

UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:)
)
)
INTEGRITY ADVANCE, LLC and)
JAMES R. CARNES,)
)
)
Respondents.)

ORDER DENYING FURTHER DISCOVERY
ON STATUTE OF LIMITATIONS ISSUE

BACKGROUND

Procedural History

On August 16, 2019, I conducted an initial scheduling conference in this matter. At the conference, I made the decision to reopen the record with regards to the statute of limitations issue based upon a decision by the D.C. Circuit Court of Appeals, issued after the previous Administrative Law Judge’s (ALJ) recommended decision, that could potentially impact the current matter. *See PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (finding *inter alia* that statutes of limitations apply to claims brought in CFPB’s administrative proceedings); and *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc court reversing some parts of the previous panel’s decision, but reinstating portion relating to applicability of statutes of limitations). I directed the parties to meet and confer and provide me with a joint proposal for supplementing the record.¹

The parties subsequently submitted a *Joint Statement on Fact Development Regarding Statute of Limitations Defense* on August 23, 2019 (*Joint Statement*; Doc. 231). Respondents’

¹ I note that contrary to Respondents’ representation in *Respondents’ Brief in Support of Further Discovery on the Statute of Limitations Issue* (Doc. 236), I did not recognize that “Respondents were denied the opportunity to develop the factual record on the statute of limitations issue.” Respondents’ Brief at p. 3. That characterization is either an overstatement or a misunderstanding of what I said. The point I was making was that there had been a change in the relevant case law and the parties had not had a chance to fully address its impact in the prior proceeding due to the timing of the decision. Therefore, the record is silent as to the applicability of *PHH Corp.* to this matter.

Counsel (RC) simultaneously submitted *Respondents' Request for Issuance of Subpoena to the Consumer Financial Protection Bureau for Production of Documents*, seeking additional factual discovery (Doc. 232). In the *Joint Statement*, Enforcement Counsel (EC) presented various arguments as to why the record should not be reopened and RC requested an opportunity to respond. In the *Joint Statement*, EC also represented that they had already produced all required factual information pursuant to the CFPB's *Rules of Practice for Adjudication Proceedings*, 12 C.F.R. § 1081.206 (Rule 206).

I therefore issued an order dated August 30, 2019, in which I directed counsel to confer again and clarify whether the required discovery documentation had, in fact, already been provided. In the event the parties could not agree that the required documentation had been provided, I set forth a schedule for the parties to submit briefs on the issue of whether additional discovery needs to be conducted on the statute of limitations issue.

On September 11, 2019, the parties submitted a *Joint Update on Fact Development Regarding Statute of Limitations Issue (Joint Update)*; Doc. 234) in which they informed me that they were unable to reach agreement as to whether all required discovery had been provided and they would proceed to brief the issue. In the *Joint Update* at pages 3-4, the parties provided a list of undisputed facts relating to the statute of limitations issue to which they were willing to stipulate.

On September 18, 2019, EC submitted *Enforcement Counsel's Brief Addressing the Completeness of the Factual Record on Respondents' Statute-of-Limitations Defense (EC's Brief)*; Doc. 235). On October 4, 2019, RC submitted *Respondents' Brief in Support of Further Discovery on the Statute of Limitations Issue (RC's Brief)*; Doc. 236). On October 15, 2019, EC submitted *Enforcement Counsel's Reply Brief Addressing the Completeness of the Factual Record on Respondents' Statute-of-Limitations Defense (EC's Reply)*; Doc. 237).

CFPB's Position

EC argue that no further discovery on Respondents' statute of limitations defense is warranted for four reasons: 1) EC have already produced or stipulated to all the documents and material facts Respondents need to advance their limitations defense; 2) Respondents have failed to show that reopening the record is necessary or that they were denied the ability to present their statute of limitations defense during the prior proceeding; 3) legal developments between the initial proceedings and this remand hearing do not address how to apply the Consumer Financial Protection Act's (CFPA) "date of discovery" statute of limitations and do not address the facts needed to adjudicate limitations questions under the CFPA; and 4) Respondents' request for additional discovery contravenes the discovery limits set forth in the CFPB's *Rules of Practice for Adjudication Proceedings*, 12 C.F.R. part 1081.

EC agree that further development of the record with regards to briefing on the merits of the statute of limitations defense is appropriate.

Respondents' Position

RC argue that additional discovery is needed on the statute of limitations issue for four reasons: 1) the discovery Respondents seek is highly relevant to determining a potentially dispositive threshold issue; 2) the CFPB's three-year statute of limitations begins running from the date that the CFPB knew or should have known of the alleged violations; 3) the discovery Respondents seek is narrowly tailored and appropriate under CFPB rules; and 4) supplementing the record is appropriate under *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 296 F.3d 111 (D.C. Cir. 2015).

Rules of Practice for Adjudication Proceedings

The procedures for the conduct of administrative adjudication proceedings brought by the CFPB are governed by the *Rules of Practice for Adjudication Proceedings* (Rules) set forth at 12 C.F.R. part 1081. The final rules were issued after receiving and analyzing public comments. The comments and explanations for the rules are found in the Federal Register, Vol. 77, No. 126.

Rule 206, *Availability of documents for inspection and copying*, deals with the production of documents in an administrative adjudication. The commentary explains that the rule adopts an "affirmative disclosure" approach to fact discovery in order to promote fair and efficient resolution of adjudicatory proceedings. Rather than requiring respondents to submit discovery requests, the rule is written to provide them with an automatic right to inspect and copy documents they would likely seek and obtain in the course of a protracted discovery period. The purpose of the rule is to ensure that respondents have a complete understanding of the **factual basis** for the CFPB's action, thereby enabling them to determine the nature of their defenses or decide whether to seek settlement (emphasis added). 77 Fed. Reg. 39058, 39070 (June 29, 2012).

The rule provides that the Office of Enforcement (OE) shall make available for inspection and copying documents it has obtained prior to the institution of proceedings, from persons not employed by the CFPB, in connection with the investigation leading to the institution of proceedings. It sets forth three categories of documents that shall be provided: 1) documents turned over in response to civil investigative demands or other written requests to provide documents or be interviewed issued by the OE; 2) all transcripts and transcript exhibits; and 3) any other documents obtained from persons not employed by the Bureau. 12 C.F.R. § 1081.206(a)(1). Additionally, the OE must make available for inspection and copying: 1) each civil investigative demand (CID) or other written request to provide documents or be interviewed issued by the OE in connection with the investigation leading to the institution of proceedings; and 2) any final examination or inspection reports prepared by any other office of the Bureau if the OE intends to introduce them into evidence or use them to refresh the recollection of, or impeach, any witness.² 12 C.F.R. § 1081.206(a)(2).

² I am paraphrasing the rules, but recommend the parties review the source document.

The rule clarifies that the OE may provide additional documents if it so chooses and that respondents may seek access to or production of additional documents pursuant to subpoena. The hearing officer has the authority to order a subpoena issued unless he or she determines that it is unreasonable, oppressive, excessive in scope, or unduly burdensome. 12 C.F.R. §§ 1081.206(a)(3), 1081.208(d).

The rule also specifies that the OE may withhold a document if: 1) it is privileged; 2) it is an internal memorandum, note or writing prepared by a person employed by the Bureau or another government agency, other than an examination or supervision report as specified in paragraph 206(a)(2)(ii), or it would otherwise be subject to the work product doctrine and will not be offered in evidence; 3) the document was obtained from a domestic or foreign governmental entity and is either not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed; 4) the document would disclose the identity of a confidential source; 5) applicable law prohibits disclosure of the document; or 6) the hearing officer grants leave to withhold the document or category of documents as not relevant to the subject matter or otherwise, for good cause shown. The rule also prohibits the OE from withholding any material exculpatory evidence it would otherwise be required to produce. 12 C.F.R. § 1081.206(b).

Respondents' Request for Issuance of Subpoena

On August 23, 2019, Respondents filed a request for issuance of a subpoena (Doc. 232). Pursuant to the request, Respondents seek four categories of documents for the period July 21, 2011³ to November 18, 2012:⁴ 1) all consumer complaints regarding Respondents; 2) all external correspondence regarding Respondents; 3) all internal correspondence regarding Respondents; and 4) all internal reports, memoranda, notes, analysis, or other documents regarding Respondents.

In their request for subpoena, Respondents appear to acknowledge that some of the materials they are requesting could be subject to privilege and therefore properly withheld pursuant to Rule 206(b). To the extent that any of the requested documents are withheld or redacted, Respondents therefore request a withheld documents log. Respondents argue that the requested documents should be produced for the four reasons set forth above under Respondents' Position.

In their briefs (Docs. 235, 237), EC argue that the request for subpoena should be denied for the four reasons stated above under the CFPB's Position.⁵

Parties' Stipulation of Fact and Declarations

³ The effective or transfer date of the CFPB.

⁴ Three years prior to the date the Notice of Charges was filed in this matter.

⁵ I am treating EC's brief and arguments as a motion to quash the subpoena. Both parties have set forth their arguments regarding whether the subpoena should be issued.

In the parties' *Joint Update* (Doc. 234) filed on September 11, 2019, they stipulated to several facts relevant to the production of documents issue. The parties stipulated that EC have produced, among other things, documents obtained by the OE prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of such proceedings and a PDF indicating that the OE searched the Federal Trade Commission's database of consumer complaints. They stipulated as to relevant dates concerning the CID, investigative hearing testimony of Carnes and Foster, and the Notice and Opportunity to Respond and Advise (NORA) letter. The parties further stipulated as to the dates that Respondents made an initial partial production in response to the CID and dates it completed production, as well as the date of Respondents' response to the NORA letter.

Within the stipulation of facts, the parties also referenced Doc. 187, a Declaration of EC, Alusheyi J. Wheeler, who stated, in addition to the dates relating to the CID and responses thereto, that the OE first obtained copies of Integrity Advance's loan agreement through the company's productions in response to the January 7, 2013, CID. The stipulation also references Doc. 189, a Declaration of Peter S. Frechette, former counsel for Respondents, who submitted a copy of the Memorandum of Understanding between the CFPB and the Federal Trade Commission (FTC) and a document reflecting that EC searched the FTC Consumer Sentinel database of consumer complaints for complaints about "Integrity Advance" on March 29, 2012.

In their brief, EC specify that they have produced each CID in this matter, responses to each CID, transcripts of testimony taken in June 2014 from Respondent James Carnes and Integrity Advance's Chief Operating Officer, Edward Foster, and consumer complaints obtained by the OE (Doc. 235, pp. 4-5). They represent that if they had other information they were required to disclose, they would have supplemented the disclosures.

ANALYSIS

1. Has EC already produced all required categories of documents set forth in Rule 206(a)?

In their brief, EC represent that they have already produced all of the documents obtained by the OE from external sources prior to filing the *Notice of Charges* and stipulated to material facts pertinent to Respondents' statute of limitations defense. EC specifically represent that they have produced each CID and responses thereto, transcripts of testimony taken in June 2014 from James Carnes and Edward Foster, and all consumer complaints and communications regarding Respondents that the OE received from outside sources before these proceedings were initiated. *EC's Brief* at 4-5, *EC's Reply* at 1-2. EC represent that they have no further information to disclose pursuant to Rule 206 and, if they did, they would have supplemented their production. *EC's Brief* at 5.

Pursuant to the stipulation of facts contained in the *Joint Update* (Doc. 234, pp. 3-4), as discussed above, Respondents have conceded that EC produced documents obtained by the OE

prior to the institution of proceedings from persons not employed by the Bureau and a PDF indicating that a member of the OE searched the Federal Trade Commission's Consumer Sentinel database of consumer complaints on March 29, 2012. Respondents have also stipulated to other relevant facts and dates related to the investigation including the dates of the CID, responses to the CID, investigational hearing testimony, the NORA letter, responses to the NORA letter, and filing of the *Notice of Charges*.

Within the stipulation of facts, the parties also referenced Doc. 187, a Declaration of EC, Alusheyi J. Wheeler, who stated, in addition to the dates relating to the CID and responses to the CID, that EC first obtained copies of Integrity Advance's loan agreement through the company's productions in response to the January 7, 2013, CID. Attached to the Declaration was a copy of the January 7, 2013, CID which also sets forth, beginning at page 7, *Interrogatories* and *Requests for Documents* that EC were specifically seeking from the Respondents as part of the investigation.

In their brief (Doc. 235, p. 5), EC reiterate that the loan agreement, upon which EC's claims rest, was received by the OE when it was produced in response to the January 7, 2013, CID. EC also represent that they learned of Respondent Carnes' awareness of Integrity Advance's consumer lending activities and his involvement in and authority to control those activities when they conducted the investigational hearings of Carnes and Foster. The parties stipulated in their *Joint Update* (Doc. 234) that the interviews of those two individuals took place in June of 2014.

The stipulation of facts (Doc. 234) also references Doc. 189, a Declaration of Peter S. Frechette, former counsel for Respondents, who submitted a copy of the Memorandum of Understanding between the CFPB and the Federal Trade Commission (FTC) and a document reflecting that EC searched the FTC Consumer Sentinel database of consumer complaints for complaints about "Integrity Advance" on March 29, 2012.

Respondents thus do not appear to allege that EC has not produced the documents required under Rule 206, but rather they are requesting additional categories of documents that they perceive to be relevant, above and beyond those described in Rule 206(a), *Availability of documents for inspection and copying*.

After reviewing the parties' briefs, stipulation of facts, and documents they have submitted or referenced therein, I find that EC have already produced the documents required under Rule 206(a), which includes documents obtained by the OE prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of the proceedings. This encompasses categories one and two of Respondents' subpoena: consumer complaints and external correspondence (Doc. 232 at 1, and Att. A). I therefore **DENY** Respondents' request for issuance of a subpoena for these two categories of documents as unreasonable. I decline to issue a subpoena for documents that have already been provided in accordance with the Rules.

2. Are Respondents entitled to additional documents that Rule 206(b) lists as Documents that may be withheld?

In their brief, Respondents clarify that they are seeking documents to establish: 1) when someone at the CFPB first viewed a copy of the loan agreement; 2) when someone at the CFPB first viewed a consumer complaint; 3) when the CFPB opened a research matter; and 4) when the CFPB opened an investigative matter. *RC's Brief* at 1. They assert that the answers to these questions are relevant to when the CFPB “knew or should have known of the alleged violations”⁶ and that the Rules allow for discovery of additional relevant documentation.

EC argue in reply that Respondents are seeking documents that are explicitly exempt from disclosure, including the Bureau’s internal correspondence and internal reports, and that Respondents are thus seeking to employ discovery mechanisms that are not available under the Bureau’s procedural rules (Doc. 237 at 6). They argue that Respondents should not be allowed to seek information beyond the required discovery documentation that EC have already provided that may specifically be withheld under Rule 206(b).

I find based on *RC's Brief* (Doc. 236), *Request for Subpoena* (Doc. 232), and the *Joint Statement* (Doc. 231) that Respondents are seeking to obtain documentation from the CFPB that goes beyond the required documentation listed under Rule 206(a), and that would reveal its attorneys’ mental impressions of the factual information received, work product, and case strategy in deciding when to institute proceedings by filing the *Notice of Charges* in this matter.

In their *Request for Subpoena*, Respondents specifically state that that they are seeking “internal correspondence” and “internal reports” (Doc. 232 at 2 and Att. A). Thus, on its very face, the subpoena is seeking categories of documentation that may properly be withheld under the Rules. In both their brief and subpoena, Respondents acknowledge that the documentation they are seeking may properly be withheld under the categories set forth in Rule 206(b) which would include privilege, internal communications, and work product. (Doc. 232 at Att. A, Doc. 236 at 13).

Furthermore, Respondents have already acknowledged, via a document referenced in the stipulation of facts (Doc. 187), that the CFPB represents that it first received a copy of Integrity Advance’s loan agreement through the company’s production in response to the CID. So, presumably Respondents know when the CFPB asserts that someone at the Bureau first viewed a copy of the loan agreement. Respondents also stipulated that EC provided copies of documents

⁶ Respondents are thus asserting that the term “date of discovery” within the Consumer Financial Protection Act statute of limitations means “constructive” discovery, i.e., the date when the CFPB “knew or should have known of the alleged violations.” I note however, that Respondents state in their brief (*RC's Brief* p. 2) and EC agree (*EC's Brief* p. 6) that whether a constructive discovery standard applies in this matter need not be ruled upon for purposes of determining whether the Respondents are entitled to additional factual discovery on the statute of limitations issue. I agree that an analysis of this issue will be more appropriate when I am considering the merits of the parties’ statute of limitations arguments, so I decline to discuss that issue now, although both parties devote a significant portion of their briefs to arguing their positions on this issue.

obtained by the OE prior to the institution of proceedings, from persons not employed by the Bureau. This would include copies of consumer complaints. Thus, presumably Respondents also already know when someone at the Bureau first viewed a copy of a consumer complaint. I therefore find the Respondents' argument that they are trying to ascertain missing information unconvincing.

I also am not convinced by the Respondents' argument concerning the relevance of whether members of the OE followed guidance set forth in an internal office manual. Such guidance, whether followed or not, would not reveal when the OE received the factual information which is the basis for the allegations contained in the *Notice of Charges*. As discussed in the Rules and commentary, Respondents are entitled to know the factual bases for the charges against them.

Respondents are correct that Rule 206(a)(3) provides for the possibility that additional documents other than those enumerated in Rule 206(a)(1)-(2) may be either provided by the OE of its own accord or sought by Respondents pursuant to subpoena under Rule 208, *Subpoenas*. However, the fact that Respondents may perceive information to be relevant does not mean that Rule 206(b) regarding withheld documents may be ignored.

Rule 208 governs the issuance of subpoenas in administrative adjudication proceedings. The rule grants the hearing officer the discretion to determine whether to issue or deny a subpoena. The standard for denying a subpoena is whether the hearing officer finds it to be unreasonable, oppressive, excessive in scope, or unduly burdensome.

The commentary to Rule 206 provides that Rule 208 permits a respondent to seek other relevant documents in the possession of the Bureau. However, it goes on to explain that Rule 206 is intended to give respondents access to the **material facts underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings** (emphasis added). It states that it is not intended to create an obligation for enforcement counsel to search the files of other divisions or offices in the Bureau, but that the Bureau will include in its affirmative disclosure documents obtained by other elements of the Bureau from persons not employed by the Bureau and later provided to the OE for its use in connection with the investigation leading to the institution of proceedings. It further states that through the affirmative disclosure process, the OE will turn over the **documents that informed its decision to recommend the institution of proceedings** (emphasis added). 77 Fed. Reg. 39058, 39073 (June 29, 2012).

Respondents acknowledge in their brief that the purpose of the discovery process is to provide them with a complete understanding of the factual basis for the Bureau's action (Doc. 236 at 13). Respondents also cite to a case which *inter alia* actually appears to support EC's position that they should not be required to produce either documents or witnesses which reveal counsel's mental impressions, case strategies, or legal opinions, but only those materials which contain factual matters that support the allegations. See *CFPB v. Universal Debt Sols., LLC*, No. 1:15-CV-859, 2017 U.S. Dist. LEXIS 146222 (N.D. Ga. Aug. 25, 2017).

I find that EC have provided documentation showing the material facts underlying their decision to recommend the commencement of enforcement proceedings. I further find that Respondents are attempting to subpoena documents via their subpoena categories 3 and 4 (Doc. 232, Att. A) that clearly fall within the categories of documents that may properly be withheld under Rule 206(b). Respondents have not provided convincing authority entitling them to such categories of information. Accordingly, I **DENY** Respondents' request for issuance of a subpoena for these two categories, i.e., internal correspondence and internal reports, memoranda, notes, analysis and other documents. I find that the subpoena of these documents is both unreasonable and excessive in scope.

3. Are Respondents entitled to a withheld document list?

In their brief, Respondents acknowledge that some of the documents they are seeking “could be privileged” (Doc. 236 at 13). They therefore request that EC be ordered to provide a “privilege log.”⁷ In support of their request for a privilege log they cite to Rule 206(c) which provides that a hearing officer *may* require the OE to produce a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) through (v). Respondents again cite to the *Universal Debt Sols.* case, described above, in which the court did not even address the issue of a withheld document list, but emphasized that the defendants in that case were entitled only to the factual bases for the CFPB's allegations. I therefore do not find the case particularly helpful or supportive of Respondents' request for a withheld document list. Respondents did not cite to any other cases or authorities to support their position that they are entitled to a withheld document list. EC did not address the issue of a withheld document list in its reply brief.

Rule 206(c) provides for the possible production of a “withheld document list” and states that the hearing officer *may* require the OE to produce a list of documents or categories of documents withheld based upon the five withholding categories set forth above or to submit to the hearing officer any document withheld.

The commentary regarding Rule 206(c) states only that a hearing officer *may* require the OE to submit a withheld document list. It provides that the hearing officer *may* require the OE to submit a list of documents or categories of documents withheld “when appropriate” but does not elaborate further. 77 Fed. Reg. 39058, 39074 (June 29, 2012).

I do not find it appropriate in this case to compel EC to produce a detailed withheld document list. Although the rules provide that I may alternatively require EC to provide a list of “categories” of documents that it wishes to withhold, based on the briefs, it is clear that those categories would include categories three and four, set forth in Respondents' subpoena request: internal correspondence, reports, memoranda, notes, analysis, etc. I therefore find requiring a category list to be an unnecessary and dilatory exercise. Given that the documents in question involve EC's internal correspondence and internal reports, etc., reflecting counsels' analysis of the

⁷ I believe what RC are referring to by “privilege log” is a “withheld document list” as discussed in Rule 206(c).

case and charging strategy, rather than documents containing factual information obtained from external sources that provided the bases for the allegations, I decline to require a withheld document list.

4. Are Respondents entitled to supplement the record under the *Intercollegiate* case?

In their brief, RC argue that they are entitled to the additional discovery they request in their subpoena pursuant to the case of *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015) (Doc. 236 at 14-15). They argue that because the law regarding applicability of statutes of limitations in administrative proceedings has changed due to the *PHH Corp.* case, they have therefore provided a “specific reason” why it is necessary to reopen the record. They also argue that, although they did not make a discovery request for the documents they are seeking now when the statute of limitations issue was adjudicated by the ALJ previously, and, although they presented their argument to Judge McKenna without claiming that they needed this additional information, they should be excused from not having requested these documents previously, because it would not have made a difference.

EC argue that Respondents have not provided a “specific reason” why it is necessary to reopen the record to take further evidence and that Respondents cannot explain how they were denied an opportunity to present their case or point to any decision of the prior ALJ that prevented them from obtaining information. They assert that Respondents are attempting to reason backward from the ALJ’s decision on the motion to dismiss by arguing that any efforts to seek discovery would have been futile (Doc. 235 at 8-10). EC also argue that *PHH Corp.* did not change the law with regards to the “date of discovery” issue or what elements parties must assert in the statute of limitations.

In the *Intercollegiate* case, the D.C. Circuit addressed the cure for an appointments clause violation in a case involving the Copyright Royalty Board. The Court found *inter alia* that a *de novo* record review, rather than live trial-like adversarial hearing, was reasonable where each party had ample opportunity to present its case in the initial proceedings, and no party provided any specific reason why it was necessary to reopen the record to take further evidence.

In the current matter, as I discussed in my *Scheduling Order* (Doc. 233 at FN. 1), the Respondents’ previous motion to dismiss based on the running of the statute of limitations was denied by the ALJ based on the CFPB Director’s decision in *PHH Corp.* (finding statutes of limitations inapplicable in CFPB administrative proceedings). Ultimately, the Director’s decision was overturned on this point by the D.C. Circuit Court. However, due to the timing of the D.C. Circuit’s decision, the statute of limitations issue was never revisited in the previous proceeding, and the issue of what effect, if any, the D.C. Circuit’s *PHH Corp.* decision has on this matter, was not resolved.

I therefore do agree that Respondents have presented a specific reason why I need to reopen the record on the statute of limitations issue. I find that the parties should be able to submit their

respective arguments regarding what effect, if any, the *PHH Corp.* case has on this matter, in light of the fact that Respondents' previous motion on this issue was denied specifically due to the Director's *PHH Corp.* decision. I also find Respondents' argument that, even though they did not seek the additional evidence that they now seek when they made their previous statute of limitations argument before Judge McKenna, their failure to do so should be ignored because it "would not have made a difference" to be unconvincing. Regardless of whether or when Respondents did or did not seek the additional discovery, as discussed above, I have found that Respondents are not entitled to the additional discovery they are seeking because it may properly be withheld under Rule 206(b).

I find that the *PHH Corp.* decision is significant because it addressed the **applicability** of statutes of limitations to CFPB administrative proceedings. The case did not address the "discovery rule" or the specific statute of limitations in this matter. Nor did the case address whether Respondents should be entitled to the type of discovery they are now requesting. It did not make a finding that would entitle Respondents to discovery of documents that would properly be withheld under Rule 206(b). Accordingly, I find only that the record on the statute of limitations issue should be **reopened** to allow the parties to present their arguments regarding what effect, if any, the *PHH Corp.* case has in this matter and whether any of the charged Counts are time-barred. I **DENY** the Respondents' request to open the record for additional factual discovery on the statute of limitations.

Accordingly, I issue the following **ORDERS**:

1. *Respondents' Request for Issuance of Subpoena to the Consumer Financial Protection Bureau for Production of Documents* (Doc. 232) is **DENIED**.
2. The parties will submit briefs on the issue of whether any, or all, of the counts in this matter are barred by the relevant statute of limitations. In their briefs, the parties will specifically address the following issues:
 - a. what statute of limitations applies to each count and their position as to whether the count is time-barred by the relevant statute;
 - b. what effect, if any, the *PHH Corp.* case or other recent case law has on the current matter;
 - c. what the parties' position is with regard to Count IV which was previously dismissed with prejudice by ALJ McKenna based upon the parties' *Stipulated Motion to Withdraw Count IV With Prejudice*. See Doc. 127, 133.
3. The briefing schedule is as follows:
 - a. RC's Brief due **November 15, 2019**

- b. EC's Response Brief due **December 6, 2019**
- c. RC's Reply Brief due **December 13, 2019**

SO ORDERED.

Christine L.
Kirby

Digitally signed by Christine L.
Kirby
Date: 2019.10.28 15:24:28
-04'00'

HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 28th day of October 2019 at
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying Further Discovery on Statute of Limitations Issue* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

Via Electronic Mail to Representatives for Bureau of Consumer Financial Protection

Benjamin Clark, Esq.
1700 G Street, NW
Washington, DC 20552
benjamin.clark@cfpb.gov

Stephen C. Jacques, Esq., Email: stephen.jacques@cfpb.gov
Alusheyi J. Wheeler, Esq., Email: alusheyi.wheeler@cfpb.gov
Deborah Morris, Esq., Email: deborah.morris@cfpb.gov

Via Electronic Mail to Representatives for Respondent

Richard J. Zack, Esq.
Pepper Hamilton, Esq.
3000 Two Logan Square
Philadelphia, PA 19103
zackr@pepperlaw.com

Michael A. Schwartz, Esq., Email: schwarma@pepperlaw.com
Christen M. Tuttle, Esq., Email: tuttlec@pepperlaw.com
Saverio S. Romeo, Esq., Email: romeos@pepperlaw.com

Jameelah
Morgan

Digitally signed by
Jameelah Morgan
Date: 2019.10.28
15:35:15 -04'00'

Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 28th day of October 2019
at Washington, D.C.