UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING File No. 2015-CFPB-0029	)	**RESPONDENTS' POST-ORAL ARGUMENT SUPPLEMENTAL BRIEF**
In the matter of	)	
INTEGRITY ADVANCE, LLC and JAMES R. CARNES	)	

RESPONDENTS' POST-ORAL ARGUMENT SUPPLEMENTAL BRIEF

INTRODUCTION

Pursuant to Director Cordray's January 24, 2017 Order, Respondents respectfully submit this supplemental brief in order to respond more fully to questions on the issue of statute of limitations posed by the Director during the January 11, 2017 oral argument. Dkt. 199.

The CFPA claims as to Mr. Carnes are time-barred (as he is not subject to any tolling agreement between the parties)[1] and the TILA and EFTA claims are time-barred, as well. The unfairness and deception claims in this matter started running from no later than March 29, 2012, which is the date of discovery. As discussed below in greater detail, this is the date when the Bureau (including but not limited to EC) knew or should have known, through the exercise of reasonable diligence, about the existence of a potential violation of the CFPA. The CFPA has a three year statute of limitations that starts running from the date of discovery, and that would render the CFPA claims as to Mr. Carnes time-barred because the Notice of Charges was filed more than three and one-half years later.

Notwithstanding established law to the contrary, EC maintains that no statute of limitations should apply to the claims it has brought in this administrative action and, that even if a limitations period does apply, none of its claims are time-barred. Under EC's formulation, it would not run afoul of the statute of limitations if it filed its notice of charges 100 years after the violation actually occurred so long as the Bureau actually discovered the violation within the three-year period leading up to its filing. *See* Tr. at 45:4-6 ("[EC's] position is that we are never put on inquiry notice, that we have to actually conduct an investigation before we can discover a

[1] Contrary to EC's assertion at oral argument that it never sought a tolling agreement as to Mr. Carnes because EC "[p]robably . . . didn't even know he existed," Tr. at 64:6-7, EC knew of Mr. Carnes. Indeed, EC conducted an investigational hearing of Mr. Carnes on June 17, 2014, a mere two weeks after entering into the June 2, 2014 tolling agreement with the Company.

violation."); *id.* at 45:11-14 (DIRECTOR CORDRAY: ". . . when does the clock actually start to run in your view? MR. WHEELER: We would need to discover the violation."). Indeed, the D.C. Circuit raised a nearly-identical criticism in *PHH* and rejected the Bureau's contention. That court explained that it "looks askance now at the idea that the CFPB is free to pursue an administrative enforcement action for an indefinite period of time after the relevant conduct took place." *PHH Corp.*, 839 F.3d at 55. This is because "[s]tatutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (internal quotations and citations omitted).

ARGUMENT

I. THE LAW APPLIES A THREE YEAR STATUTE OF LIMITATIONS, WHICH RUNS FROM DATE OF DISCOVERY, AND APPLIES TO ALL CFPA CLAIMS

1. The CFPA's three-year statute of limitations applies to administrative forum claims. The D.C. Circuit ruled in *PHH Corp. v. CFPB* that statutes of limitations apply to causes of action arising in the Bureau's administrative forum, just as they apply to claims brought in federal district court. *See* 839 F.3d 1, 51-55 (D.C. Cir. 2016).[2] To hold otherwise would create a "nonsensical dichotomy between CFPB court actions and CFPB administrative actions . . . especially given that the CFPB has full discretion to pursue administrative actions instead of court proceedings and can obtain all of the same remedies through administrative actions that it can obtain in court." *See id.* at 54. Accordingly, the CFPA's statute of limitations provision that "no action may be brought

[2] Notably, in *PHH*, the Bureau did not challenge the D.C. Circuit's decision with regard to statutes of limitation when it requested rehearing *en banc* by the D.C. Circuit. *See* Resp't CFPB Pet. for Reh'rg En Banc, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Oct. 11, 2016) (No. 16-46917) (requesting rehearing on other issues but not the issue of the applicability of statutes of limitations to the Bureau's administrative forum).

under this title more than 3 years after the date of discovery of the violation to which an action relates," applies to the CFPA claims in this case. *See* 12 U.S.C. § 5564(g).

2. The "date of discovery" is "the date that a plaintiff, in the exercise of *reasonable diligence*, discovered or *should have discovered* the breach or violation." *Harris v. Koenig*, 722 F. Supp. 2d 44, 55 (D.D.C. 2010) (emphasis added). In the law enforcement context, the date of discovery is "[w]hen, in the exercise of reasonable diligence, it [a potential violation] could have been discovered." *Gabelli*, 133 S. Ct. at 1221. Here, the "date of discovery" does not hinge on what the Bureau actually knew, but rather, what it could have known through reasonable diligence. The "reasonable diligence" standard is not inquiry notice, but rather includes that information that could have been obtained by the Bureau if it had looked in the first instance; this is true regardless of whether the Bureau did, in fact, pursue this information at that time.

Moreover, "reasonable diligence" by the Bureau, a government regulator and law enforcement agency, must be construed broadly in light of the tools, legal authorities, and personnel available to it at the time. *Gabelli*, 133 S. Ct. at 1222. "Reasonable diligence" in this context would therefore include, at a minimum, reviewing publically available information and sources, reviewing consumer complaints, following up with consumers to obtain more information about any loan they received from Integrity Advance, and requesting information from applicable state and federal regulators.

3. The "date of discovery" begins to run when the Bureau had reason to know about a "potential violation," of a consumer financial law. *See Gabelli*, 133 S.Ct. at 1222. At oral argument, the Director questioned whether the "violation" referenced in Section 5564(g) refers to "violations" or "potential violations." *See* Tr. at 94:22-95:4. Here, "violation" must mean a "potential" violation, and not an actual – that is, legally proven – violation of a consumer financial law. To read "potential" out of the statute of limitations provision in section 1054(g) of the CFPA would vitiate the provision. The

CFPA defines the term "violation" as "any act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law." 12 U.S.C. § 5561(5). First, EC must allege a violation, then marshal evidence that proves that violation through a dispositive motion or at trial, and finally, a court or the Director must find that a violation has occurred. "Discovery" of a violation, for the purposes of Section 5564(g), is therefore inherently "potential" in nature. *Gabelli*, in turn, indicates that the relevant "discovery" under a discovery rule test is the discovery of a "cause of action." *Gabelli*, 133 S. Ct. at 1221. "Discovery" of the potential violation, therefore, occurs when there are sufficient facts *available* to the Bureau for it to identify a potential cause of action – not when EC has *actually collected* enough evidence to support every element of its claims.

For example, in False Claims Act cases, courts hold law enforcement and relator plaintiffs to a "knew or should have known" "discovery-due-diligence" standard. This means that "the running of the statute of limitations does not begin at the point the plaintiff has sufficient information to prevail at trial, or even when a plaintiff is *aware* that the conduct at issue is actionable under the law." *U.S. ex rel. Miller v. Bill Harbert Int'l Const.*, 505 F. Supp. 2d 1, 7 (D.D.C. 2007) (citations omitted) (emphasis added). Rather, a discovery rule limitations period begins to run at the point in time that an agency "discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Id.* Applied here, the limitations period started to run when the Bureau knew or should have known "sufficient critical facts" to put it on notice that, allegedly, "a wrong ha[d] been committed" and further investigation was needed. *Id.*

Indeed, EC's arguments underscore the precise reason why violations are "potential" violations for the purposes of the CFPA's statute of limitation. In its Reply Brief on Appeal, EC argued that a "search for complaints" cannot be deemed to be a "discovery" because "[a]n online consumer complaint does not *establish* a violation." Dkt. 191 at 10 (emphasis added). EC further explains that if

it could "establish" a violation through an online consumer complaint, EC need only "[a]ttach a consumer complaint to a Notice of Charges or Complaint and would be entitled to a judgment on the pleadings." *Id.* at 11. EC conflates "discovery of the violation" with *proving its case*. It cannot be the law that the CFPA's statute of limitations does not begin to run until EC has sufficient, legally admissible evidence to obtain summary judgment.[3]

Moreover, and contrary to EC's contentions at oral argument, Respondents do not contend that the "date of discovery" here begins to run immediately upon the Bureau's receipt of a consumer complaint. The Bureau's search for and review of consumer complaints, however, are relevant to and inform the reasonable diligence analysis. In *Merck & Co. v. Reynolds* – a case cited by EC – the Supreme Court explained that the discovery rule applies a "knew or should have known" standard evaluated by the "reasonably diligent plaintiff test" and explains that, while not dispositive, "[t]erms such as 'inquiry notice' and 'storm warnings' may be useful to the extent that they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating. But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered "the facts constituting the violation, including scienter—*irrespective of whether the actual plaintiff undertook a reasonably diligent investigation.*" *Merck & Co. v. Reynolds*, 559 U.S. 633, 653 (2010) (emphasis added). Applied here, EC's search for consumer complaints regarding "Integrity Advance" is a sufficient trigger to begin the reasonable diligence analysis.

[3] Further, it also cannot be the case that the statute of limitations does not begin to run until EC has sufficient evidence to survive a motion to dismiss because, as noted above, the limitations period can begin to run *before* EC has enough evidence for each element of its claim. Put differently, the only scenario in which EC violates the statute of limitations occurs where EC has, and knows it has, sufficient facts to file a complaint, but then sits on those facts for three years without filing charges. This cannot be the law.

4. Moreover, a statute of limitations determination must be made by a readily ascertainable event that objectively occurred and that is not purely discretionary in nature. For example, the discovery rule cannot tie the start of the limitations period to actions solely within the CFPB's discretion, such as an internal decision to formally open an investigation, or the issuance of a CID or NORA (*see CFPB v. Nationwide Biweekly Admin. Inc.*, No. 15-cv-02106-RS (N.D. Cal.), slip op. at 9 (May 23, 2016)). Tying the statute of limitations to agency discretion would "would leave defendants exposed to Government enforcement action . . . for an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223. The discovery rule provides plaintiffs (here, a government agency) leeway when an injury or violation may not be readily apparent at the moment it occurs. *See id.* at 1221. However, principles of fair notice and due process require a definite and objective period after which time potential parties may be sure of repose. *See Rotella*, 528 U.S. at 554 (disapproving the extension of a limitation period that "would have thwarted the basic objective of repose underlying the very notion of a limitations period.").

To be sure, the Supreme Court has discussed the complexities inherent in applying the discovery rule in the law enforcement context. Unlike private litigants, for example, law enforcement agencies have numerous tools and abundant resources with which to unearth potential violations of the law. The *Gabelli* court acknowledged the substantial benefits that inure to law enforcement agencies in this regard, and looked specifically at the SEC. Here, these same considerations apply: (1) A central mission of the Bureau is to investigate potential violations; (2) The Bureau's "very purpose is to root out" violations of the consumer financial laws (among other purposes); *see e.g.* 12 U.S.C. §5511(a); (3) The Bureau has "many legal tools at hand to aid in [its] pursuit" of violations; (4) The Bureau can, without filing suit, subpoena any documents and witnesses it deems relevant or material to an investigation; (5) The CFPB has "hundreds of employees . . . and several levels of leadership"; and (6) The CFPB has "overlapping responsibilities" with the Federal Trade Commission, federal banking

regulators, and various state regulators and law enforcement agencies. *See Gabelli* 133 S. Ct. at 1222-23. These factors further underscore the reason why the relevant question here is when the Bureau knew or had reason to know about the existence of a potential violation. This is the date of discovery and the date from which the CFPA's three-year statute of limitations starts running. And these considerations must be balanced against the right to repose, and they must be fair to parties who are being subjected to government authority.[4]

II. THE BUREAU SHOULD HAVE KNOWN ABOUT ANY POTENTIAL VIOLATIONS OF THE CFPA ON OR BEFORE MARCH 29, 2012

1. Rule 206 of the Bureau's Rules of Adjudicatory Proceedings mandates that "the Office of Enforcement shall make available for inspection and copying by any respondent documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings." 12 C.F.R. § 1081.206(a). Per the Bureau's Rules of Adjudication, this file is comprised of materials that are the predicate for the enforcement proceeding. And pursuant to this Rule, EC produced its investigative file, which included documentation of consumer complaints retrieved from the Federal Trade Commission's ("FTC's") Consumer Sentinel Network complaint database. Among other things, this file also includes evidence that EC accessed this consumer complaint database on March 29, 2012 and

[4] To the extent the "date of discovery" is ambiguous, application of the rule of lenity would militate in favor of interpreting any ambiguity narrowly and in favor of the subject of a law enforcement action, even if application of the rule would bar the action altogether. Although commonly used in the criminal context, the Supreme Court has acknowledged that the rule of lenity can apply in the non-criminal context. *See* Transcript of Oral Argument at 32, *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) (No. 11-1274) (Comments of Scalia, J.)("[D]oesn't the rule of lenity apply whether the penalty is criminal or civil? So if I think the word "accrual" is, at best, ambiguous, shouldn't the tie go to the defendant?"); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) ("And we have said that the rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context.") (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11, n. 8 (2004)).

deployed the search term "Integrity Advance." In other words, the Bureau's reasonable diligence efforts commenced at least as early as March 29, 2012 (and likely earlier); this is the date when Enforcement attorneys knew to access the database of another law enforcement agency in search of consumer complaints about Integrity Advance. Based on this access to consumer complaints, EC should have known to ascertain additional facts, including Integrity Advance's Loan Agreement and information about Mr. Carnes's role at the Company, both of which are discussed below.

2. EC's claims stem from the allegation that Integrity Advance's Loan Agreement, on its face, did not properly disclose the cost of the loan made to consumers. To this end, EC has asserted that a facial analysis of the Loan Agreement alone establishes violations of the CFPA, TILA and the EFTA. Indeed, the ALJ supported this assertion, noting that "[t]he Loan Agreement itself provides sufficient facts to render a decision on this issue . . . ." Dkt. 111 at 28. EC has agreed that "[t]he claims in this matter directly flowed from Respondents' loan agreement . . . ." Dkt. 191 at 11; *see also* Tr. at 66:9-11 ("[m]any of [EC's] claims are flowed directly from the loan agreement."). EC's allegations and its subsequent arguments made in dispositive motions and at the hearing lead to a conclusion that all "act[s] or omission[s]" that could constitute violations were therefore contained in the Loan Agreement.[5]

EC's own assertions, thus, mandate the reasonable due diligence question here: When could EC have obtained a copy of the Loan Agreement? Indeed, there are at least four separate ways that EC

[5] EC's argument that it "did not see the language of [the Loan Agreement] until late 2013," Dkt. 191 at 11, is unavailing. It also does not matter whether EC has "possession of the loan agreements at issue in this matter until Respondents produced them in response to the CID." Dkt. 186 at 19. Section 5564(g)(a) looks to what the CFPB knew *or could have known*. It is unassailable that the CFPB *could have* discovered the Loan Agreement on or around March 29, 2012, if not much earlier. Moreover, it has been established that the Integrity Advance Loan Agreement did not materially change during the Company's existence. Dkt. 176 at 14 ("Integrity Advance's loan agreement did not change significantly between 2008 and 2013.").

could have obtained – through reasonable diligence efforts -- a copy of the Loan Agreement on or before March 29, 2012. *First*, Integrity Advance was a Delaware consumer lending institution, licensed and examined by the Delaware Office of the State Bank Commissioner ("OSBC") beginning in 2008. That state agency, of course, had copies of the Loan Agreement.[6] *Second*, Integrity Advance operated through a website that was publically available starting in 2008. *See* Dkt. 111 at 6, ¶ 10. In fact, Integrity Advance's licensure by the State of Delaware was noted on its publicly-available website. Dkt. 176 at xxxv, ¶ 74). *Third*, EC could have contacted a complaining consumer and asked for a copy of the Loan Agreement. *Fourth*, the Loan Agreement was also filed publicly on May 7, 2012 in a civil action against Integrity Advance. Answer and Counterclaims, *State of Minnesota by its Attorney General, Lori Swanson v. Integrity Advance, LLC*, No. 62-CV-11-7168 at Ex. A (Minn. Dist. Ct., Ramsey Cnty. May 7, 2012). Thus, EC's claim that it could not "have discovered the violation until [it] started receiving [Respondents'] documents" pursuant to a CID, Tr. at 65:2-4, is plainly incorrect. Actual discovery is irrelevant under the "should have known" standard.

3. EC's claims as to Mr. Carnes (Counts III and VII) are time-barred under 12 U.S.C. § 5564(g). EC has alleged no separate violation on the part of Mr. Carnes. EC asserts authority over Mr. Carnes as a "related person," a status derived entirely from his position as *de facto* CEO of Integrity Advance. 12 U.S.C. § 5481(25)(C)(i). The argument advanced against Mr. Carnes seeks to hold him personally liable for violations of the Company, specifically, those allegedly arising from Integrity Advance's Loan Agreement. Dkt. 176 at 39 (explaining the standard for "[w]hen an

[6] Access to OSBC's information would have been facilitated by the Bureau's MOU with the Conference of State Bank Supervisors ("CSBS"). MOU Between the CFPB and the CSBS et al. On the Sharing of Information for Consumer Protection Purposes (Jan. 4, 2011), *available at* https://www.csbs.org/regulatory/Cooperative-Agreements/Documents/CFPB%20CSBS%20MOU.pdf ("The parties may exchange Confidential Supervisory Information and Personal Information, including information derived from Confidential Supervisory Information or from consumer complaints).

individual may be held liable for a *corporation's* unfair and deceptive acts and practices") (emphasis added); *id.* at 40 (stating the elements needed "[t]o prove that an individual is liable for *corporate violations* of the CFPA") (emphasis added) (*citing FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600 (9th Cir. 2016).

Indeed, EC's argument as to why Mr. Carnes is individually liable – including addressing both prongs of the *Gordon* standard – emanate solely from the fact of the Loan Agreement and from the fact that he was Integrity Advance's CEO. For example, EC argued that "Carnes had 'ultimate authority' over Integrity Advance during the company's entire existence. He was an active and engaged manager who exercised control over all business decisions. The loan agreement was the operative document for Integrity Advance's only product, a product that generated millions of dollars of income for the company (and for Carnes). And Carnes knew that the loan agreement disclosed the cost of the loan by assuming that it would be repaid in a single payment, even though Integrity Advance would automatically renew the loan multiple times by default, and most Integrity Advance loans were in fact automatically renewed." Dkt. 162 at 14. Moreover, EC and the ALJ presumed Carnes's knowledge solely by virtue of his role as CEO. *See, e.g.*, Dkt. 176 at 54 ("The assertion that a CEO in his position would have no more than a cursory understanding of his most profitable company's only product is wholly unconvincing.").

In other words, the two predicate facts that could establish liability as to Mr. Carnes under the apparent – albeit incorrect – theory of individual liability posited by EC are that (1) there was a Loan Agreement and (2) Mr. Carnes was CEO of Integrity Advance. To this end, the Bureau also could have exercised reasonable diligence in order to ascertain that Mr. Carnes was the President and CEO of Integrity Advance and that the Company was a relatively small business. This reasonable diligence could have been exercised on or before March 29, 2012, when the Bureau knew enough to access a

consumer complaint database looking for complaints relating to Integrity Advance. For example, Integrity Advance's license application and annual renewal listed "James Robert Carnes" as the President and CEO of Integrity Advance. RX-010 at 10. In addition, the State of Delaware's lending license renewal application annually required an "updated list of Principals (officers, directors, partners, members, owners, senior management etc.)" as well as a list of "all individuals and businesses with an ownership interest." RX-010 at 4.

4. Respondents respectfully renew their request for additional discovery. Respondents asserted statute of limitations defenses and made a prima facie case in support of those defenses. Dkt. 021 ¶ 2,-3; Dkt. 028-A at 16-22. EC's sole response was to argue that no statute of limitations could apply to this action because this matter was in the Bureau's administrative forum and not in district court. *See* Dkt. 33 at 110-14. The ALJ, citing the Director's order in *PHH*, agreed. Dkt. 75 at 29 ("I am bound to apply the Director's interpretation, which was clearly set out in *PHH*. Ultimate authority for issuing a Decision and Order in this case rests with the Director. I decline to adopt a position contrary to his."). In holding that no statute of limitation could apply to cases brought by EC in the CFPB's administrative forum, the ALJ did not reach the next questions – when EC had "discovered" the violations it alleges and whether its claims were timely. Dkt. 176 at 29 n.2 ("I did not reach the question of whether, even if the statute of limitations did apply, the Bureau timely filed its Notice of Charges.")

5. "[T]he need to establish [an] affirmative defense does not arise until the plaintiff has established his prima facie case." *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004). Further, statutes of limitations defenses asserted in motions to dismiss are limited to those allegations made in the complaint. *Hammel v. Marsh USA Inc.*, 79 F. Supp. 3d 234, 238 (D.D.C. 2015). That EC filed its Notice more than one year after the last possible alleged violation (which occurred in December 2012),

is not disputed. That EC could have, through reasonable diligence, discovered the UDAAP violations it alleges before November 18, 2012, is also evident from the face of the Notice. However, in the ALJ's ruling on Respondents' motion to dismiss (made 60 days *after* the deadline set in the CFPB's Rules[7]), the ALJ held that EC had made a prima facie case and simultaneously precluded Respondents' from asserting any statute of limitations defense. The ALJ's rulings thus precluded further factual development of the question of EC's "date of discovery." Should the Director find that Respondents' statute of limitations defense is not adequately supported (although, it is), now that the D.C. Circuit has ruled that such limitations *do* apply to the Bureau when it proceeds in its administrative forum, the Director should allow for discovery on issues relating to "date of discovery."

III. THE TILA (COUNT I) AND EFTA (COUNT V) CLAIMS ARE TIME-BARRED AND COUNTS II AND VI ALSO SHOULD BE DISMISSED

1. The court in *PHH v. CFPB*, explains that "[b]y its terms . . . Section 5563 ties the CFPB's administrative adjudications to the statutes of limitations of the various federal consumer protection laws it is charged with enforcing." 839 F.3d 1, 51 (D.C. Cir. 2016). TILA and EFTA, have statutes of limitations that govern agency action, as well as private litigants. *See* 15 U.S.C. § 1640(e); 15 U.S.C. § 1693m(g). Agencies, such as the CFPB, that are assigned enforcement duties under Section 1607(a), are not exempt from "the one-year statute of limitations imposed by TILA's civil liability provision." *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508, at *33 (S.D. Ind. Mar. 6, 2015). The court in *ITT* looked only to prudential regulators, which have no independent district court litigating authority for enforcement matters, and thus that court did not note

[7] Under the CFPB's rules, the ALJ was required to rule on Respondents' motion to dismiss on February 24, 2016. *See* 12 C.F.R. § 1081.212(h) (Within 30 days following the expiration of the time for filing all responses and replies to any dispositive motion, the hearing officer shall determine whether the motion shall be granted."). Respondents filed their Motion to Dismiss on December 21, 2015. Dkt. 28. Final briefing occurred on January 24, 2016. Dkt. 34. However, the ALJ did not rule on the motion until April 22, 2016. Dkt. 75.

the fact that administrative adjudications under Section 5563(a) of the CFPA are essentially identical to civil actions filed by the Bureau, and must not be treated differently for statute of limitations purposes. *But see PHH Corp*. v, 839 F.3d at 51.

2. The TILA and EFTA statutes of limitation begin to run "from the date of the occurrence the violation." 15 U.S.C. § 1640(e); *id.* § 1693m(g); *see ITT Educ. Servs.*, 2015 WL 1013508, *33. The alleged violations "occur" when the loan is consummated, since the claimed TILA and EFTA requirements at issue here would have been violated (if ever) as soon as the loan was made. *See In re Smith*, 737 F.2d 1549, 1552 (11th Cir. 1984); *Postow v. OBA Fed. Savings & Loan Ass'n*, 627 F.2d 1370, 1380 (D.C. Cir. 1980). Therefore, the TILA and EFTA claims would be (and indeed, are) necessarily time-barred, as the last possible violations would have occurred in December 2012 when Integrity Advance originated its final loan. *See* Dkt. 176 at 14.

3. Violations of Federal consumer protection laws are deemed to be violations of the CFPA. *See* 12 U.S.C. § 5536(a)(1)(A). However, EC may not pursue claims under Section 5536(a)(1)(A) when it would be barred from pursuing claims under the predicate law. Otherwise, the CFPA would override the predicate statute's limitation period. Nothing in the CFPA indicates that Congress intended this result. "Moreover, Congress does not, one might say, hide elephants in mouseholes." *PHH Corp.*, 839 F.3d at 54 (internal citation and quotation omitted). "If by means of the Dodd–Frank Act, Congress intended to alter the fundamental details of the statutes of limitations for enforcement of this critical consumer protection law, we would expect the text of the amended statute to say so." *Id.* (internal citation and quotation omitted).

IV. 15 U.S.C. § 1607(E)(5) DOES NOT APPLY TO COUNTS I AND II

Section 1607(e)(5) states:

> Except as otherwise specifically provided in this subsection and notwithstanding any provision of law referred to in subsection (a) or (c) of this section, no agency

> referred to in subsection (a) or (c) of this section may require a creditor to make dollar adjustments for errors in any requirements under this subchapter, except with regard to the requirements of section 1666d of this title.

15 U.S.C. § 1607(e)(5). EC has never sought remedies under section 1607(e)(5). Rather, it has reiterated (including most recently during oral argument) that it seeks remedies for TILA violations only under section 1055 of the CFPA. *See* Notice ¶ 1, 2; *id.* at 14 (Prayer for Relief); Dkt. 33 at 13 ("[e]nforcement of TILA is governed by 15 U.S.C. § 1607(a)(6)").

In any event, EC could not seek relief under this TILA provision. It has waived that right. By its terms, Section 1607(e) relief is only available when the Bureau proceeds in a cease and desist proceeding. 15 U.S.C. § 1607(e)(4)(A) ("Notwithstanding any other provision of this section, an adjustment under this subsection may be required by an agency referred to in subsection (a) or (c) of this section only by an order *issued in accordance with cease and desist procedures* provided by the provision of law referred to in such subsections.") (emphasis added). EC has proceeded under section 1053(a) of the CFPA, and not under section 1053(b), which provides for "special rules for cease and desist proceedings." 12 U.S.C. § 5563(b). Moreover, section 1607(e)(5) contemplates a specific remedy, namely the making of "dollar adjustments for errors in any requirements." *Id.* Here, too, EC has never sought this remedy, or introduced any evidence at any time in this case that would call for an accounting that could enable a particularized dollar adjustment. Indeed, as previously briefed, EC never articulated a cognizable damages theory. If anything, EC should be precluded from obtaining any monetary relief in this matter. And certainly, neither EC, nor the Director on its behalf can just now re-plead EC's TILA claim.[8]

[8] The CFPA does not apply retroactively. Thus, since EC has proceeded entirely under the CFPA, it may not pursue claims as to conduct that occurred prior to the CFPA's effective date, July 21, 2011. *See* 12 U.S.C. § 5561 note. A law may not have an impermissibly retroactive effect if "[t]he new provision attaches new legal consequences to events completed before its enactment." *See Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on

1. But even if Section 1607(e) applied (it does not) and EC had asserted it (it did not), any "adjustment" would be time-barred under Section 1607(e)(3), which has a two-year statute of limitations on any adjustments sought under section 1607. In order to overcome this two-year limit, EC would have to have proven that that the "disclosure errors resulted from a willful violation which was intended to mislead the person to whom credit was extended." 15 U.S.C. § 1607(e)(3)(C). EC has never pled any claim that includes a scienter standard of "willfulness," never argued such a theory, never alleged any predicate facts, and never presented any evidence that could support a "willfulness" theory. Respondents, in turn, would have had no notice of such a claim. Furthermore, there is no evidence in the record to support a finding that Integrity Advance engaged in a "willful violation [of TILA] which was intended to mislead."

CONCLUSION

As set forth above, all of the claims against Mr. Carnes (Counts III and VII) are time-barred. The claims arising from alleged TILA and EFTA violations (Counts I, II, V, and VI) are also time-barred. As to these Counts, the ALJ's decision should be set aside.

Respectfully submitted,

Dated: February 8, 2017

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a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."); *Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir. 2009) ("[courts] presume the statute applies only prospectively" from it effective date). Even if ECs claims were not time barred and applied retroactively, the Bureau may not seek civil penalties or equitable monetary relief for conduct prior to November 18, 2010. Equitable monetary relief, such as disgorgement and restitution, falls within the definition of the term "forfeiture" under Section 2462. *See SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016).

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CERTIFICATION OF SERVICE

I hereby certify that on the 8th day of February, 2017, I caused a copy of the foregoing Respondents' Supplemental Briefing to be filed by electronic transmission (e-mail) with the CFPB's Office of Administrative Adjudication (CFPB_Electronic_Filings@cfpb.gov). A copy of this brief is provided by electronic mail to U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Heather L. MacClintock (Heather.L.MacClintock@uscg.mil), and Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), and served by electronic mail on the following parties who have consented to electronic service:

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