UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of: **INTEGRITY ADVANCE, LLC and JAMES R. CARNES,** **Respondents.**	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE AN AMENDED ANSWER**

ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE AN AMENDED ANSWER

Just days before the deadline for filing motions for summary disposition, and more than a month after discovery closed, Respondents filed a motion to amend their Answer seeking to remove their statement that consumers must contact Integrity Advance to "change the terms of the loan," or "to change the terms of payment," to prevent Integrity Advance from automatically renewing their loans. Mot. at 1; Ans. ¶¶ 29-30. Respondents waited nearly five months—in a proceeding that lasts only ten months—to seek leave to amend their Answer. Respondents' motion to amend their Answer, filed after discovery closed, is unduly prejudicial to Enforcement Counsel. Respondents offer no justification for their undue delay and have failed to demonstrate good cause justifying their proposed amendments. Furthermore, Respondents never even contend that their original Answer is factually incorrect. In essence, Respondents

want to change their Answer because it is damaging. Therefore, Enforcement Counsel respectfully requests that the Administrative Law Judge deny Respondents' motion.

Courts Have Routinely Denied Motions to Amend Filed After Discovery Has Closed

The CFPB's rule governing amended pleadings, Rule 202, "implements an appropriate limit for amendments that are unduly prejudicial." *Rules of Practice for Adjudication Proceedings*, 77 Fed. Reg. 39058, 39069 (June 29, 2012).[1] It is well settled that, in light of prejudice to the nonmovant, "amendments of pleadings are particularly inappropriate, absent exceptional circumstances, once discovery has closed." *Remington Arms Co., Inc. v. Modern Muzzleloading, Inc.*, 2:97CV00660, 1998 WL 1040949, at *2 (M.D.N.C. Dec. 17, 1998); *see also Gallagher's NYC Steakhouse Franchising, Inc. v. N.Y. Steakhouse of Tampa, Inc.*, No. 11–cv–1456, 2011 U.S. Dist. LEXIS 139175, at *23–25 (S.D.N.Y. Dec. 5, 2011) (denying as, *inter alia*, prejudicial, a defendant's motion to amend answer where discovery had closed and a plaintiff's motion for summary judgment was pending); *Lyondell-Citgo Refining, LP v. Petroleos De Venezuela S.A.*, 02 CIV.0795 CBM AJP, 2004 WL 2650884, at *1 (S.D.N.Y. Nov. 22, 2004) ("Prejudice may be found, for example, when the amendment is sought after discovery has been closed."); *Classicberry Ltd. v. Musicmaker.com, Inc.*, No. 02-7054, 48 Fed. Appx. 360, 361-3, 2002 WL 31313186, at *1-2 (2d Cir. Oct. 16, 2002) (upholding denial of motion to amend answer made after close of discovery and summary judgment

[1] *See also Societe Liz, S.A. v. Charles of the Ritz Group, Ltd.*, 118 F.R.D. 2, 4-5 (D.D.C. 1987) ("In deciding whether to grant or deny a motion for leave to amend a complaint, the Court must deny the motion where there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.") (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962); Fed.R.Civ.P. 15a).

made); *Lifescan Inc. v. Polymer Tech. Int'l Corp.*, 35 U.S.P.Q.2d 1225, 1238 (W.D.Wash. 1995) (denying defendant's motion to amend its answer to add a defense where "[e]xtensive discovery [had] already occurred and any further discovery ... would jeopardize the current trial date...."); *Elf Atochem, N. Am., Inc. v. United States*, 161 F.R.D. 300, 301–02 (E.D.Pa. 1995) ("[M]otion [to amend] is untimely based on the fact that discovery is virtually complete, and trial is looming close."). Furthermore, the Rule 202 standard explicitly discourages parties from "reserving claims and defenses for last minute amendments." 77 Fed. Reg. at 39069.

Respondents filed their Answer on December 11, 2015. Discovery in this proceeding—including expert discovery—closed on March 31, 2016, over one month before Respondents filed their motion to amend. Respondents have demonstrated no exceptional circumstances for permitting the amendment to their Answer given the advanced stage of this proceeding.

Respondents Have Offered No Excuse for Their Undue Delay in Filing the Motion to Amend

It is well settled that "the Court may deny a motion to amend when the movant knew or should have known of the facts upon which the amendment is based when the original pleading was filed, particularly when the movant offers no excuse for the delay." *Lyondell-Citgo* Refining, 2004 WL 2650884, at *1; *see also Societe Liz*, 118 F.R.D. at 4 ("The unexplained delay ... presents another important consideration in the decision to deny [a movant's] motion.").

Respondents offer no excuse for their delay in filing the instant motion. Because their counsel requested, and received, an extension from the Administrative Law Judge, Respondents had more than three weeks to craft their Answer. Order Granting Ext. at 1.

Respondents were on notice of Enforcement Counsel's reliance on Respondents' admissions as of January 14, 2016, when Enforcement Counsel filed its opposition to Respondents' motion to dismiss. Opp. to MTD at 2-3, 15, 16, 18. However, by their own admission, it took an additional two months, until March 18, 2016, for Respondents to even broach the issue of amending their Answer with Enforcement Counsel.[2] Mot. at 3. Enforcement Counsel responded that it did not consent to Respondents filing an amended answer and pointed out that, pursuant to Rule 202, Respondents would need to seek leave of the Administrative Law Judge to file an amended answer. Nevertheless, Respondents did not file a motion seeking leave for another six-and-a-half weeks. Furthermore, Respondents did not raise an objection to Enforcement Counsel's reliance on the 'change the terms' language during the April 5 hearing (Apr. 5, 2016 Oral Argument at Tr. 13:6-24). Similarly, despite filing a motion to strike the pleading, Respondents did not lodge an objection to this language being highlighted in Enforcement Counsel's March 23, 2016 proposed stipulations filing (EC's Prop. Stips. ¶¶ 37, 39, 43, 47, 57, 66, 67) and delayed more than an additional month before filing their motion. Respondents' inexplicable delay supports denial of the motion.

Respondents Have Shown No Good Cause to Amend Their Answer

Respondents have provided no good cause in support of their motion to amend their Answer. Respondents' reasons for amending their Answer are opaque—to "clarify," "achieve uniformity in Respondents' Answer," and "for consistency with the rest of the Answer." Mot. at 1-2. At bottom, Respondents appear to admit that they want to remove

[2] While Respondents attempt to mitigate the delay in filing the motion by pointing out their notification to Enforcement Counsel in March, "[a]s an initial matter, notification to ... counsel of intent to file a motion does not establish diligence in filing said motion." *Zest IP Holdings, LLC v. Implant Direct Mfg., LLC*, 10CV0541-GPC-WVG, 2014 WL 67494, at *4 (S.D. Cal. Jan. 8, 2014).

a damaging admission from their Answer.[3] Courts consistently deny such motions. *See, e.g. Columbus Bank & Trust Co. v. McKenzie Trucking & Leasing LLC*, 4:07-CV-189 (CDL), 2009 WL 3526648, at *5 (M.D. Ga. Oct. 23, 2009) (denying motion to amend Answer because, "[a]pparently, after recognizing the likelihood of an adverse summary judgment ruling, [movant] now attempts to rescue his defense by amending his Answer to exclude his damaging admission"); *see also Lowe's Home Ctrs., Inc. v. Olin Corp.*, 313 F.3d 1307, 1315 (11th Cir.2002) (citing *Local 472, etc. v. Ga. Power Co.*, 684 F.2d 721, 724 (11th Cir.1982) (Denying motions to amend "when ... designed to avoid an impending adverse summary judgment."); *Lyondell-Citgo Refining*, 2004 WL 2650884, at *1 ("Leave to amend a complaint will generally be denied when the motion to amend is filed solely in an attempt to prevent the Court from granting a motion to dismiss or for summary judgment, particularly when the new claim could have been raised earlier.") (internal citations omitted); *In re Peterson*, 03-65019-MGD, 2006 WL 6589911, at *5 (Bankr. N.D. Ga. July 7, 2006) (denying Defendants' motion to amend their Answer "purportedly to be 'consistent with the facts of the case'" where "the only evidence which is tendered is the affidavit/declaration ... based on personal knowledge. ... It is clear that the true purpose of the amendment was to attempt to create a fact issue in an attempt to defeat Plaintiff's Motion for Summary Judgement.").

Furthermore, Respondents' proposed amendments are an attempt to obfuscate how their loan agreements operate. Respondents have not represented in their motion that the admission in question is factually untrue, and although there have been numerous opportunities, Respondents have failed to demonstrate that the "change the

[3] Indeed, Respondents stated that they believe "Enforcement Counsel have taken and characterized the language at issue far beyond the answer Respondents intended to provide." Mot. at 2.

terms" language they now seek to eliminate is factually inaccurate. During oral argument on Respondents' motion to dismiss, Enforcement Counsel quoted the "change the terms" language, and Respondents did not even attempt to rebut the truth of the statement. Nor did Respondents proffer any evidence that the "change the terms" language from Paragraphs 29 and 30 of their Answer was factually inaccurate when they justified their refusal to stipulate to that fact. *See* Resps.' List of Controverted Facts at 10 (¶ 37).

Conclusion

Respondents have waited too long and have failed to justify their proposed amendments. Respondents had an opportunity when they filed their motion for summary disposition to offer evidence on how their loan agreements operated, and the Administrative Law Judge can consider that evidence to the extent he deems it useful and proper to do so. But Respondents have failed to justify their request to amend their Answer. Therefore, for all the reasons stated above, Enforcement Counsel respectfully requests that the Administrative Law Judge deny Respondents' Motion for Leave to File an Amended Answer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May 2016, I caused a copy of the foregoing Enforcement Counsel's Opposition to Respondents' Motion for Leave to File an Amended Answer to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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