or what data should be considered versus excluded. These concerns and the possible adjusted scope in the administrative litigation of the case necessarily differentiate the present situation from the average one and render the effect of a dismissal without prejudice of greater consequence.

In weighing the equities, courts should also assess the good or bad faith of plaintiff's counsel in seeking dismissal without prejudice. *Goodwin*, 757 F.3d at 1219. Defendants expend many pages arguing that the FTC filed this motion merely to seek a more favorable forum and solely to avoid an adverse summary judgment ruling. (Def. Resp. at 15-20.) They also argue that the FTC's four-month delay in pursuing this course after the Supreme Court's decision in *AMG*—a decision, according to Defendants, that was preordained—demonstrates bad faith. (*Id.*)

As discussed at the hearing, the Court will not assume bad faith on the part of the FTC. In filing this lawsuit in federal court in December of 2019, the FTC was acting in reliance on the state of the law as it existed at that time in this circuit and all others except the Seventh Circuit.[4] There is no fault, and nothing unreasonable, in the FTC's decision. The Court reiterates its understanding that *AMG* was a major change in the law and that all parties are attempting to find their footing in response to this change, with the FTC rightly motivated by its congressionally established purpose of advocating for alleged injured customers. As to the four-month delay after *AMG*, the Court understands that agency decision-making takes time, and that litigation counsel is not tasked with broader agency strategic decision-making. In this connection, the Court also must find that plaintiff's counsel filed the *Daubert* motion in good faith, as no evidence has been presented that the Commissioners or other FTC high level authorities had formally determined that counsel should alter course or drop the litigation in this case.

Although the Court finds no evidence of bad faith, it determines that dismissal without prejudice will not necessarily better serve the FTC's stated aims. As noted above in Section II (discussing the stay request), the FTC has not explained why its goal of protecting consumers' financial interests through recoupment of damages on their behalf cannot be accomplished by a combination of litigation of the liability and injunctive relief issues in this Court and subsequent

[4] *See FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019) (holding that Section 13(b) of FTC Act "does not authorize restitutionary relief").

pursuit of an agency cease-and-desist order and then follow-up district court proceedings. In other words, the FTC can still pursue damages relief *after* this Court has addressed the merits and potentially issued an injunction.

In a post-hearing letter, the FTC raises the concern that an injunction from this Court might result in Defendants arguing against a cease-and-desist order on the basis that an injunction has already issued. (FTC Post-Hearing Letter, Doc. 190.) But Defendants have represented to the Court that, if this Court issues an injunction, they will not argue in the administrative proceeding that a cease-and-desist order is improper on the basis that an injunction has issued. (Defendants' Post Hearing Letter, Doc. 191.) The Court treats Defendants' representation to the Court as binding. And while the FTC cites judicial economy as a reason against this Court deciding the merits of this case, the opposite option—of litigating from the start in the administrative proceeding—also involves a number of lengthy steps, outlined above in Section II. Accordingly, the Court does not understand how the FTC's stated purpose is better served by a dismissal without prejudice as opposed to the alternate course wherein this Court determines liability.

Taking this into consideration, as well as other factors discussed above—specifically the advanced stage of the litigation, including the associated expenses related to shifting to an administrative proceeding, and the unique circumstances of the FTC filing the administrative complaint after discovery and merits briefing—the Court finds that Defendants would suffer the loss of substantial rights if the Court were to dismiss without prejudice with no attached conditions. In so

concluding, the Court has considered dismissal without prejudice *with attached conditions*, particularly the FTC's payment of some serious amount of FleetCor's attorneys' fees and costs. However, the FTC has made clear to the Court that it cannot, consistent with the public interest, approve payment of any significant portion of the Defendants' sizable, claimed attorney's fees and costs as a means of shifting this case into an administrative forum, especially because the case poses major issues of concern to taxpayers and consumers who allegedly have been effectively fleeced. (Pl. Reply at 14-15.) The Court finds that imposition of the condition of payment of fees and costs as a condition of voluntary dismissal would not be in the public interest or be equitable to the parties, especially in light of the large sum of attorneys' fees at issue.

Under the totality of these circumstances, the Court finds that the most equitable course is to promptly move forward with adjudicating the merits in this proceeding, after which the FTC may be able to pursue a cease-and-desist order in the administrative proceeding and subsequently return to district court, seeking consumer refund relief pursuant to Section 19(a)(2) of the FTC Act. For all of the reasons outlined above, the Court **DENIES** the FTC's request for dismissal without prejudice.

IV. Conclusion

As the Court concludes, in its discretion, that the balance of equities does not weigh in favor of a stay or dismissal without prejudice, the FTC's Motion to Stay or, in the Alternative, Voluntarily Dismiss [Doc. 182] is **DENIED**. The Court

will proceed to rule on the outstanding motions for summary judgment, as well as the *Daubert* motion, in short order and, if appropriate, set a trial date.

IT IS SO ORDERED this 7th day of February 2022.

Honorable Amy Totenberg
United States District Judge