UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	**ENFORCEMENT COUNSEL'S SUPPLEMENTAL BRIEF**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

ENFORCEMENT COUNSEL'S SUPPLEMENTAL BRIEF

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Pursuant to Director Cordray's January 23, 2017 order granting Respondents' request for supplemental briefing, Enforcement Counsel hereby submits its Supplemental Brief in the above-captioned proceeding.

I. Introduction

The relief requested by Enforcement Counsel in this proceeding is not barred by any statute of limitations or by 15 U.S.C. § 1607(e). Pursuant to 12 U.S.C. § 5565, the Director may order Respondents to provide restitution of $131,433,343.47 for violations of the Truth in Lending Act (TILA) (Count I), restitution of $38,164,153.31 for violations of the CFPA by virtue of the TILA violations (Count II), restitution of $38,164,153.31 for Respondents' deception violations (Count III), and restitution of $115,024.50 for Respondents' unfairness violations (Count VII).[1] In addition, the Director may order Respondents to pay a combined $13,592,500 in civil money penalties for the violations that occurred on or after July 21, 2011.

15 U.S.C. § 1607(e) does not limit the Director's ability to order the restitution requested by Enforcement Counsel for Counts I and II. That provision concerns agencies' ability to order "adjustment[s] to the account[s]" of consumers "to assure that such person[s] will not be required to pay a finance charge in excess" of the amount disclosed. 15 U.S.C. § 1607(e)(1). Here, Enforcement Counsel has sought restitution under the CFPA, not adjustments to the accounts of the harmed consumers. Therefore, the two-year limitation on adjustments contained in §1607(e)(3)(C)(iii) is not applicable. Moreover, the text of both TILA and the CFPA clearly indicates that adjustments are not the Bureau's sole remedy for TILA claims.

[1] As Enforcement Counsel has previously noted, these categories of harm overlap. *See* EC Post-Hearing Br. [dkt. 162] at 23 n.9; EC Opening Appeal Br. [dkt. 183] at 8. Enforcement Counsel is not seeking a double recovery for any harmed consumers.

Respondents have repeatedly claimed that Enforcement Counsel's claims in this matter are time-barred. Each time, their claims have been rejected for the simple reason that their position is incorrect. Because this is an administrative proceeding pursuant to 12 U.S.C. § 5563, the claims in this matter are not subject to the CFPA's three-year date-of-discovery statute of limitations (12 U.S.C. § 5564(g)(1)). And even if they were, § 5564 would not bar the claims here because Enforcement Counsel filed the Notice of Charges well within three years of discovering Respondents' violations. Moreover, the Bureau does not "discover" a violation within the meaning of § 5564(g)(1) through constructive or inquiry notice, and Respondents point to no law holding otherwise. Finally, the administrative enforcement provisions of both TILA and EFTA do not contain statutes of limitations, and therefore those claims are not time-barred here either.

II. Because Enforcement Counsel Seeks Restitution Rather than Adjustments, 15 U.S.C. § 1607(e) Does Not Limit the Relief Available

Adjustments under 15 U.S.C. § 1607(e) and restitution under 12 U.S.C. § 5565 are different remedies. Section 1607(e) authorizes the agencies listed in § 1607(a) and (c) to require creditors to "make an adjustment to the account of the person to whom credit was extended, to assure that such person will not be required to pay a finance charge in excess" of the amounts disclosed. This remedy is created, and defined, by TILA. The remedy may be ordered only "in cases where an annual percentage rate or finance charge was inaccurately disclosed," 15 U.S.C. § 1607(e)(1), and section 1607(e)(3) provides that, absent circumstances not relevant here, "no adjustment shall be ordered" by the agencies in question "after the later of (I) the expiration of the life of the credit extension, or (II) two years after the agreement to extend credit was

consummated," 15 U.S.C. § 1607(e)(3)(C)(iii).[2] Thus, if an agency discovered—fifteen years into a thirty-year mortgage— that a creditor had improperly disclosed the interest rate in violation of TILA, the agency could order the creditor to adjust that consumer's account so that past payments were properly applied to the account and future payments were adjusted so that the consumer ultimately did not pay more than the disclosed amount.

Restitution, by contrast, is an equitable remedy allowing for the return of something (including money) to its rightful owner. *See, e.g.*, *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) (explaining that restitution can "restore the status quo"); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (affirming restitution award that returned "the full amount lost by consumers"). Restitution looks backward to help a consumer after she has made improper payments. *See, e.g*., *United States v. Lowell*, No. 99-3683, 2000 WL 519127, *3 (7th Cir. Apr. 28, 2000) ("Restitution is a backward-looking remedy designed to put a person in the position they occupied before a particular event took place"); *United States v. Innarelli*, 524 F.3d 286, 294 (1st Cir. 2008) (holding that restitution "is necessarily a backward-looking inquiry that takes into account what actually happened"); *In re Transact, Inc., v. D'errico*, No. SACV 13–1312–MWF,

[2] Any defense based on § 1607(e)(3)(C)(iii) was waived by Respondents long ago. Respondents never raised such a defense, and it is axiomatic that "[a]rguments not made … are deemed waived." *Marymount Hosp. v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994). Moreover, the time limit that section 1607(e)(3) imposes on the authority to order adjustments is akin to a statute of limitations, and it is well-established that statutes of limitations are "an affirmative defense … that must be asserted in a party's responsive pleading 'at the earliest possible moment' and is a personal defense that is waived if not promptly pleaded." *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987) (citations omitted). Respondents not only have never raised a defense that § 1607(e)(3) bars Enforcement Counsel's claims for restitution for any violations in this case, they also expressly *disclaimed* any such defense during oral argument. Hearing Tr. dated Jan. 11, 2017 at 25:2-7.

2014 WL 3888230, *12 (C.D. Cal. Aug. 6, 2014) ("[R]estitution looks backward and attempts to return the parties to their respective positions before the contract was formed.").

Because § 1607(e)(3)(C)(iii) allows agencies to order adjustments up to two years after the origination of a credit extension, it is possible that an adjustment for a credit extension that expired in less than two years could result in a lump sum payment that would look similar to restitution. However, the fact that two theories of remedies could result in similar relief does not merge the two concepts into one. *See generally, SEC v. Drexel Burnham Lambert, Inc.*, 956 F.Supp. 503, 507 (S.D.N.Y. 1997) (recognizing that disgorgement and restitution are "similar" remedies but stating that "[w]hile some cases have equated the two remedies…they are distinct…."); *Solis v. Couturier*, No. 2:08–cv–02732, 2009 WL 1748724, *5 (E.D. Ca. June 19, 2009) ("Restitution and disgorgement of unjust enrichment are related concepts, but are not identical." (internal quotations omitted)). For example, the CFPA provides that the Bureau may order, *inter alia*, rescission, restitution, refunds, disgorgement, and damages. 12 U.S.C. § 5565. In some cases, these different forms of relief could result in the same monetary figure, but that does not erase the fact that they are conceptually distinct. An adjustment allows an agency to give a consumer prospective relief so that she does not ultimately pay more than the amount disclosed; restitution allows an agency to order an entity to give back something that rightfully belongs to the consumer, including money taken from a consumer.

Furthermore, the CFPA clearly provides that restitution may be ordered for a TILA violation, which is a violation of Federal consumer financial law. 12 U.S.C. § 5565 (authorizing restitution for a "violation of Federal consumer financial law); *id.* §§ 5481(12)(O), (14) (identifying TILA as a "Federal consumer financial law"). And nothing in TILA provides otherwise. Indeed, § 1607(b) expressly provides, "[i]n addition to its powers under any provision

of law specifically referred to in subsection (a), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter, any other authority conferred on it by law."

Section 1607(e)(5) does not undo this authority. That subsection provides that, "notwithstanding any provision of law" including the CFPA, agencies may not "require a creditor to make dollar adjustments" "[e]xcept as otherwise specifically provided in this subsection." By its plain language, this provision limits agencies' authority only to order adjustments, not to order other types of relief. Indeed, the Third Circuit has acknowledged that § 1607 authorizes adjustments but also allows for other forms of relief. *See Johnson v. West Suburban Bank*, 225 F.3d 366, 375 (3d Cir. 2000) (concluding that agencies may order relief other than adjustments for TILA violations because, "[i]n addition to allowing these federal agencies to order the adjustment of inaccurately disclosed finance charges, [15 U.S.C.] § 1607(e), the TILA cross-references section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818, to set forth other enforcement powers.").

In this case, Integrity Advance violated TILA by, *inter alia*, disclosing a "total of payments" in the TILA box that was much lower than the actual total of payments required by the default, automatic rollover provisions in the loan agreement. Based on those default provisions, Integrity Advance took more than the "total of payments" it had disclosed from thousands of consumers. Therefore, to remedy that violation, the Bureau may—pursuant to 12

U.S.C. § 5565—properly order restitution that requires Respondents to return to consumers the amounts that it took from them that were above the "total of payments" disclosed.[3]

Holding otherwise—on the view that adjustments and restitution are the same remedy or because § 1607(e)(5) prohibited any remedy other than restitution for a TILA violation—also would ignore the fact that § 1607(e), by its terms applies only to adjustments ordered for errors in the disclosed finance charge or annual percentage rate. 15 U.S.C. § 1607(e)(1). Although Respondents improperly disclosed those features of the loans, it also violated TILA by, *inter alia*, disclosing a "total of payments" in the TILA box that was less (often by a considerable amount) than the actual total of payments required by the default operation of the loan agreement. 12 C.F.R. § 1026.18(h). Indeed, in the Notice of Charges Enforcement Counsel included a chart showing how a $300 loan, where Integrity Advance would have disclosed the total of payments as $390, could have cost a consumer over $1000. Notice [dkt. 001] at 6; *see also* EC Opp. to Mot. to Dismiss [dkt. 033] at 16; EC Memo in Supp. of Mot. for SD [dkt. 087] at 9. The Administrative Law Judge expressly found that Integrity Advance's total of payments disclosures were inaccurate (*see* SD Order [dkt. 111] at 26) and he recommended using the amounts paid over the total of payments as an appropriate measure of relief for Integrity Advance's TILA violations. *See* Rec. Dec. [dkt. 176] at 66. Section 1607(e) does not address remedies for errors in the disclosure of the "total of payments."

[3] Throughout this proceeding, Enforcement Counsel has sought restitution under 12 U.S.C. § 5565. *See, e.g.*, Notice [dkt. 001] at 14; EC Post-Hearing Br. [dkt. 162] at 24-25; EC Opening Appeal Br. [dkt. 183] at 4-8. At no point in this proceeding has Enforcement Counsel sought an adjustment on Integrity Advance's loans under section 1607(e). And Respondents do not disagree. Hearing Tr. Dated Jan. 11, 2017, at 25:2-7.

The availability of other remedies, in addition to adjustments, is not unique to the CFPA. For example, Federal banking agencies, as defined in 12 U.S.C. § 1813(q), enforce TILA pursuant to Section 8 of the FDI Act, 15 U.S.C. § 1607(a)(1). Section 8 of the Federal Deposit Insurance Act provides for a variety of remedies, including restitution. 12 U.S.C. § 1818(b)(6). There is no principled reason to treat the remedies under the FDI Act, or any of the other authorities described in § 1607(a) or (c), differently from the remedies available under the CFPA.

III. No Statute of Limitations Bars Enforcement Counsel's CFPA Claims

Enforcement Counsel brought, and proved, deception and unfairness counts both against Integrity Advance and its chief executive James Carnes. Respondents have repeatedly argued that these claims are time-barred under § 5564 of the CFPA. Respondents are simply incorrect. That provision does not apply to the claims in this administrative proceeding, and, even if it did, it still would not bar those claims from proceeding here as Enforcement Counsel did not discover the relevant violations more than three years prior to the filing of the Notice of Charges.

Congress clearly intended a dichotomy between administrative proceedings and actions in court. Section 5563 of the CFPA is entitled "Hearings and Adjudication Proceedings" and gives the Bureau the power to conduct administrative proceedings like the instant one. This provision does not contain a statute of limitations for CFPA claims, but rather authorizes the Bureau to conduct hearings and adjudication proceedings "to ensure or enforce compliance with … the provisions of [the CFPA]" or rules prescribed under the CFPA, without mentioning any

time limitation. 12 U.S.C. § 5563(a)(1).[4] In contrast, § 5564 gives the Bureau the authority to commence litigation in court – it refers to "civil actions" and settlements approved "by the court" and provides that actions may be brought in certain "United States district court[s]" and state "court[s] of competent jurisdiction."[5] This section contains a three-years-from-date–of-discovery statute of limitations provision. *See* 12 U.S.C. § 5564(g)(1) ("Time for Bringing Action – (1) In General – Except as otherwise permitted by law or equity, no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates."). There is no authority for employing the statute of limitations applicable to court actions to an administrative proceeding like this one. Respondents have argued that the D.C. Circuit's opinion in the PHH matter (*CFPB v. PHH Corp*., 839 F.3d 1 (D.C. Cir. 2016)) is instructive, but as Enforcement Counsel previously argued, that decision hinges on the court's opinion that the Real Estate Settlement Procedures Act did not differentiate between administrative proceedings and actions in court. *See* EC Ans. Br. [dkt. 186] at 13-14. The decision does not require or suggest that the Director here should ignore that the CFPA *does* differentiate between court actions and administrative proceedings.

[4] In contrast to § 5563(a)(1), § 5563(a)(2)—the provision under which the administrative proceeding in *PHH* was conducted—authorizes the Bureau to conduct hearings and adjudication proceedings to enforce other Federal laws in the Bureau's authority—"unless such Federal law specifically limits the Bureau" from doing so. The court in *PHH* held that the other federal law at issue in that case—the Real Estate Settlement Procedures Act (RESPA) imposed the time limit. *PHH*'s holding thus has no bearing on the time limits to enforce the CFPA in the Bureau's administrative process.

[5] Congress' intent in differentiating between actions and proceedings is further demonstrated by § 5565, which provides the "court (or the Bureau, as the case may be) in an *action or adjudication proceeding*" may grant appropriate relief. 12 U.S.C. § 5565 (a)(1) (emphasis added).

However, even if § 5564 did apply to this proceeding, it still would not bar any of Enforcement Counsel's CFPA claims. The statute requires that claims be filed within 3 years from the "date of discovery of the violation." 12 U.S.C. § 5564(g). Hence, Respondents would need to show that Enforcement Counsel discovered Respondents' violations prior to November 18, 2012 (*i.e*., three years prior to the filing of the Notice of Charges). *See Seed Co. Ltd v. Westerman*, 832 F.3d 325, 331 (D.C. Cir. 2016) ("The burden of proof rests with the defendants because the statute of limitations is an affirmative defense."). As of November 2012, Enforcement Counsel had yet to send a CID to Respondents and had not received any of their documents, including the loan agreement. *See* EC Ans. Br. [dkt. 186] at 18-19. Enforcement Counsel cannot discover violations based on a loan agreement before actually seeing the agreement.

Respondents have argued that the fact that an Enforcement lawyer searched for Integrity Advance consumer complaints on March 29, 2012 means either that Enforcement Counsel discovered Respondents' violations at that time or should have discovered them at some point prior to November 18, 2012.[6] These arguments misconstrue § 5564(g)(1), which requires discovery of an actual violation *not* discovery of the possibility that there might be a violation. In any case, neither of Respondents' arguments is plausible. Consumer complaints do not prove the

[6] Given that Respondents first made this claim during appeal briefing before the Director (*see* Resp. Reply Br. on Appeal [dkt. 192] at 12) they have waived the argument. Enforcement Counsel produced the document evidencing the complaint search within two weeks after the filing of the Notice of Charges.

existence of a violation.[7] They sometimes present a useful starting point for an investigation, but that is not the same as discovering a violation within the meaning of § 5564(g)(1). Finally, Respondents' notion that Enforcement Counsel should have discovered Respondents' violations is deeply flawed. Essentially, Respondents suggest that Enforcement Counsel should be subject to a constructive or inquiry notice standard the way a private litigant might. Of course, this is not what the CFPA says – it merely talks about the date of discovery of the violation. Congress could have written a 'knew or should have known' standard into the CFPA but clearly chose not to do so.[8]

Respondents suggest that a date of discovery statute implies inquiry notice, but the case law Respondents provide on this question does not actually support their position. Respondents rely heavily on *Gabelli v. SEC*, 133 S.Ct. 1216 (2013), a case in which the Securities and Exchange Commission filed suit seeking penalties from individuals for unlawful activity. *Id*. at 1219. The relevant statute of limitations stated that actions for fines or penalties could only be maintained if filed "within five years from the date when the claim first accrued." 28 U.S.C. § 2462. The Supreme Court rejected the SEC's argument that even though the statute of limitations ran from "accru[al]," the Court should nonetheless read a discovery rule into the statute for claims sounding in fraud. *Gabelli,* 133 S.Ct. at 1223-24.

[7] In addition, consumer complaints typically provide no information regarding an individual's role in an entity's practices. Respondents have not pointed to any information in consumer complaints regarding Carnes's role in Integrity Advance's practices.

[8] In a case currently pending in the United States District Court of the Northern District of California, the defendants moved for summary judgment on the grounds, among other things, that a single consumer complaint submitted to the Bureau triggered the running of the statute of limitations. The district judge declined to grant summary judgement. *See CFPB v. Nationwide Biweekly*, No. 15-cv-02106-RS, slip op. at 5 (N.D. Cal. Feb. 6, 2017).

This decision is plainly irrelevant to the question of how to interpret the CFPA's statute of limitations provision. In the CFPA, the discovery rule is explicitly built into the statute – so a discovery rule clearly applies. The question is when "discovery" occurs—when the agency actually discovers the violation or when it knew or should have known about the violation. Because the Supreme Court in *Gabelli* declined to recognize a discovery rule at all, it had no occasion to address that question.

To support their contention that the Bureau's "discovery" occurs under § 5564(g) when it knows or should know of a violation, Respondents rely on *Merck v. Reynolds*, 559 U.S. 633 (2010). But that case also fails to support their position. To be sure, the statute in that case contained a 'date of discovery' statute of limitations[9] and the Court did decide to apply a 'knew or should have known' standard. *Id*. at 653. But *Merck* was a suit by a private plaintiff, not a government enforcement case. It makes sense to hold a private plaintiff to an inquiry notice standard because she, in most cases, directly experiences an injury and has an interest in addressing that injury. When the Bureau acts in an enforcement capacity it is not vindicating its own injury, but rather it seeks to address illegal practices in the national consumer marketplace. Moreover, the Bureau has jurisdiction over large parts of the American economy, literally thousands of entities and individuals, and has already received over 1 million complaints during its short existence. Given this, an inquiry notice standard would require the Bureau to move

[9] The language of that statute was different than the CFPA as it stated that claims must be brought within "2 years after the discovery of the facts constituting the violation." 559 U.S. at 633. The CFPA statute of limitations in § 5564 references the date of discovery "of the violation."

forward without due consideration and file lawsuits just to avoid losing the opportunity to pursue meritorious claims.

IV. Enforcement Counsel's TILA and EFTA Claims are not Time-Barred

As Enforcement Counsel has previously argued, federal government enforcement of TILA is governed by 15 U.S.C. § 1607(a). This provision is entitled "Administrative Enforcement" and explicitly provides that the Bureau is one of the "enforcing agencies." *Id*. This section does not contain a statute of limitations provision. Similarly, federal government enforcement of EFTA is governed by 15 U.S.C. § 1693o, which empowers the Bureau to enforce that law, but does not contain a statute of limitations provision. The one-year time-bars that Respondents seek to apply here are found in the civil liability statutory provisions that govern *private* rights of action and expressly apply only to actions brought under those provisions providing for *private* liability. *See* 15 U.S.C. § 1640 (imposing one-year statute of limitations for "any action *under this section*" (emphasis added)); 15 U.S.C. § 1693m (same).

V. Limitations on the TILA and EFTA Claims (Counts I and V) Do Not Apply to Counts II and VI Respectively

Even if a statute of limitations, or a limitation on the relief available like 15 U.S.C. § 1607(e), applied to Count I—and they do not—any such limitation would not extend to the violation of the CFPA asserted in Count II. Count II asserts a violation of 12 U.S.C. § 5536(a)(1)(A). To prove a violation of that provision, Enforcement Counsel needed to show only (1) that a covered person or service provider (2) violated a Federal consumer financial law. 12 U.S.C. § 5536(a)(1)(A). The Administrative Law Judge found that Integrity Advance violated § 5536(a)(1)(A) because it was a covered person that violated TILA. SD Ord. [dkt. 111] at 27. Nothing more is required.

Counts I and II assert violations of different statutes. Count II does not assert a TILA violation; rather, because Integrity Advance is a covered person, when it violated TILA it also—but separately—violated the CFPA. Even if a statute of limitations barred claims for the TILA violations (and, as explained above, none does), those TILA violations still happened—and thus the CFPA violations happened as well. And the violation of the CFPA in Count II is governed by the statute of limitations, if any, applicable to CFPA claims brought in administrative proceedings, not by any limitations that apply to the TILA claim. The same is true for the EFTA claim (Count V): even if it is barred by a statute of limitations, the related Count VI CFPA claim could only be time-barred, if at all, by a statute of limitations that applies to CFPA claims.

Similarly, any limitation in § 1607(e) on the relief available for Count I would not extend to the relief available for violations of the CFPA in Count II. Section 1607(e)(5) expressly applies only to "adjustments for errors in any requirements *under this subchapter*." (emphasis added). This subchapter refers to TILA, not to the CFPA, and as discussed above Count II asserts a violation of the CFPA and seeks remedies under the CFPA for that violation. Section 1607(e)(5) is simply inapplicable.

VI. The Tolling Agreements Signed By Integrity Advance Undermine Respondents' Argument That the Claims Against Integrity Advance are Time-Barred

Beginning June 2, 2014, and lasting until after the filing of the Notice of Charges, Enforcement Counsel and Integrity Advance, but not Carnes, entered into two agreements tolling "the running of any applicable statute of limitations for any cause of action or related claim or remedy that could be brought against [Integrity Advance] by the Bureau arising under Federal Consumer Protection Laws." *See* Feb. 8 Joint Filing. The language of both agreements also explicitly states that if Integrity Advance raises statute of limitations defenses, the period of the tolling agreement will be "excluded for the purposes of calculating the statute of limitations." *Id.*

These agreements have two effects. First, even if the three-year date of discovery in 12 U.S.C. § 5564(g)(1) applies to any claims against Integrity Advance, it would bar claims only for violations the Bureau discovered before June 2, 2011 (three years prior to the tolling agreement). For all the reasons discussed above, the Bureau did not discover the violations until after November 18, 2012, but in any case, the Bureau cannot have discovered the violations before June 2, 2011 – which is before the designated transfer date. Therefore the tolling agreements mean that § 5564(g)(1) cannot limit any CFPA claims (Counts II, III, VI, VII) against Integrity Advance.

Second, if § 1607(e) applied to any counts, it would only bar those claims against Integrity Advance for violations that happened before June 2, 2012, which is two years prior to the tolling agreement. *See* 15 U.S.C. § 1607(e)(3)(C)(iii).

VII. Conclusion

For the foregoing reasons, the Director should find that Enforcement Counsel is entitled to restitution for all Integrity Advance's TILA violations throughout the time that it made loans to consumers. The Director should also affirm that ALJ's Recommended Decision and affirm that no statutes of limitation bar any of Enforcement Counsel's claims in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February 2017, I caused a copy of the foregoing Enforcement Counsel's Supplemental Brief 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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