UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	**ENFORCEMENT COUNSEL'S REPLY BRIEF ADDRESSING THE COMPLETENESS OF THE FACTUAL RECORD ON RESPONDENTS' STATUTE-OF-LIMITATIONS DEFENSE**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	
Respondents.	

ENFORCEMENT COUNSEL'S REPLY BRIEF ADDRESSING THE COMPLETENESS OF THE FACTUAL RECORD ON RESPONDENTS' STATUTE-OF-LIMITATIONS DEFENSE

I. Introduction

As set forth in Enforcement Counsel's opening brief, no further factual development is necessary or appropriate in this case.[1] Nothing in Respondents' brief changes this conclusion.[2] The ALJ should find that no further factual development is warranted here.[3]

II. Argument

A. Respondents have failed to justify additional fact development in light of what Enforcement Counsel has already produced and stipulated to.

1. Enforcement Counsel has already produced or stipulated to all the material facts necessary to resolve Respondents' limitations defense.

To ensure that Bureau adjudication proceedings are fair and expeditious,[4] the Bureau's Rules of Practice for Adjudication Proceedings were designed to eliminate traditional pre-trial discovery while ensuring that Respondents have access to information relevant to Enforcement Counsel's decision to commence enforcement proceedings.[5] Consistent with these Rules, Enforcement Counsel produced all of the documents and information obtained in connection with its investigation of Respondents. Enforcement Counsel also recently stipulated to additional

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[1] Enforcement Counsel's Brief Addressing the Completeness of the Factual Record on Respondents' Statute-of-Limitations Defense (Sept. 18, 2019) ("EC Br.") [Dkt. 235].

[2] Respondents' Brief in Support of Further Discovery on the Statute of Limitations Issue (Oct. 4, 2019) ("Resp. Br.") [not yet docketed].

[3] Because Respondents are seeking additional fact development only in connection with the Bureau's claims under the Consumer Financial Protection Act (CFPA), Enforcement Counsel's arguments here are similarly limited. Respondents assert in their brief, however, that the Bureau's claims under the Truth in Lending Act and the Electronic Funds Transfer Act, as well as its § 1036(a)(1)(A) CFPA claims, are also time barred. *See* Resp. Br. at n.1. Enforcement Counsel disagrees, and reserves argument on those issues should Respondents file a motion arguing as much.

[4] 12 C.F.R. § 1081.101.

[5] CFPB Rules of Practice for Adjudication Proceedings (Final Rule), 77 Fed. Reg. 39058, 39059 (June 29, 2012); *see* 12 C.F.R. § 1081.206.

facts relating to critical stages of its investigation. Respondents nevertheless maintain that they are entitled to additional information that has no bearing on when the Bureau discovered violations. Respondents are mistaken.

There are not, as Respondents contend, "obvious holes in the record," and there is no "reason to believe that the statute may have begun running well before November 2012."[6] Respondents claim that several dates are crucial to the Bureau's discovery of violations cited in the Notice of Charges, but they simply are not. Respondents suggest, for example, that when the Bureau's Director announced an intention to examine payday lenders, or when the Bureau opened a "research matter" or "investigative matter," is relevant to when the Bureau discovered the violations. But these dates have no bearing on what facts Enforcement Counsel had about Respondents at those times or when the Bureau discovered an element of any asserted violations. Respondents also argue that they need to know when the Bureau first saw the loan agreement or learned that Respondent Carnes was the CEO of Integrity Advance to mount their defense, but Enforcement Counsel has already produced the documents and information it has relating to these issues. If Enforcement Counsel had received other information outside of the CID process, it would have been disclosed in the Rule 206 production.

What *is* relevant to Respondents' defense is when the Bureau discovered the necessary elements of the violations asserted in the Notice of Charges.[7] This cannot occur before Enforcement Counsel conducts an investigation or otherwise receives credible external information. Here, through its Rule 206 disclosures, Enforcement Counsel has already provided that information, which, contrary to Respondents' suggestion, is not solely limited to documents

[6] Resp. Br. at 6.

[7] *See Merck & Co. v. Reynolds*, 559 U.S. 633, 648-49 (2010) (holding limitations period does not begin to run until plaintiff discovers facts suggesting all necessary elements of violation).

obtained pursuant to formal investigative demands. It defies logic to suggest that the Bureau could have discovered the elements of the pleaded violations before obtaining that information. A government agency cannot be expected to discover violations and file cases before investigating potential wrongdoers and establishing facts constituting those violations.

Enforcement Counsel has already produced to Respondents all information and documents required by Rule 206, and the parties have jointly stipulated to additional facts relating to the statute-of-limitations issue. Respondents have all they need to mount their statute-of-limitations defense.

2. Respondents would not be entitled to additional discovery even if § 1054(g)(1) of the CFPA incorporated a constructive-discovery standard.

Separately, Respondents argue that the CFPA's statute of limitations prohibits the Bureau from bringing actions more than three years after the date that it *should have discovered* the violation to which an action relates. Enforcement Counsel disagrees, as explained in its opening brief (and as it can explain further in substantive briefing on Respondents' statute-of-limitations defense). But, as Respondents concede, the ALJ need not decide now whether § 1054(g)(1)'s statute of limitations incorporates a "should have discovered" standard.[8] Even if it did, that would not entitle Respondents to additional discovery—because no additional evidence could establish that Enforcement Counsel "should have known" of the violations alleged here before November 18, 2012.

Indeed, Respondents do not identify any additional information that would demonstrate when Enforcement Counsel "should have discovered" the violations. If they are suggesting that they need discovery to determine what steps Enforcement Counsel took to investigate once they

[8] *See* Resp. Br. at 11.

became aware of consumer complaints or other signs that violations *may* have occurred, Respondents misunderstand the "should have discovered" standard. As the Supreme Court held in *Merck & Co. v. Reynolds*, even where a statute of limitations runs from when a plaintiff "should have discovered" a violation, the question is when a hypothetical "reasonably diligent plaintiff would have discovered" the violation.[9] The Court was explicit: it is irrelevant for statute-of-limitations purposes "whether the actual plaintiff undertook a reasonably diligent investigation."[10] So the details of what investigative steps Enforcement Counsel took simply have no relevance.

B. Respondents have not shown that it is necessary to reopen the record or that they were denied an opportunity to develop their case.

Respondents should only have another chance to seek further evidence if they can both (1) provide a "specific reason why it is necessary to reopen the record and take further evidence," and (2) explain how they were denied an "opportunity to present [their] case."[11] Respondents have not made either showing. They admit that they did not seek evidence on their limitations argument through subpoena before the initial hearing's record closed.[12] Because of

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[9] 559 U.S. at 653.

[10] *Id.*

[11] *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 126 (D.C. Cir. 2015); Scheduling Conference Order (July 24, 2019) [Dkt. 227] at 2 (citing *Intercollegiate Broadcasting* decision for proposition that when an appointments clause violation prompts the rehearing of an administrative matter, it is reasonable for the ALJ to conduct a de novo record review, rather than a live trial-like adversarial hearing). Respondents suggest that applying *Intercollegiate Broadcasting* to this matter would raise due-process concerns, but they fail to explain why applying the standard from the case would deprive them of due process.

[12] Respondents point to two requests they made. Resp. Br. at 14 (citing Dkt. 192 at 12 n.11, Dkt. 203 at 11-12 ¶¶ 4-5). But each came while the matter was on appeal to the Director, after the prior ALJ had issued his Recommended Decision and the hearing record was closed. *See* Recommended Decision (Sept. 27, 2019) [Dkt. 176]; 12 C.F.R. § 1081.400(e) (permitting the ALJ to receive evidence until the filing of a recommended decision).

this, they cannot point to any decision of the prior ALJ that prevented them from obtaining information. Instead, they attempt to reason backward from that ALJ's decision on the motion to dismiss and argue that any efforts to seek discovery would have been futile. This post hoc rationalization of how that ALJ would have treated a hypothetical subpoena is just conjecture. At the time Respondents could have sought a subpoena, their position was that the statute-of-limitations issue was an available defense.[13] In fact, they asserted—in direct contradiction to the view they now seek to advance—that the Director's *PHH* decision had no bearing on the defense.[14] Yet they did not seek further evidence.

Respondents also cannot identify any specific reason it is necessary to reopen the record. Pointing to the D.C. Circuit's *PHH Corp. v. CFPB* decision, they assert that the law has changed. But they cannot explain why that decision should entitle them to reopen the factual record. *PHH* did not "expressly and directly change the law of this case," as Respondents assert,[15] because it did not address whether the limitations provision in § 1054(g) of the CFPA applies in administrative proceedings, let alone how that provision operates.[16] More importantly, the previous ALJ never denied Respondents an opportunity to seek additional evidence on the basis of the Director's overruled *PHH* decision. Respondents, therefore, have failed to demonstrate why further factual development is warranted here.

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[13] Resp. Memo in Supp. of MTD (Dec. 21, 2015) [Dkt. 28-A] at 16-19.

[14] Resp. Reply Memo in Supp. of MTD (Jan. 26, 2016) [Dkt. 34] at 12.

[15] Resp. Br. at 14 n.7.

[16] *PHH Corp. v. CFPB*, 839 F.3d 1, 50-55 (D.C. Cir. 2016), *vacated, reinstated in part, and remanded by*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) (determining that the RESPA statute of limitations found at 12 U.S.C. § 2614 applies in the CFPB's administrative proceedings).

C. Respondents confirm that they seek information using methods that conflict with the Bureau's Rules.

Respondents' discovery plan is inappropriate.[17] Respondents confirm in their brief that they seek documents that the Bureau's Rules explicitly exempt from disclosure, including the Bureau's internal correspondence and internal reports.[18] Respondents also confirm that they intend to employ discovery mechanisms that are not available under the Bureau's Rules, including live testimony at an evidentiary hearing and deposition testimony under 12 C.F.R. § 1081.209 related to the date of discovery.[19] But no provisions of the Bureau's Rules permit discovery depositions or evidentiary hearings of the sort Respondents propose. If Respondents are permitted to seek additional information, their efforts should be limited in a manner consistent with the Bureau's Rules, lest they receive on this remand an administrative proceeding that exceeds that available to other respondents.

III. Conclusion

For the reasons described above and in Enforcement Counsel's opening brief, the ALJ should find that Respondents have failed to demonstrate that additional factual development is necessary to resolve their statute-of-limitations defense.

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[17] To the extent that it is necessary, Enforcement Counsel reserves argument regarding any of Respondents' specific discovery requests for motions to quash.

[18] *See* Resp. Br. at 11; Proposed Subpoena (Aug. 23, 2019) [Dkt. 232A] at 5; 12 C.F.R. § 1081.206(b)(1)(ii) (permitting the Office of Enforcement to withhold internal memoranda, notes, or writings prepared "by a person employed by the Bureau or another government agency," or if the document "would otherwise be subject to the work product doctrine").

[19] *See* Resp. Br. at 12; Joint Proposed Prehearing Schedule (Aug. 14, 2019) [Dkt. 228] at 1, n.1.

Respectfully submitted,

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October 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October 2019, I caused a copy of the foregoing Enforcement Counsel's Reply Brief Addressing the Completeness of the Factual Record on Respondents' Statute-of-Limitations Defense to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on Respondents' counsel at the following addresses:

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