UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of: **INTEGRITY ADVANCE, LLC and JAMES R. CARNES,** **Respondents.**	**RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY DISPOSITION ON GROUNDS LIMITED TO OCTOBER 28, 2019 ORDER** **ORAL ARGUMENT REQUESTED**

RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY DISPOSITION ON GROUNDS LIMITED TO OCTOBER 28, 2019 ORDER

Pursuant to 12 C.F.R. § 1081.212 and Administrative Law Judge ("ALJ") Christine L. Kirby's October 28, 2019 Order, Respondents Integrity Advance, LLC and James R. Carnes ("Respondents") respectfully request that the ALJ dismiss and/or grant summary disposition as to Counts II and VII of the Notice of Charges (against Mr. Carnes) and Counts I, II, V, and VI of the Notice of Charges (against Integrity Advance) based on the applicable statutes of limitations. Respondents further request that Count IV remain dismissed with prejudice. In support thereof, Respondents incorporate by reference the accompanying memorandum of law, statement of undisputed material facts, Declaration of Richard J. Zack, and accompanying exhibits. Respondents respectfully request oral argument on the Motion pursuant to 12 C.F.R. § 1081.212(g).

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Dated: November 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November 2019, I caused a copy of the foregoing Respondents' Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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I. INTRODUCTION AND SUMMARY

Pursuant to ALJ Christine L. Kirby's October 28, 2019 Order, Respondents Integrity Advance, LLC and James R. Carnes ("Respondents") respectfully submit this brief in support of their Motion to Dismiss and/or for Summary Disposition as to Counts II and VII (against Mr. Carnes) and Counts I, II, V, and VI (against Integrity Advance).[1] These claims—which all arise from conduct mostly occurring more than seven years ago—are time-barred by the applicable statutes of limitation and should be dismissed.

The ALJ should dismiss the Consumer Financial Protection Act ("CFPA") claims asserted against Mr. Carnes in Counts II and VII because those claims were filed outside of the CFPA's three-year statute of limitations. Enforcement Counsel was aware of this statute of limitations, as it executed tolling agreements with Integrity Advance in June 2014 and March 2015, but neither of those tolling agreements apply to Mr. Carnes. The U.S. Court of Appeals for the D.C. Circuit has held that the Consumer Financial Protection Bureau ("CFPB") is not immune to statutes of limitation in administrative actions. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016). As the D.C. Circuit determined, and as sound reason dictates, the CFPB is subject to applicable statutes of limitation regardless of the forum in which it chooses to bring suit. The CFPA's statute of limitation applies, and it bars the CFPB's claims against Mr. Carnes here.

Under the CFPA, "no action may be brought . . . more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g). This statute, like

[1] In accordance with ALJ Kirby's Order, Respondents' Motion is limited to arguing for dismissal and/or summary disposition on statute of limitations grounds, as well as the status of the previously-withdrawn claim at Count IV. Respondents reserve the right to raise any and all additional arguments in support of dismissal and/or summary disposition at the appropriate time. Respondents also reserve the right to pursue the statute of limitations issue at trial, if necessary.

other statutes using similar language, runs from the date that the CFPB knew or should have known of the alleged violations. The record conclusively establishes that the CFPB knew, or should have known, of the alleged violations well before November 18, 2012, three years before the date on which it filed the Notice of Charges, and, thus, its claims against Mr. Carnes are time-barred.

The CFPB's claims against Integrity Advance in Counts I, II, V, and VI for alleged violations of the Truth in Lending Act ("TILA"), the Electronic Fund Transfer Act ("EFTA"), and derivative claims under the CFPA, are similarly time-barred. By statute, any such claims must have been brought within one year of the occurrence of the violation. That is not the case here. As alleged in the Notice of Charges, Integrity Advance ceased offering payday loans in December 2012. Thus, any claim under TILA, EFTA, or any derivative claim under the CFPA must have been filed no later than December 2013. The Notice of Charges, however, was not filed until November 18, 2015, almost three full years after the statute of limitations had run. Although the CFPB eventually entered into a tolling agreement with Integrity Advance, that agreement was not executed until June 2014, more than six months after the statute of limitations had expired. Thus, the tolling agreement cannot revive these stale claims.

Finally, Count IV, which was dismissed with prejudice by agreement of the parties in a previous phase of the case, should remain dismissed. There is no legitimate basis for breathing new life into these claims, particularly where Enforcement Counsel previously acknowledged that these claims were dismissed with prejudice in "the interests of judicial economy and narrowing the issues for trial." In any event, even if these claims were somehow to be revived, they would still fail against Mr. Carnes because, like the claims in Counts III and VII, they are barred by the CFPA's three-year statute of limitations.

The ALJ should dismiss and/or grant summary disposition as to Counts III and VII against Mr. Carnes and Counts I, II, V, and VI against Integrity Advance. The ALJ should hold that Count IV has already been withdrawn with prejudice as to both Mr. Carnes and Integrity Advance.

II. PROCEDURAL BACKGROUND

On May 29, 2019, Director Kathleen L. Kraninger remanded this matter to ALJ Kirby for a "new hearing and recommended decision in accordance with the Bureau's Rules of Practice for Adjudication Proceedings." Dkt. 216 at 2, 9. In part due to significant legal developments in the time since the prior proceedings occurred, Respondents thereafter filed a Motion to Open Record for a New Hearing in which Respondents argued, *inter alia*, that further discovery was needed on the statute of limitations issue. *See* Dkt. 229A at 7-8. Following a teleconference on August 16, 2019, ALJ Kirby determined to reopen the record on the statute of limitations issue "based upon the parties' verbal agreement that the previously created record did not contain sufficient factual development of the issue." Dkt. 233 at 3. Consistent with that ruling, Respondents filed a Request for Issuance of Subpoena to the CFPB on August 23, 2019, seeking four categories of narrowly tailored discovery on the statute of limitations issue. *See* Dkt. 232. Respondents also filed a proposed discovery schedule, setting a timeline for the subpoena response and a hearing for testimony restricted to "facts relevant to the statute of limitations." *See* Dkt. 231.

At some point after the August 16 teleconference, Enforcement Counsel changed its position and claimed that further discovery on the statute of limitations is not warranted. *See* Dkt. 231 at 4-9. The ALJ construed Enforcement Counsel's argument as a motion for reconsideration of her August 16 ruling reopening the record and set a briefing schedule. *See id.* at 3. Following the parties' briefing, *see* Dkt. 235-37, the ALJ construed Enforcement Counsel's briefing as a "motion to quash the subpoena," and denied further discovery on the statute of limitations issue by Order dated October 28, 2019. Dkt. 238. The ALJ further directed that the parties "submit briefs on the issue of whether any, or all, of the counts in this matter are barred by the relevant statute of limitations" as well as the parties' position regarding Count IV which was previously dismissed with prejudice. *Id.* at 11. This brief sets forth Respondents' position as to these issues.

III. ARGUMENT

A. The CFPA Claims Against Mr. Carnes Are Time-Barred.

In Counts III and VII of the Notice of Charges,[2] the CFPB alleges that Integrity Advance and Mr. Carnes engaged in deceptive and unfair practices in violation of the CFPA. The ALJ should dismiss and/or grant summary disposition as to the CFPA claims against Mr. Carnes[3] because they are barred by the CFPA's three-year statute of limitations.

1. The CFPA's statute of limitations applies to this administrative proceeding.

In recent briefing, Enforcement Counsel has continued to suggest – in the face of binding authority to the contrary – that the CFPA's three-year statute of limitations does not apply in administrative proceedings. *See* Dkt. 235 at 4 n.10 ("reserv[ing] argument" on the

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[2] The CFPB also asserted CFPA unfairness claims in Count IV, but those claims were withdrawn with prejudice in a previous phase of the case. *See* Dkt. 127, 133. As discussed in more detail in Section III.C. below, Enforcement Counsel previously moved to withdraw Count IV "in the interests of judicial economy and narrowing the issues for trial" because "[t]he consumer harm caused by the [allegedly] deceptive loan agreement is co-extensive with the harm Enforcement Counsel would allege in continuing to assert the Count IV unfairness claim." Dkt. 127 at 1. The withdrawal was not made contingent on any event or occurrence, and it was made with prejudice. Thus, it is Respondents' position that Count IV is, and should remain, dismissed. In any event, even if the CFPB's claims in Count IV were somehow revived, they still fail because they are barred by the CFPA's statute of limitations.

[3] The CFPB previously entered into tolling agreements with Integrity Advance on June 2, 2014 (Dkt. 200) and March 16, 2015 (Dkt. 201). In light of the tolling agreements, Respondents do not seek dismissal of Counts III and VII on statute of limitations grounds as to Integrity Advance; they only seek dismissal of those Counts on statute of limitations grounds as to Mr. Carnes, who was not a party to those tolling agreements and who has never entered into a tolling agreement with the CFPB.

applicability of the statute of limitations until dispositive motions briefing). The ALJ should reject Enforcement Counsel's invitation to hold it exempt from the statute of limitations. The D.C. Circuit already has spoken on the issue, calling this argument "nonsensical" and holding that "statutes of limitations do, in fact, apply to CFPB administrative proceedings." Dkt. 233 at 2 n.1 (citing *PHH Corp.*, 839 F.3d 1) (reinstated on statute of limitation grounds and reversed on other grounds by *en banc* panel, 881 F.3d 75 (D.C. Cir. 2018)). Although the D.C. Circuit ruled on the issue in the context of a different statute, the Real Estate Settlement Procedures Act ("RESPA"), it rejected Enforcement Counsel's argument that statutes of limitations do not apply in administrative enforcement actions more broadly. *See PHH Corp.*, 839 F.3d at 51 ("The CFPB's argument that it is not bound by any statute of limitations in administrative proceedings would extend to all 19 of the consumer protection laws that Congress empowered the CFPB to enforce. . . . The CFPB's argument misreads the enforcement provisions of the Dodd-Frank Act."). The D.C. Circuit even referenced this case in so concluding. *See id.* (citing Dkt. 33).

As the D.C. Circuit noted, to hold that the statute of limitations does not apply would "create . . . a nonsensical dichotomy between CFPB court actions and CFPB administrative actions" and would lead to "absurd" results. *Id.* at 54. There is no legitimate reason to create such a nonsensical dichotomy here, particularly where doing so would contravene the long-recognized critical role that statutes of limitation play in our judicial system. *See Gabelli v. SEC*, 568 U.S. 442, 452 (2013) (noting that, more than 200 years ago, Chief Justice Marshall "emphasiz[ed] the importance of time limits on penalty actions, stating that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'") (citing *Adams v. Woods*, 6 U.S. 336 (1805)); *see also Artis v. District of Columbia*, 138 S. Ct. 594, 608 (2018) (citing *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487

(1980) ("Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system.")).

Consistent with the D.C. Circuit's conclusion, the ALJ should find that the CFPA's statute of limitations applies to this proceeding.

2. <u>The CFPB's claims against Mr. Carnes are barred because it knew of the alleged violations more than three years prior to the filing of the Notice of Charges</u>.

The CFPA's statute of limitations provides that "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." 12 U.S.C. § 5564(g). The factual record establishes that the CFPB knew of the alleged violations against Mr. Carnes well before November 18, 2012, and that it did not file its Notice of Charges until November 18, 2015. Its CFPA claims against Mr. Carnes are therefore barred by the statute of limitations.[4]

It is undisputed that the CFPB set its sights on payday lenders like Integrity Advance prior to January 2012. *See* Respondents' Statement of Undisputed Facts ("Respondents' SUF") ¶¶ 4-5 (citing Remarks by Richard Cordray at the Payday Loan Field Hearing in Birmingham, AL (Jan. 19, 2012)).[5] Indeed, on January 19, 2012, then-Director Cordray publicly declared that the CFPB had developed and "launched [its] examination program" and would be "giving payday lenders much more attention." *Id.* ¶ 5. Cordray suggested that the CFPB's "examination program" was well considered and had taken significant

[4] The statute of limitations is a threshold issue that may be considered jurisdictional in nature. *See Alexander v. United States*, 44 F.3d 328, 330-31 (5th Cir. 1995) (treating a since-repealed Internal Revenue Code provision using the similar phrase "no action may be brought . . ." as jurisdictional). Alternatively, it is an affirmative defense that Mr. Carnes must prove. The ALJ need not rule on the issue, however, because the CFPB's CFPA claims against Mr. Carnes are time-barred under either standard.

[5] Available at https://www.consumerfinance.gov/about-us/newsroom/remarks-by-richard-cordray-at-the-payday-loan-field-hearing-in-birmingham-al/.

resources to develop, clearly establishing that efforts were commenced long before his January 2012 announcement. *Id.*

Consistent with then-Director Cordray's announcement, the CFPB began collecting information about Integrity Advance around that time. It is undisputed that, on March 29, 2012, a high-level CFPB employee ran a search for "Integrity Advance" in the Federal Trade Commission's ("FTC") consumer complaint database. *Id.* ¶¶ 14-15; *see also* Ex. A to Decl. of Richard J. Zack in Supp. of Respondents' Mot. to Dismiss and/or for Summ. Disposition on Grounds Limited to Oct. 28, 2019 ("Zack Decl."). Enforcement Counsel has declined to provide the date when the CFPB first learned of the existence of Integrity Advance. However, it is clear that the CFPB had some significant level of knowledge about Integrity Advance prior to March 29, 2012, leading it to decide to conduct the search. Multiple complaints in the database at the time of the search described the same type of conduct that the CFPB later included in the Notice of Charges, though the complaints clearly reference a misunderstanding of or failure to read the loan agreement. *Compare* Dkt. 1 at 32 ("Complaints submitted by consumers indicate that the consumers thought the company would debit only the total amount disclosed in the TILA disclosure and did not understand that their loans would rollover four times before the company credited any of their payments to principal."), *with* Ex. A to Zack Decl. at 13:

> I took out a $400 loan from Advance Integrity [sic], on 10-06-11, and am just finding out that they charge $120 every 2 weeks for finance charges only. They already took out this amount of $120 on 10-14-11 and they will take this amount out every payday, on the 15th and last day of the month. None of this $120 is towards the principle [sic] it is finance charges only. That is 30% every 2 weeks. . . . [T]his is totally shocking and unexceptable [sic].

The CFPB again conducted a search of the FTC consumer complaint database for Integrity Advance on August 14, 2012. *See* Ex. B to Zack Decl. Additional consumer complaints reviewed by the CFPB on August 14, 2012 provide further evidence of the CFPB's specific knowledge of the alleged violations more than three years prior to the filing of the Notice of Charges. *See id*. One of those complainants stated that:

> I assumed that since this company was a quick cash loan until pay day they were going to continue taking 90 dollars on my pay day until the 300 dollars was paid off. Now June 2012 I am still getting 90 dollars taken out of my account and was told today that their default payment option is that you pay the finance fee of 90 dollars as an extention [sic] so you do not have to pay the full amount of the loan. Also, even though I was never told the payment plans and did not choose the extention [sic] plan as my payment option I was told that the 450 dollars that I have already paid and thought was going towards my loan as a payment is just lost money.

Id. at 3. Another complaint reviewed by the CFPB on August 14, 2012 stated: "Thought that I was getting a quick loan for 300.00 but have paid 450.00 so far and they say it is for renewal…what renewal??????????? So, so [sic] far NONE of the payments have gone toward paying off loan!!!" *Id.* at 5.

These consumer complaints describe exactly the type of conduct alleged in the Notice of Charges. The complaints, while perhaps not dispositive on their own, provide strong evidence that the CFPB knew of the alleged violations well before November 18, 2012, three years before the filing of the Notice of Charges on November 18, 2015. *Cf. Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106-RS, 2017 U.S. Dist. LEXIS 145923, at *26 (N.D. Cal. Sep. 8, 2017) (rejecting argument where defendant's statute of limitations argument relied on the CFPB's "mere receipt of a consumer complaint").

In addition to the above-referenced consumer complaints, it is appropriate to infer that the CFPB knew of the alleged violations pursuant to the CFPB's formal information sharing agreement with the FTC. *See* Dkt. 189A; Respondents' SUF ¶ 6 (citing Memorandum of Understanding Between the Consumer Financial Protection Bureau and the Federal Trade

Commission (Jan. 20, 2012))[6]; *id.* ¶ 7 (discussing the "strong and comprehensive framework for coordination and cooperation" established in the Memorandum of Understanding) (citing Memorandum of Understanding Creates Framework for Strong Coordination and Cooperation (Jan. 23, 2012).[7] Aside from the above-mentioned complaints, the FTC clearly possessed other information about Integrity Advance going back to as early as 2010. *See, e.g.*, Ex. C to Zack Decl. (CFPB035707) (consumer complaint dated July 30, 2010 accusing Integrity Advance of offering "illegal" payday loans, with a copy sent to the FTC). According to the formal information sharing agreement between the CFPB and the FTC, which was in existence as of January 2012, the FTC was required to share such information with the CFPB, and it strains credulity to think that the CFPB would not have asked the FTC for information on Integrity Advance at or around the time of the March 29, 2012 search.

The CFPB's own publicly-available policies and procedures provide further evidence that the CFPB already knew of the alleged violations in or around March 2012. *See* Respondents' SUF ¶¶ 8-13 (citing Office of Enforcement Policies and Procedures Manual (May 5, 2017)) ("Enforcement Manual").[8] According to the CFPB's Enforcement Manual, before a formal "investigation" is launched, employees are directed to conduct a "research matter" for purposes of "gather[ing] basic information and preliminarily evaluat[ing] the potential for successful enforcement of suspected violations of federal consumer financial law . . . ." *Id.* ¶ 9. As stated in the Manual, "[t]he primary purpose of a research matter is to collect and analyze

[6] Available at https://www.ftc.gov/system/files/120123ftc-cfpb-mou.pdf.

[7] Available at https://www.ftc.gov/news-events/press-releases/2012/01/federal-trade-commission-consumer-financial-protection-bureau.

[8] Available at https://files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.

easily obtainable information in order to . . . [d]etermine whether the relevant conduct likely violates federal consumer financial law and the Bureau likely has jurisdiction." *Id.* ¶ 10. Among other things, employees are directed to gather evidence through "non-identifiable internet searching, review of consumer complaints, media sources, legal research, and contact with other law enforcement agencies and consumers." *Id.* ¶ 11. Of course, visiting the Integrity Advance website would be a top priority for "non-identifiable internet searching" as would asking a consumer for a copy of a loan agreement. The "research" phase typically lasts for two months. *Id.* ¶ 12. When the CFPB employee's "initial research" reveals, among other things, "a plausible set of facts that, if proven, would amount to a violation of one or more federal consumer financial laws," the matter then proceeds to the "investigation" phase. *Id.* ¶ 13. Here, Enforcement Counsel would not be able to articulate a "plausible set of facts that, if proven," would demonstrate a violation, while at the same time having no idea what was in the loan agreement.

The declaration from Enforcement Counsel, Alusheyi J. Wheeler, does not provide any reason to think otherwise. In her Order Denying Further Discovery on Statute of Limitations Issue, the ALJ indicated that the CFPB claims to have first viewed Integrity Advance's loan agreement after it was produced by Integrity Advance in 2013, based on Mr. Wheeler's declaration. *See* Dkt. 238 at 6. Mr. Wheeler's declaration does not support such a finding. Instead, Mr. Wheeler's declaration merely states that he worked on the investigation in 2013 and that "***Enforcement Counsel*** first obtained copies of Integrity Advance's loan agreement through the company's productions in response to the January 7, 2013 CID." Dkt. 187 at ¶ 2, 7 (emphasis added); *see* 12 C.F.R. § 1081.103 ("*Enforcement counsel* means any individual who files a notice of appearance as counsel on behalf of the Bureau in an adjudication proceeding.") This declaration does not explain when the ***CFPB*** first viewed the loan agreement. Further, it does not explain why Mr. Wheeler and his colleagues waited for more than a year to obtain the agreement when the consumer complaints the CFPB reviewed in early 2012 pointed it out as a key document in the case. Mr. Wheeler does not claim to have been involved in the investigation earlier than 2013 – though it is known through the available facts that other CFPB personnel were gathering information on Integrity Advance at least by March 29, 2012. While it is plausible that Mr. Wheeler may have taken his time before eventually reviewing the agreement, it is not plausible that other CFPB personnel reviewed complaints in March 2012 identifying the loan agreement as a key document but made no effort to look at it. Based on the known facts, it is highly unlikely that the CFPB waited to view the loan agreement until Integrity Advance itself produced it in late 2013. If it did, then the CFPB did not exercise due diligence as defined by its own procedures.[9]

The ALJ should conclude that this matter was in the "research" phase no later than March 29, 2012, when Kara Miller (CFPB Enforcement Attorney) ran a search for "Integrity Advance" in the consumer complaint database. Additionally, the ALJ should conclude that Ms. Miller and/or others at the CFPB reviewed basic, easily-obtainable information about Respondents at or around that time, such as Mr. Carnes' position as CEO of Integrity Advance and the contents of the loan agreement itself. This easily-obtainable information forms the bases for the CFPA claims against Respondents. *See* Dkt. 1 at ¶ 15 ("As the CEO of Integrity Advance

[9] Another flaw in relying on Mr. Wheeler's declaration to determine when the CFPB first reviewed the loan agreement is that Respondents have not had the opportunity to seek additional information about the declaration or question Mr. Wheeler, even though Enforcement Counsel elected to put his state of knowledge and credibility squarely at issue in this key part of the litigation. It is not appropriate to bind Respondents with self-serving declarations that have not been subject to cross-examination. Therefore, should this motion be denied, Respondents will seek the testimony of Mr. Wheeler and the opportunity to question him about his affidavit.

at that time, Carnes was directly responsible for all of the policies and procedures developed and implemented by the company."); *id.* at ¶¶ 23-38 (describing the terms of the loan agreement).

This type of information gathering is precisely what CFPB employees were directed to do as part of the process of "collect[ing] and analyz[ing] easily obtainable information in order to . . . [d]etermine whether the relevant conduct likely violates federal consumer financial law and the Bureau likely has jurisdiction." Respondents' SUF ¶ 10. As the research phase typically lasts up to two months, the CFPB's determination that there was a plausible violation of the consumer financial laws—a prerequisite to proceeding to the formal investigation phase, *see id.* ¶ 13—must have occurred prior to November 2012. The ALJ should find that the CFPA's statute of limitations began running at the latest on or around March 29, 2012.

3. The CFPB's claims against Mr. Carnes are barred because it should have known of the alleged violations more than three years prior to the filing of the Notice of Charges.

If the ALJ concludes that the current record is not sufficient to demonstrate that the CFPB knew of the alleged violations more than three years prior to the filing of the Notice of Charges, the ALJ should still dismiss the CFPA claims against Mr. Carnes because the CFPB clearly ***should have known*** of the alleged violations well before November 18, 2012.[10]

[10] If the ALJ concludes that the known facts are insufficient to find that the CFPB knew or should have known of the alleged violations prior to November 18, 2012, Respondents intend on renewing their request for a hearing on when the CFPB knew or should have known of those alleged violations. Respondents reserve the right to request testimony from Kara Miller, the individual who conducted the March 29, 2012 search, in order to gain information about what the CFPB already knew or should have known about Respondents as of March 29, 2012 and from Mr. Wheeler, who claims that he first saw the Integrity Advance loan agreement in 2013, despite the CFPB having been collecting information on Integrity Advance for more than a year prior.

a. The statute begins running on the date that the CFPB knew, or should have known, of the alleged violations.

Just like other statutes using similar language, the CFPA's three-year statute of limitations runs from the date that the CFPB knew or should have known of the alleged violations. As the Supreme Court of the United States held in *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010), the word "discovery" in a statute of limitations is a "term of art" that generally means the date on which a plaintiff "first knows ***or with due diligence should know*** facts that will form the basis for an action." *Id.* at 644-46 (citation and internal quotation marks omitted) (emphasis in original). The Supreme Court based that conclusion, in part, on "the history and precedent surrounding the use of the word 'discovery' in the limitations context ***generally***" and did not draw any distinctions between a private plaintiff and a government agency plaintiff in doing so. *Id.* at 648 (emphasis added). In keeping with that well-established general rule, the Supreme Court held in *Merck* that a statute using similar language[11] "encompasse[d] not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known." *Merck*, 559 U.S. at 648.

Enforcement Counsel's attempt to carve out a different rule for itself should be rejected. Enforcement Counsel has not pointed to any case law, because it cannot, in support of its position that the phrase "date of discovery" in the CFPA should be interpreted as encompassing the CFPB's actual knowledge only.[12] Instead, Enforcement Counsel relies heavily

[11] *See* 28 U.S.C. § 1658 (barring certain actions brought more than "2 years after the discovery of the facts constituting the violation").

[12] In reality, Enforcement Counsel argues for a standard that is even narrower than "actual knowledge," as it asserts that "discovery" occurs "when the Bureau obtained information" and goes on to argue that the only information relevant to this inquiry is that obtained from third parties and discoverable under Rules 206 and 207. *See* Dkt. 235 at 4-6. That, of course, excludes information that the CFPB gathered on its own or in consultation with other government agencies (as it must have done, per the requirements of the Enforcement Manual and multiple then-existing Memorandums of Understanding with other agencies). Enforcement Counsel provides no legal

on a case in which the issue before the Court was whether to infer a discovery rule into a statute of limitation keyed to the date of ***occurrence*** of a violation. *See* Dkt. 235 at 7 (citing *Gabelli*, 568 U.S. at 452). That case is inapposite because the CFPA's statute of limitations is expressly tied to the date of discovery.

Enforcement Counsel's statutory interpretation argument also fails. *See* Dkt. 235 at 8. Like Enforcement Counsel here, the plaintiff in *Merck* argued that when a plaintiff "should have" known of a violation was irrelevant because Congress did not explicitly include those words in the statute. *See Merck*, 559 U.S. at 646-67. The Supreme Court rejected that argument, noting that an explicit provision is not required because "the term 'discovery' in respect to statutes of limitations for fraud has long been understood to include discoveries a reasonably diligent plaintiff would make." *Id.* at 647. In light of that long-established rule, and the presumption that "when Congress enacts statutes, it is aware of relevant judicial precedent," it is plain that if Congress had intended on tying the discovery date in the CFPA to the CFPB's actual knowledge only, it would have stated that explicitly in the statute. *See id.* (citing 29 U.S.C. § 1113(2), "Congress provided that an action be brought 'three years after the earliest date on which the plaintiff had ***actual knowledge*** of the breach or violation'") (emphasis in original). But Congress did not do so here. It used the phrase "date of discovery of the violation," which, as discussed above, has long been understood to encompass not only facts a particular plaintiff knows, but also facts that a reasonably diligent plaintiff would know. *See id.* at 644-48.

Consistent with the foregoing, at least two courts have explicitly held the CFPB to the "knew or should have known" standard. *See Consumer Fin. Prot. Bureau v. Nationwide*

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support for this unprecedented, restrictive view of "discovery" that deems even evidence of when the CFPB actually knew of the alleged violations to be "irrelevant." Of course, that position has no support in the statutory language or the Supreme Court case law.

Biweekly Admin., Inc., No. 15-cv-02106, 2017 U.S. Dist. LEXIS 145923 (N.D. Cal. Sep. 8, 2017) ("[T]he statute did not begin to run until CFPB 'thereafter discover[ed] ***or a reasonably diligent plaintiff would have discovered*** 'the facts constituting the violation.") (emphasis added); *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 U.S. Dist. LEXIS 177756, at *58 (S.D.N.Y. Dec. 2, 2016) ("The date of discovery is the date when the plaintiff 'obtains actual knowledge of the facts giving rise to the action ***or notice of the facts, which in the exercise of reasonable diligence, would have led to actual knowledge***.") (emphasis added). Particularly given the investigative tools and potential remedies available to Enforcement Counsel, which are not available to private plaintiffs, such a rule is required to protect against the unfairness of bringing stale enforcement claims.

The ALJ should reject Enforcement Counsel's inappropriate invitation to consider it immune from the obligation to exercise reasonable diligence in investigating potential claims. Enforcement Counsel has cited no authority to support such an extraordinary and novel proposition, and such a rule would flout the fundamental role that statutes of limitation play in the American legal system. *See Gabelli*, 568 U.S. at 452; *Artis*, 138 S. Ct. at 608; *see also Phillips Petroleum Co. v Lujan*, 4 F.3d 858, 863 (10th Cir. 1993) ("Clearly, the government should not be able to postpone litigation due to a lack of efficiency or diligence on its part.").

b. <u>The CFPB should have known of the alleged violations well before November 18, 2012</u>.

The CFPB seeks to hold Mr. Carnes personally liable for Integrity Advance's alleged violations of the CFPA; it does not allege any separate violation or distinct conduct on the part of Mr. Carnes. *See* Dkt. 1 at ¶ 15 ("As the CEO of Integrity Advance at that time, Carnes was directly responsible for all of the policies and procedures developed and implemented by the company."); *see also* Dkt. 162 at 19 (arguing that "Carnes had 'ultimate authority' over Integrity Advance during the company's entire existence" and that he "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"). In sum, the claims against Mr. Carnes arise solely from the allegation that Integrity Advance's loan agreement was deceptive and/or misleading and the fact that Mr. Carnes was the CEO at the time of the conduct. Because the record establishes that the CFPB should have known of the basis for these claims well before November 18, 2012, the ALJ should dismiss the claims as time-barred.

As an initial matter, the CFPB's claim to immunity from the exercise of reasonable due diligence is belied by its own policies and procedures. Those policies and procedures provide the framework of due diligence that the CFPB has established for itself and that the CFPB should have followed in conducting its investigation of Respondents' alleged violations of the consumer protection laws. The CFPB clearly followed some of those procedures: as noted above, it is undisputed that a high-level CFPB employee searched the FTC's consumer complaint database for the term "Integrity Advance" on March 29, 2012. *See* Ex. A to Zack Decl. According to its own procedures, the CFPB also should have obtained readily-available information such as the loan agreement itself and the fact that Mr. Carnes was the CEO.

However, despite this framework, and the other evidence discussed above, Enforcement Counsel may assert that the CFPB could not have discovered the alleged violations until Enforcement Counsel received a copy of Integrity Advance's loan agreement from Integrity Advance pursuant to the Civil Investigative Demand ("CID") it served on January 7, 2013. *See* Dkt. 234 ¶ 4, 6. The ALJ should reject that assertion. As an initial matter, the requirement for due diligence applies to the CFPB as an agency, not merely individual attorneys who enter their appearance as Enforcement Counsel. The CFPB clearly ***could have*** obtained a copy of the loan agreement well before Integrity Advance produced a copy in response to the CID if it had exercised any modicum of reasonable diligence. In fact, it is likely that the CFPB did obtain a copy of the loan agreement long before 2013 from one of many sources. The CFPB could have obtained a copy of the loan agreement from the Delaware Office of the State Bank Commissioner pursuant to its Memorandum of Understanding with that agency. *See* Federal Consumer Agency to Partner with State Regulators on Supervision of Providers of Consumer Financial Products and Services, Including Mortgage Lenders, Private Student Lenders and Payday Lenders, (Jan. 4, 2011).[13] It could have obtained a copy of the loan agreement by contacting a complaining consumer. Or it could have obtained a copy of the loan agreement in connection with a publicly-filed civil action against Integrity Advance in Minnesota state court on May 7, 2012. *See* 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). Enforcement Counsel's contention that it could not have obtained the loan agreement until it was produced by Integrity Advance is simply wrong. The CFPB admits that its lawyers saw, in early 2012, complaints from consumers that the loan agreement was misunderstood or confusing. *See* Respondents' SUF ¶¶ 14-16. It also had procedures in place suggesting that its employees should obtain from internet searches or elsewhere the loan agreement even before opening a formal investigation. *See id.* ¶¶ 8-13. Yet, the CFPB seeks to rely on its failure to obtain the loan agreement or its failure to follow its procedures as a reason

[13] Available at https://www.consumerfinance.gov/about-us/newsroom/consumer-agency-to-partner-with-state-regulators/.

why the statute of limitations did not begin to run. To the contrary, the CFPB had ample information showing that it needed to act with diligence. It cannot be the law that the CFPB can extend the statute of limitations by simply declining to obtain information from various readily-available sources, until it decides to obtain that information from the entity under investigation.

Similarly, the CFPB could have easily discovered that Mr. Carnes was the CEO of Integrity Advance well before November 18, 2012. Mr. Carnes, of course, was listed as the President and CEO of Integrity Advance on numerous documents, including Integrity Advance's Delaware license application and subsequent renewals. The CFPB could have obtained that information from the Delaware Office of the State Bank Commissioner pursuant to its MOU with that agency. Thus, the critical facts underlying its claims (i.e. the fact of the loan agreement and the fact that Mr. Carnes was the CEO of Integrity Advance) are facts that the CFPB should have learned months before November 2012 if it had exercised any measure of even the most basic diligence. Because the CFPB should have learned of the alleged violations at or around the time of the March 29, 2012 search, the ALJ should conclude that its CFPA claims against Mr. Carnes are time-barred.

4. <u>The CFPA claims are not preserved under a "continuing violation" theory</u>.

The CFPB cannot evade the CFPA's statute of limitations by seeking to rely on a "continuing violation" theory. As an initial matter, there does not appear to be any case law in which the continuing violation doctrine has been applied in connection with the CFPA's statute of limitations.[14] The ALJ should decline to create new law here. Rather, the ALJ should

[14] Courts that have considered whether to apply the continuing violation theory in the context of TILA and EFTA claims have declined to do so. *See, e.g.*, *Repay v. Bank of Am.*, N.A., No. 12 CV 10228, 2013 WL 6224641, at *4 (N.D. Ill. Nov. 27, 2013) (rejecting continuing violation theory in connection with EFTA claim where plaintiff "entered into payment arrangements . . . that contemplated recurring electronic debits to [his] checking account" because "once the series of transfers is initiated by the first transfer, the violation occurs and Plaintiff is harmed"); *Butler v. Fairbanks Capital*, 2005 U.S. Dist. LEXIS 44537, *28 (D.D.C. Jan. 3, 2005) ("[C]ourts have generally

conclude—as courts have in the context of other statutes of limitation incorporating a discovery rule—that the continuing violation doctrine does not apply. *See, e.g.*, *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 759 (8th Cir. 2009) (declining to recognize the continuing violation doctrine where statute provided that "a plaintiff's claim 'accrues' . . . when the plaintiff 'either knew, or in the exercise of reasonable diligence should have known, that [he or she] had a claim'). Moreover, the CFPB cannot argue that the statute of limitations started anew each time a payment was made on a loan because such a theory would conflict with the Supreme Court of the United States' admonition that a plaintiff cannot rely on the "continuing effects" of an initial violation in order to "make out a present violation." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 625 (2007), *overturned on other grounds by* Pub. L. 111-2, 123 Stat 5 (Jan. 29, 2009). The CFPB cannot attempt to "breathe life into prior . . . [conduct]" by relying on continuing effects of that conduct. *Id.* at 628.

Even if the continuing violation theory did apply, it would not permit the CFPB to recover for alleged violations that fall outside of the statute of limitations period. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) ("[T]he commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period."). As discussed above, the record demonstrates that the CFPB knew, or should have known, of the alleged violations underlying its claims against Mr. Carnes well before November 18, 2012. In accordance with *Klehr*, even if the continuing violation doctrine was applicable, it would only permit the CFPB to pursue claims against Mr. Carnes arising from conduct occurring after November 18, 2012. Because Integrity Advance stopped offering

rejected application of any continuing-violations doctrine to the TILA statute of limitations."); *King v. State of Cal.*, 784 F.2d 910, 913-14 (9th Cir. 1986) (rejecting the continuing-violations theory in connection with TILA claim because it would "expose[] the lender to a prolonged and unforeseeable liability that Congress did not intend").

payday loans in December 2012, *see* Respondents' SUF ¶ 3, this means that the CFPB could theoretically only recover for violations that occurred in the timeframe of November 18, 2012 (three years prior to the filing of the Notice of Charges) through December 2012 (the last month in which Integrity Advance offered payday loans to consumers).

B. The Claims under the Truth in Lending Act and Electronic Funds Transfer Act are Time-Barred.

Count I of the Notice of Charges asserts a claim against Integrity Advance under the Truth in Lending Act ("TILA"). Dkt. 1 at ¶¶ 49-57. Count V asserts a claim against Integrity Advance under the Electronic Funds Transfer Act ("EFTA"). *Id.* at ¶¶ 78-83. Counts II and VI allege Integrity Advance violated the CFPA based on the TILA and EFTA violations, respectively ("the derivative CFPA claims.") *Id.* at ¶¶ 58-61, 84-87.[15] These four claims are time-barred under their applicable statutes of limitations, and the ALJ should dismiss and/or grant summary disposition as to the claims.

1. The claims are time-barred by the TILA and EFTA statutes of limitations.

By statute, claims under TILA and EFTA must be brought within one year of the violation. 15 U.S.C. § 1640(e) ("Except as provided in the subsequent sentence, any action under this section [TILA] may be brought in any United States district court, or in any other court of competent jurisdiction, ***within one year from the date of the occurrence of the violation***") (emphasis added); 15 U.S.C. § 1693m(g) ("Without regard to the amount in controversy, any action under this section [EFTA] may be brought in any United States district court, or in any other court of competent jurisdiction, ***within one year from the date of the occurrence of the violation.***") (emphasis added). The derivative CFPA claims are based solely

[15] Note that all four of these counts are asserted against Respondent Integrity Advance only, not Respondent James Carnes.

on the underlying TILA and EFTA allegations. *See* Dkt. 1 at ¶¶ 58-61; 84-87. As such, the derivative CFPA claims cannot proceed when the predicate offenses cannot. Therefore, the derivative CFPA claims must be brought within the same time period as the predicate offenses, within one year of the alleged violation. *See* 12 U.S.C. § 5564(g)(2) ("in any action arising solely under an enumerated consumer law [*e.g.*, TILA and EFTA], the [CFPB] may commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as applicable.")

2. <u>TILA and EFTA statutes of limitations apply to CFPB administrative proceedings.</u>

As with the statute of limitations in the CFPA, discussed above, the statutes of limitations contained in other consumer protection laws apply to enforcement actions by the CFPB, whether those actions are brought in district court or in an administrative proceeding. *See Id.*; *PHH Corp.*, 839 F.3d at 10 ("[T]he Dodd-Frank Act incorporates the statutes of limitations in the underlying statutes enforced by the CFPB in administrative proceedings."). In *PHH*, the D.C. Circuit's analysis encompassed all of the consumer protection statutes enforced by the CFPB and was not limited to the statute at issue in that case. *PHH Corp.*, 839 F.3d at 51 ("By its terms, then, Section 5563 [of the Dodd-Frank Act] ties the CFPB's administrative adjudications to the statutes of limitations of the various federal consumer laws it is charged with enforcing."). To illustrate its point, the D.C. Circuit specifically identified this case as a case in which the CFPB has argued that statutes of limitations do not apply to this administrative action enforcing TILA and EFTA. *See id.* The Court found that the CFPB "misreads the enforcement provisions of the Dodd-Frank Act." *Id.* at 51.

The D.C. Circuit went on to reject the CFPB's secondary argument that the specific statute of limitations at issue in that case (RESPA) applied only to CFPB actions brought in district court rather than administrative proceedings. *Id.* at 51-52. The Court noted that the Dodd-Frank Act uses the term "action" to apply to both court actions and administrative actions. *Id.* at 52-53. The Court reasoned that it was "absurd" to distinguish between the two, especially as the CFPB can seek the same remedies in both forums including civil money penalties. *Id.* at 54. To hold otherwise, the CFPB could "always circumvent the three-year statute of limitations [contained in RESPA] simply by bringing the enforcement action administratively rather than in court." *Id.* Such a result is not tenable. The Court's analysis also applies to the statutes of limitations contained in TILA and EFTA.

Further, the statute of limitations provisions within TILA and EFTA are not limited to private plaintiffs. *See* 15 U.S.C. § 1640(e); 15 U.S.C. § 1693m(g)*; see also CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 922-23 (S.D. Ind. Mar. 6, 2015) (holding that TILA's one-year statute of limitations applies to actions brought by the CFPB, not just private plaintiffs).[16] In fact, the TILA provision explicitly references enforcement actions by states attorney general. *See* 15 U.S.C. § 1640(e). As the Supreme Court has recognized, "the cases in which a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it." *Gabelli v. SEC*, 568 U.S. 442, 133 S. Ct. 1216, 1224 (2013) (internal citation omitted). No such restriction should be read into the statutes of limitations here.[17]

[16] While the court in *CFPB v. ITT Educ. Servs.* drew a distinction between the CFPB's administrative proceedings and court actions, the D.C Circuit has since held that no such distinction exists within the Dodd-Frank Act. *See PHH Corp.*, 839 F.3d at 41.

[17] It should be noted that one district court recently held that CFPB enforcement actions under TILA are limited by the three-year statute of limitations in the CFPA, rather than the one-year limitation in TILA. *CFPB v Ocwen Fin. Corp.*, 2019 US Dist. LEXIS 152336, No. 17-80495-CIV, at *74 (S.D. Fla. Sept. 5, 2019). Respondents believe this case was wrongly decided, in light of the analysis and holding of the D.C. Circuit in *PHH*.

As alleged in the Notice of Charges, the conduct that allegedly violated TILA and EFTA ended in December 2012. Dkt. 1 at ¶ 12. Therefore, the "occurrence of the violation" was completed by that time, and the one-year statutes of limitations for the TILA, EFTA, and derivative CFPA claims ran as of December 2013. The CFPB did not file its Notice of Charges until almost three years after the conduct occurred, on November 18, 2015. Even the Tolling Agreement with Integrity Advance was not effectuated until June 2, 2014 – over six months after the statute of limitations had expired. *See* Dkt. 200, 201. The TILA, EFTA, and derivative CFPA charges are time-barred and should be dismissed and/or summary disposition should be granted.

C. <u>Count IV Has Been Withdrawn with Prejudice and Cannot Proceed.</u>

On July 11, 2016, the CFPB moved to withdraw Count IV with prejudice, with the agreement of the Respondents. Respondents' SUF ¶ 21 (citing Dkt. 127). On July 12, 2016, the former ALJ granted the motion. *Id.* ¶ 22 (citing Dkt. 133). As acknowledged by Director Kraninger, "[t]he parties agreed by stipulation to withdraw the remaining count." Dkt. 216 at 3.

Because the CFPB withdrew Count IV with prejudice, and with the agreement of Respondents, the CFPB cannot now resurrect the claim. *See Nemaizer v. Baker,* 793 F.2d 58, 60 (2d Cir. 1986) (where the parties stipulated that the action was dismissed with prejudice, it "has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action"). A claim that has been withdrawn by way of stipulation, particularly where the withdrawal is explicitly "with prejudice," is barred by *res judicata* or claim preclusion from being revived. *See Arizona v. California*, 530 U.S. 392, 414 (2000) ("[C]onsent agreements . . . are intended to preclude any further litigation on the claim presented") (internal citation omitted). That principle applies to actions by administrative agencies. *See, e.g., Green Aviation Mgmt. Co., LLC v. FAA*, 676 F.3d 200, 204 (D.C. Cir. 2012) (holding that the FAA's dismissal of its complaint with prejudice had *res judicata* effect and prohibited re-filing a complaint on the same facts). Finally, the CFPB is precluded from reviving a claim that it previously stipulated to withdraw with prejudice, even where the prior ALJ lacked jurisdiction to enter the order because he was improperly appointed. *See Lambert v. Conrad,* 536 F.2d 1183, 1185 (7th Cir. 1976) ("[A] prior decision remains a bar to a future action even though it now appears that the court had no jurisdiction in the prior action").

Additionally, under principles of judicial estoppel, the CFPB cannot now take a position that is contrary to its prior position. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (*quoting Pegram* v. *Herdrich*, 530 U.S. 211, 227, n. 8 (2000)). The doctrine precludes "a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001); *see also Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010) (holding that the District Court properly invoked judicial estoppel to prevent a plaintiff from taking a position that was "clearly inconsistent" with his prior position).

The CFPB previously asserted that the "consumer harm caused by the deceptive loan agreement is co-extensive with the harm Enforcement Counsel would allege in continuing to assert the Count IV unfairness claim." Respondents' SUF ¶ 21 (citing Dkt. 127). The CFPB moved to withdraw Count IV with prejudice "in the interests of judicial economy and narrowing the issues for trial," with agreement by Respondents. *Id.* That motion was granted. *Id.* ¶ 22 (citing Dkt. 133). In order to revive the claim, the CFPB would now have to reverse course and take the inconsistent position that Count IV should proceed. The CFPB should be estopped from doing so.

Finally, in order to proceed with Count IV, the CFPB would have to essentially re-file the claim. At this point in time, such an action would certainly be barred by the CFPA's three-year statute of limitations. *See* 12 U.S.C. § 5564(g).

IV. CONCLUSION

For the foregoing reasons, the ALJ should dismiss and/or grant summary disposition as to Counts III and VII against Mr. Carnes and Counts I, II, V, and VI against Integrity Advance, and should hold that Count IV has been withdrawn with prejudice and cannot proceed.

Respectfully submitted,

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Dated: November 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November 2019, I caused a copy of the foregoing Respondents' Brief in Support of their Motion to Dismiss and/or for Summary Disposition on Grounds Limited to October 28, 2019 Order to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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